IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:22-cv-276-D

NORTH CAROLINA GREEN PARTY, et al., Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, et al., Defendants.	)	**DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendants, the North Carolina State Board of Elections, Damon Circosta, Stella Anderson, Jeff Carmon, III, Stacy Eggers, IV, Tommy Tucker, and Karen Brinson Bell, named in their official capacities only ("State Board"), hereby respond to Plaintiffs Motion for Preliminary Injunction. [D.E. 28 and 30].

NATURE OF THE CASE

The Court's consideration of the two forms of relief requested by Plaintiff in the motion at issue is of primary importance to resolving the motion. Specifically, Plaintiffs request that the Court (1) order the State Board to certify the Green Party as a new party to be on the November general election ballot, despite the State Board not having determined that the party submitted sufficient petitions to do so, and (2) extend the candidate filing deadline for new party candidates. [D.E. 28, p.1]. For reasons explained in more detail below, the State Board opposes the first request, but it has no objection to the second should the Green Party be certified when the State Board takes up that issue on August 1, 2022.

In support of the relief requested, Plaintiffs identify N.C.G.S. §§ 163-96(a)(2) and 163-98 as "Challenged Provisions," but it should be noted that Plaintiffs do not actually challenge those statutes, only how the statutes are being applied by the State Board. [D.E. 30, p. 8]. And, in so

doing, Plaintiffs rely entirely upon a flawed assumption – that there is no question that the Green Party fully complied with North Carolina's state statutory requirements for a new party to be certified and that the State Board should presume compliance. *Id.*, pp. 1, 6, 8, 9, 12-15. Contrary to Plaintiffs' repeated assertion that there has been no question about whether the Green Party complied with the statutes (*id.*), determining compliance is a required step that cannot be assumed or disregarded by the State Board.

The State Board is the state agency tasked with administering elections, enforcing election laws, and investigating the administration of election laws, frauds, and irregularities in elections in North Carolina. *See* N.C.G.S. §§ 163-22 and -96(a)(2). It is thus required by statute to reach a determination that any new party sufficiently meets the minimum qualifications required under North Carolina law before it can certify that party. Specifically, as it applies to the Green Party, the party will be certified if the State Board determines (1) it has sufficient valid signatures from registered and qualified voters on its petitions, (2) at least 200 of those signatures come from each of three congressional districts, and (3) the signatures were timely submitted. *See id*. Upon making that determination, the State Board is required to immediately communicate that determination to the state chair of the Green Party. *See id.* These reasonable time, place, and manner restrictions are sufficiently justified by the State's important regulatory interests.

When the State Board encountered numerous fake signatures, largely all coming from paid signature gatherers who were responsible for approximately 2,750 of the signatures submitted by the Green Party, it became clear that further investigation was required before a reliable determination could be made in accord with the above statutory provisions. Due to the

unprecedented number of fake signatures included in the Green Party's petitions,[1] as of June 30, 2022, the State Board's efforts to reach a final determination were still ongoing, and the State Board could not yet determine whether the Green Party had the requisite number of valid signatures required for certification.[2] The State Board's inability to reach a final determination was compounded by delays to the review of the petitions by county boards of elections ("county boards"), which the county boards had to complete at the same time they were conducting their time-consuming canvass for North Carolina's primary, which was held on the same day the petition signatures were due. That primary, scheduled by statute for March, was delayed by redistricting litigation from March 8, 2022 to May 17, 2022.[3] As a result of the delay, certain county boards did not provide petitions to the State Board until the week of its June 30, 2022 meeting. At that meeting, which was broadcasted to the public, State Board staff provided examples of the signatures in question, and expressly stated that the number of signatures in question exceeded the margin needed for certification thus necessitating that the investigation must continue to ensure that certification was appropriate.[4] At its meeting on July 14, 2022, State Board

[1] Contrary to Plaintiffs' representation in the memorandum of law in support of the motion for preliminary injunction, the undersigned never made any concession at the July 18, 2022 status conference before this Court that "NCSBE's failure to certify NCGP as a new party, despite NCGP's compliance with all applicable requirements under state law, is 'unprecedented.'" [D.E. 30, pp. 6, 13]. The undersigned stated that the depth of the investigation was required by the unprecedented number of fake signatures submitted by the Green Party.

[2] A video recording of the June 30, 2022 meeting of the State Board is publicly available online: https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-06-30/State%20Board%20of%20Elections%20Meeting-20220630%201300-1.mp4, last visited July 28, 2022. Should the Court desire a copy of the video of this meeting, Defendants will make it available immediately upon request.

[3] Under the election timeline enacted by the North Carolina General Assembly, the primary would have taken place on March 8, 2022. *See* N.C.G.S. §§ 163-1(b). As no run-off second primary was required for federal contests, the second non-federal primary would have taken place on April 22, 2022. *Id.*, § 163-111(e).

[4] *See* n.2, *supra*.

staff indicated that not all county boards had compared the petition signature with the signature on file for that voter, as required by N.C.G.S. § 163-96(c). County boards were directed to complete this review, if they had not done so already, by July 29, 2022. See the Declaration of Paul Cox ("Cox Decl."), ¶27 and Ex. 10, attached thereto.

As of today, July 29, 2022, State Board staff, in coordination with the county boards, has completed its review of the sufficiency of the Green Party's petitions to be certified as a new party under N.C.G.S. § 163-96(a)(2). At a meeting scheduled for August 1, 2022, the State Board will consider the matter and will issue a final decision regarding the certification of the Green Party. Regardless of the outcome of that decision, by the time this matter is heard by this Court on August 8, 2022, the primary issue for which Plaintiffs seek the Court's intervention will be moot. If the State Board's review demonstrates that the Green Party has qualified to be a new party, it is statutorily bound to certify the party. Conversely, if the State Board's review demonstrates that the Green Party failed to qualify to be a new party, the State Board is statutorily bound to deny certification to the party. These are the requirements of state law. N.C.G.S. § 163-96(a)(2).

In light of its statutory duties, the State Board opposes any relief which would require it to certify a new party that fails to meet the minimum requirements under North Carolina law. However, should the Green Party be certified on August 1, the State Board does not oppose relief that would extend or temporarily enjoin the July 1, 2022 candidate filing deadline for new parties found in N.C.G.S. § 163-98, such that Green Party candidates can submit their notice of candidacy in time to be included on the November 2022 general election ballot.

With respect to all other matters, this Court should decline to exercise jurisdiction based on abstention and mootness grounds. Should the Court exercise jurisdiction, Plaintiffs cannot demonstrate a likelihood of success because the State Board has acted in full compliance with the

law at all times, such that there has been no violation of Plaintiffs' rights.

STATEMENT OF THE FACTS

A. Statutes in Question.

After submission of petitions to the State Board, the relevant portion of N.C.G.S. §§ 163-96(a)(2) requires that "[t]he State Board of Elections **shall forthwith determine the sufficiency of petitions filed with it** and shall immediately communicate its determination to the State chair of the proposed new party." *Id.* (emphasis added). The bolded portion imposes upon the State Board a statutory duty to determine whether petitions submitted in support of the certification of a political party are indeed sufficient for certification. *Id.*

N.C.G.S. § 163-98 requires that a new political party must submit the names of persons chosen as the new party's candidates "not later than the first day of July prior to the general election." *Id.* As stated above, to the extent that the Green Party has been certified as a new party by the State Board by the time this matter is heard, the State Board does not oppose the Court's extension of this deadline to August 12, 2022, the date by which ballots must be finalized ahead of the absentee-ballot distribution deadline for the November 2022 general election.

B. Plaintiffs' Petition Process and the State Board's Review.

The Green Party started a new petition drive in February 2021 to seek recognition in time for the November 2022 election. Cox Decl. ¶ 5. State Board staff first became aware of issues when five separate county boards reported irregularities in October 2021 related to the submission of old signature sheets from prior petition drives. *Id.,* ¶ 6. State Board staff contacted Green Party chair, and Plaintiff in this action, Anthony Ndege, informed him of the issues, and requested confirmation on if such sheets were being submitted. *Id.*, ¶ 7, see also Ex. 2 attached to the Cox

Decl. Neither Mr. Ndege, nor anyone else from the Green Party, responded to this request, forcing the State Board to address the issue on their own. *Id.* ¶¶ 7-8.

On March 13, 2022, the Green Party informed the State Board that it was not seeking recognition in 2022, but rather seeking recognition in 2024. *Id.*, ¶ 9. It then reversed itself again two months later in May, when it informed the State Board that it would be seeking recognition this year. *Id.* This caused confusion and delay at the county board level when many county boards inadvertently validated signatures that arrived after the May 17, 2022 deadline because they would have been timely for 2024 recognition, but ultimately were not timely for 2022 recognition. *Id.*

As detailed in the Declaration of State Board Lead Investigator, Matthew Martucci ("Martucci Decl."), on April 29, 2022, the State Board received its first notice that signature pages submitted by the Green Party included what appeared to be fake signatures. Martucci Decl., ¶ 4. State Board staff attempted to contact Green Party Chair Ndege to discuss these discrepancies and the methods used to obtain the signatures. *Id.*, ¶ 5. Around May 10, Mr. Ndege left a voicemail stating that he was not responsible for everyone that turns in signatures and was unaware of the submission of fraudulent signatures. *Id.*, ¶ 6. Further attempts were made in May to contact and discuss the matter with the Green Party. *Id.*, ¶ 7.

On May 27, June 2, and June 7, the State Board's Investigations Division received complaints from the county boards of Wake, Durham, and Nash, all detailing significant discrepancies on the signature sheets and/or calls from voters claiming they did not sign the petition. *Id.*, ¶¶ 8-10, see also Ex. 11. By investigating these reports, State Board investigators were able to identify certain paid signature gatherers that were responsible for most of the irregularities and fake signatures. *Id.* As a result, the investigation was elevated to a potentially criminal matter with high priority and narrowed to those two gatherers in those three counties. *Id.*,

¶ 11. All told, investigators were able to identify at least seven paid signature gatherers and two paid consulting firms out of Michigan and Arkansas, but were only able to make contact with one individual in June. *Id.*, ¶ 13-14. A subpoena was issued for records to the owner of one of the consulting firms. *Id.*, ¶ 14.

Investigators reached out to the Green Party again on June 7 with a request to meet about their signature collection process, but Mr. Ndege requested any questions be submitted in writing and was unresponsive on the request to meet. *Id.*, ¶ 12, see also Ex. 12 and 13.

Plaintiffs' counsel in this matter emailed State Board staff on June 13, and requested a copy of all complaints or challenges and the basis and authority for the investigation. *Id.*, ¶ 15. On June 15, 2022, State Board legal staff responded to Plaintiffs' counsel's email providing a basis and legal statute authorizing State Board investigators to investigate this matter. *Id.* The email included a second request to meet and an explanation of the urgency to obtain information from the Green Party to avoid any potential delays with the State Board certifying their petition to be recognized as a party. *Id.*, see also Ex. 14. The Green Party also requested copies of petitions containing fake signatures, and State Board staff responded via email with a sample of problematic pages, identified by county and batch number, along with disclosing the names of the two signature gatherers suspected of providing the fake signatures. *Id.*, ¶ 17, see also Ex. 15. In that email, a third request was made to schedule a time to meet with the Green Party. *Id.*

On June 22, following a State Board request, the Green Party did provide contracts and agreements with paid consulting firms and paid individuals, and met virtually with investigators for the first time. *Id.*, ¶¶ 18-19. Through this meeting, investigators were able to obtain the full names and contact information for the two persons of interest and expanded the investigative scope to a third person. *Id.*, ¶ 20.

Throughout the month of June, as the Green Party submitted petition sheets, State Board staff move expeditiously to review those sheets for sufficiency. Cox Decl., ¶¶ 14, 16. State Board staff also reviewed all signature pages to ensure they were not submitted past the May 17 deadline (*id.*, ¶17), facially obvious fraudulent signatures (*id.*, ¶ 18), any pages with outdate party chairs (*id.*, ¶ 19), and reviewed county records to ensure the signatures were reviewed properly. *Id.*, ¶ 20. This review was delayed, in part, by the Green Party withholding copies of petition sheets as they were under the mistaken impression that copies were insufficient. *Id.*, ¶ 15, see also Ex. 7.

During this same period, the staff and investigators were reviewing roughly 3,560 submitted petition pages by county to identify those submitted and bearing the signature marks of the three persons of interest in the investigation. Martucci Decl., ¶ 21. Staff were able to learn that approximately 2,600 signatures were collected by the three persons of interest, but not every signature page the party submitted bore their name or initials. *Id.*, ¶¶ 23, 25. After a fourth submission was received from the Green Party on June 24, investigators manually processed those pages to identify any pages from the suspected persons. *Id.*, ¶ 22.

Contrary to Plaintiffs filings in this action (D.E. 27, ¶ 1, 61, 75, 76; D.E. 30, pp. 1, 2, 12-15), the State Board frequently interacted with the Green Party, and provided detailed information about the issues, irregularities, and the factual and legal bases of the ongoing investigation into fraudulent signatures weeks before the June 30 meeting. *Id.*, ¶¶ 5-7, 12, 15-20, and Exhibits 11-15.

Furthermore, Plaintiffs' suggestion in their Complaint and Amended Complaint that they were in the dark about the investigation or unable to participate, is contradicted by their own exhibits attached to those filings demonstrating they were involved. [D.E. 1-1, 27-1, 1-2, 27-2, 1-

3, 27-3]. Even Plaintiffs' allegations within their Amended Complaint contradict themselves. [*See, e.g.,* D.E. 27, ¶¶ 57, 58].

As a result of the review efforts detailed above, State Board staff identified a universe of potentially fraudulent signatures that exceeded the number of signatures that the county boards had initially approved above the legal threshold for party recognition. Cox Decl., ¶¶ 24-25; Martucci Decl., ¶¶ 23-25. Specifically, the investigators were able to identify a universe of over 2,600 signatures. Martucci Decl., ¶ 25. This formed the basis of staff's recommendation to the State Board members at the June 30 meeting. *Id.*, ¶¶ 24-25

C. June 30 State Board Meeting

Plaintiffs repeatedly alleged that the State Board failed to inform them before or during the June 30 meeting about the specific issues being investigated, failed to explain their denial decision, and failed to cite any legal authority for that decision. [D.E. 27, ¶ 1, 61, 75, 76; D.E. 30, pp. 1, 2, 12-15]. The multiple contacts prior to the meeting described above, as well as the video of that meeting, publicly broadcasted live, demonstrates these allegations are inaccurate.[5]

The discussion about the Green Party's certification began approximately one hour and five minutes into the June 30 meeting and was discussed and debated for approximately forty-one minutes. (*See* Time-stamp 1:05:00 to 1:46:10 for the June 30 mtg.) The discussion in fact opened with the Board giving Plaintiffs' own counsel five minutes to make a statement. *Id.*, 1:05:20 to 1:07:00. Plaintiffs' counsel spoke for approximately ninety seconds, during which time counsel stated that the party had met its obligations, noted the July 1 candidate filing deadline, requested certification, and offered to answer any questions. *Id.*

[5] *See* n.2, *supra*.

State Board staff was then called upon to provide a status report of the investigation into the sufficiency of the Green Party's petition. *Id.*, 1:07:30-1:21:00. State Board Executive Director Karen Brinson Bell provided a presentation, accompanied by a PowerPoint, which included an overview of the new party certification process and the governing statutes, including the State Board's duty to reach a determination of the sufficiency of the petitions. *Id.*, 1:07:30-1:15:20.[6]

Director Bell indicated that the Green Party submitted, and the county boards originally validated, more signatures than required. *Id.*, 1:14:30-1:15:20. However, starting in early May, the State Board was notified by several county boards of irregularities found with the petitions. *Id.*, 1:15:20-1:15:50. This in turn triggered the State Board to open an investigation in which State Board staff reviewed *every* signature sheet received from county boards, including sheets turned in as late as the week of the June 30 meeting. *Id.*, 1:15:20-1:15:50. Director Bell informed the State Board at the meeting that State Board staff was still reviewing the petitions submitted to determine their sufficiency. *Id.*, 1:14:30-1:15:20. Director Bell then identified the signs of fraud or irregularities found by State Board staff on numerous petition pages, including pages with the same handwriting, similar signatures, lines on the pages with incomplete information, lines with certain information crossed out, partial dates of birth for the petitioners, and duplicate signatures. There were also petition pages identifying individuals as signers who were deceased or had long been removed from voter rolls and signature sheets identifying a prior chairperson for the Green Party, both of which indicated there were petition pages resubmitted during the 2022 petition drive that were from the Green Party's pre-2018 petition effort. *Id.*, 1:15:50-1:17:05; see also Ex. A, p. 12.

[6] A copy of the PowerPoint which accompanied the Director Bell's presentation is attached as Exhibit 8 to the Cox Decl. and is publicly available on the State Board's website: https://bit.ly/3zf8MRs, last visited July 27, 2022.

Director Bell further explained that it was these significant signs of fraud which led to the discovery that paid signature gatherers were believed to be responsible for gathering suspected fake signatures. *Id.*, 1:17:00-1:18:25. Director Bell also provided examples of rejected and accepted signatures, including signatures accepted by county boards, about which the purported signatory had directly contacted the State Board to inform the Board that they did not sign the petition. 1:18:26-1:19:20. Considering these signs of potential fraud, and in light of the cumulative number of signatures involved, State Board staff concluded that there remained significant questions about the State Board's ability to determine that the petitions were sufficient at the time of its June 30 meeting. *Id.*, 1:17:00-1:18:25. This called into question the thoroughness of verification by county boards.

Finally, Director Bell noted that after the investigation was opened, State Board staff received complaints from signatories about the process, either stating that they never signed the petition, that they were not informed or misled about it, or that certain signatures were fraudulent or submitted late. *Id.*, 1:19:20-1:20:16.

In summation, Director Bell expressly informed the State Board members, and all participants and listeners at the June 30 meeting, that the "number of known questionable signatures exceed[ed] the 2,088-signature threshold." *Id.*, 1:20:18-1:21:00; *see also* Ex. A, p. 17. Director Bell also informed the State Board members that further investigation was required and stated that the formal recommendation of staff was to table consideration of the certification of the Green Party to a future date. *Id.*

State Board Member Mr. Eggers indicated with his questions and comments that tabling the decision would prejudice the Green Party, given the party's candidates were required to file their notices of candidacy by July 1, 2022. *Id.*, 1:29:08-1:30:28. State Board General Counsel

confirmed that the deadline was provided for in the controlling statute and that the State Board did not have the authority to change the date. *Id.*, 1:29:18-1:29:45. The State Board Chair acknowledged the existence of the July 1 deadline and that it conflicted with the State Board's inability to verify the sufficiency of the signatures as of June 30. *Id.*, 1:30:30-1:32:00. He nonetheless expressed a desire to take up the issue again at the next board meeting. *Id.*, 1:30:30-1:32:00. In response, State Board General Counsel noted that one possible solution would be for a court to find that it was impossible for the Green Party to comply with the deadline, thus necessitating that the court extend the deadline. *Id.*, 1:32:14-1:32:45.

The above review of the Board's June 30 meeting shows, contrary to Plaintiffs' assertions, that the State Board did in fact explain that the number of signatures to be further investigated exceeded the number necessary to call into question whether the Green Party's petition was sufficient to meet the statutory requirements. The need to complete this investigation in order to reach a determination, as required by statute, was the express reason given by the State Board Chair as to why the certification was denied on June 30, 2022, and as such, that fact too was plainly explained to the Plaintiffs through the State Board meeting. *Id.*, 1:36:15-1:37:11.

D. Ongoing Investigation through July 29.

Following the June 30 meeting, the State Board continued its efforts to reach a determination of the sufficiency of the petition. On July 7, State Board staff first learned that certain county board staff did not check to see whether the signature itself resembled that of the voter in the registration records. Cox Decl., ¶ 26. This is a required step under N.C.G.S. § 96(c), and the State Board's instructional materials inform county boards of this necessary step in the validation process. *Id.*, see also Ex. 9. Alerted to this issue, State Board staff subsequently discovered that numerous other counties also failed to take this step, including counties accounting

for large volumes of the signatures validated. *Id.* On July 11, State Board legal staff emailed all county boards and instructed them to conduct signature comparisons, if they had not done so already, and to have it completed by July 29. *Id.*, ¶ 27, see also Ex. 10. This review included larger counties preparing for an election on July 26, including Wake, Guilford, and Mecklenburg counties. *Id.* The matter remains an active criminal investigation. Martucci Decl., ¶ 30.

As of the close of business today, July 29, 2022, the State Board is aware of 15,472 signatures validated by the county boards.[7] Plaintiff is correct that this number has fluctuated over the last month, due to the county boards carrying out their obligations under the statute to compare petition signatures with those of registered voters, where they had not done so previously. *See* N.C. G.S. § 163-96(c)(2)(a) (requiring county chairs to certify petition signature were "checked against the registration records"); Cox Decl., ¶¶ 26-27. Thus, the fluctuations in signatures validated reflects the review efforts by county boards as data is uploaded to the State Board petition tracker in real time. The State Board directed the county boards to complete that review by today. See Ex. 10.

LEGAL STANDARD

A preliminary injunction constitutes "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief' and may never be awarded 'as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 24 (2008). The plaintiff has the burden to prove "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

[7] The current status regarding the number of validated signatures in support of the Green Party petition is available online at: https://vt.ncsbe.gov/PetLkup/PetitionResult/?CountyID=0&PetitionName=NORTH%20CAROLINA%20GREEN%20PARTY, last visited on July 29, 2022.

public interest." *Id.* at 20. A plaintiff must show that success on the merits is likely regardless of whether the balance of hardships weighs in his favor. *The Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010).

The purpose of a preliminary injunction is to preserve the status quo between the parties. *See, e.g., University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). However, in this action Plaintiffs seek an injunction that goes beyond preserving the status quo, requesting one that imposes affirmative requirements on Defendants. Thus, Plaintiffs must satisfy a higher, "more searching" burden. *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (citation omitted).

ARGUMENT

I. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THIS STATE LAW MATTER.

A. Plaintiff's Claims Are Not Ripe, or Alternatively, Will Be Moot.

The Court lacks subject matter jurisdiction over this matter because Plaintiffs' claims are not yet ripe. The ripeness doctrine aims to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Abbott established a two-prong test for ripeness: (1) whether the issues are fit for judicial decision, and (2) whether hardship will fall to the petitioning party on withholding court consideration. *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992) (citing *Abbot*, 387 U.S. at 149). Under the first prong, a case is fit for judicial review if "the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." *Id.* Under the second prong, hardship "is measured by the immediacy of the threat and

the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law." *Id.*

Under the first prong, the issues presented by Plaintiffs are not yet ripe for this Court's review because the agency is not yet done reviewing the underlying question of certification, and there will be an intervening agency ruling prior to this matter being heard by this Court. Thus, the alleged harm is entirely dependent on "future uncertainties [and] intervening agency rulings." *Id.*

As to the second prong, withholding court consideration until a later date presents no hardship to Plaintiff. By the time this matter is heard by this Court, the State Board will have completed its investigation and reached a final determination on whether the Green Party met the requirements for certification. The claims here will no longer be valid because they are based upon a prior denial of certification that will no longer be the operative final decision from the agency. If Plaintiffs are denied certification on August 1, they will be entitled to an appeal to the Superior Court of Wake County. N.C.G.S. § 150B-45. After all, their claims boil down to an argument that the State Board is not complying with *state* law. Therefore, interceding now is unnecessary and not doing so presents no hardship to Plaintiffs as judicial review is available through appeal and with enough time before the August 12 date, when ballots must be finalized.

For similar reasons, the current claim, particularly with respect to denying certification of the Green Party on June 30, will be moot by the time it is heard. "When a case or controversy ceases to exist, the litigation is moot, and the court's subject matter jurisdiction ceases to exist also." *S.C. Coastal Conservation League v. United States Army Corps of Eng'rs*, 789 F.3d 475, 482 (4th Cir. 2015) (*per curiam*).

Here, the State Board's review is ongoing, and it will reconsider the Green Party's certification on August 1, after its review is complete. The underlying claims are based entirely

on the June 30 denial by the State Board, which will no longer be the operative final decision by the time this matter is heard by this court on August 8. Should the State Board certify the Green Party, all of these claims, except for the relief related to the candidate filing deadline, will be moot. Should the State Board deny certification, it will be that denial, based upon the factual record not yet created, that will form the basis for any claim by the Plaintiffs, such that those claims are not yet ripe. Either eventuality weighs against exercising jurisdiction over these claims.

B. Defendants Are Entitled to Eleventh Amendment Immunity Under *Pennhurst*.

Pursuant to the Supreme Court's ruling in *Pennhurst,* this Court should hold that the individual Defendants are entitled to Eleventh Amendment immunity as state officers acting in their official capacities alleged to have committed an error of state law. *See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89,* 107-17, 124-25 (1984) ("[A]t least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it.")). "Just because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an exception to the Eleventh Amendment protection." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 293 (4th Cir. 2001).

The core teaching of *Pennhurst* is that "federal courts lack[ ] jurisdiction to enjoin . . . state officials on the basis of . . . state law." *Pennhurst,* at 124-25. Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106.

Here, Plaintiffs' Amended Complaint and Amended Memorandum of Law demonstrate that their claims are based upon the State Board's alleged failure to follow state law to certify the Green Party, despite the Green Party allegedly having met all the statutory requirements for certification. [*See* D.E. 27, ¶¶ 1, 30, 34, 80, 86, 91; D.E. 30, pp. p. 1, 6, 8, 9, 12-15]. While the

claims themselves purport to arise under federal law, the resolution of the question of state law will be dispositive. *Pennhurst* cautions that this Court does not have jurisdiction to restrain state officials from acting based on their authority under state law. Thus, any relief the Court might enter against the State Board on this basis would "contravene[ ] the Eleventh Amendment." *Pennhurst*, 456 U.S. at 106, 117.

Moreover, this is not a case where "federal claims often require federal courts 'to ascertain what' state law provides" without "compelling state officials to comply with it." *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985). Here, Plaintiffs are asking this Court to find that the State Board's decision violated state laws, and the only remedy is for this Court to compel the State Board to recognize the Green Party under the theory that this is required under N.C. Gen. Stat. § 163-96. This is the type of injunctive relief that runs afoul of *Pennhurst's* requirement that federal courts not instruct state officials how to interpret state law. Accordingly, Defendants are entitled to sovereign immunity.

C. This Court Should Decline to Exercise Jurisdiction Under the *Burford* Abstention Doctrine.

The *Burford* abstention doctrine applies to this case because adjudicating the claims would insert the Court into the State's administrative system of regulating elections and political parties—an administrative system that has an adequate review mechanism through North Carolina state courts. Under *Burford*, "when adequate state court review is available, a federal court sitting in equity should abstain from reviewing cases involving difficult questions of state law or a state's administration of its own regulatory schemes." *King v. Jefferies*, 402 F. Supp. 2d 624, 635 (M.D.N.C. 2005) (citing *Burford v. Sun Oil Co.,* 319 U.S. 315, 333-34 (1943). When the relief sought is equitable in nature, the district court may dismiss the case under the *Burford* doctrine, rather than issuing a stay of proceedings. *Id.* at 635–36.

In deciding whether to invoke *Burford* abstention, as a threshold matter, the Court must determine whether adequate state court review is available for Plaintiffs' claims. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989). North Carolina has enacted a comprehensive statutory scheme that provides adequate review because any "aggrieved party" has a "right to appeal the final decision" of the State Board to Superior Court of Wake County, and adverse decision from which is appealable of right to the N.C. Court of Appeals. N.C.G.S. §§ 7A-27(b)(1), 163-22(*l*). Further, the North Carolina Supreme Court may elect to hear appeals originating from the State Board's decisions, *see* N.C.G.S. § 7A-31, and under certain limited circumstances, including substantial Constitutional questions, *must* review decisions by the Court of Appeals. N.C.G.S. § 7A-30. Thus, adequate judicial review exists for State Board decisions.

Under *Burford*, after adequate judicial review has been established, the court turns to the second question of "whether either: 1) difficult questions of state law exist which affect policy problems of substantial public import; or 2) federal review would disrupt state efforts to establish a coherent policy in an area of public interest." *New Orleans,* 491 U.S. at 361. Here, it is Defendants' position that this is not a difficult question of state law. The statute at issue unambiguously requires the State Board to make a determination that the potential new party presented sufficient petitions before it certifies it as a new party. *See* N.C.G.S. § 163-96(a)(2). And, contrary to Plaintiffs' view on North Carolina law, petitions for a new statewide political party to be recognized are not *automatically* deemed sufficient under state law because county boards of elections have reviewed and approved the required number of signatures initially. Such an interpretation of N.C.G.S. § 163-96 would render null the requirement that the State Board "determine the sufficiency of petitions filed with it" *after* the county boards have examined and certified the signatures in the petitions that are initially filed with them. *Compare id.* § 163-96(a)(2)

with id. § 163-96(c). This would contravene a long-established canon of North Carolina statutory interpretation to give effect to all provisions of a statute to not render any single provision a nullity. *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556 (1981).

However, federal review would indeed disrupt an area that "affect[s] policy problems of substantial public import" for the State, election administration. *New Orleans*, 491 U.S. at 361. This is because the relief requested by Plaintiffs demands this Court to substitute its judgment for that of the State Board, which is obligated by state statute to determine that a new party's petitions are sufficient before certification is granted. If the Court were to draw its own conclusions about the State Board's proper application of a state statute, it would also severely disrupt the State's efforts in establishing a coherent public policy for how to evaluate the sufficiency of petitions. *Id.* Likewise, due to Plaintiffs' choice not to seek review in state court yet, it would ask this Court to make determinations where the state courts had not been given a chance to review the state agency's application of state law. *See N.C. Life & Acc. & Health Ins. Guar. Ass'n v. Alcatel*, 876 F. Supp. 748, 753 (E.D.N.C.), *aff'd*, 72 F.3d 127 (4th Cir. 1995).

The Fourth Circuit has routinely applied *Burford* to situations, like this one, where federal claims are actually "state law in federal clothing." *See, e.g., Johnson v. Collins Entm't Co.*, 199 F.3d 710, 721 (4th Cir. 1999); *Browning-Ferris v. Baltimore County,* 774 F.2d 77, 79–80 (4th Cir. 1985); *Caleb Stowe Assocs. v. County of Albemarle,* 724 F.2d 1079, 1080 (4th Cir. 1984). This is the case here, as the federal claims Plaintiffs allege are entirely dependents on their disagreement with the State Board's application of state law.

D. Constitutional Avoidance Counsels against Exercising Jurisdiction.

The doctrine of constitutional avoidance supports declining jurisdiction. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that

we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 568-69, n.34 (1947) (quoting *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). Courts "must balance 'the heavy obligation to exercise jurisdiction,' […]against the 'deeply rooted' commitment 'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 820 (1976), and *Spector*, 323 U.S. at 105).

At the heart of Plaintiffs' claim is the allegation that the State Board is not properly applying the state statute in question. Following the logic of Plaintiffs' argument, the state statute properly applied would not give rise to a constitutional violation. Thus, without that allegation, which can be resolved as a purely state-law question, there is no hook for a constitutional violation. To the extent the issue of the State Board's application of the statute in question to the Green Party's petition remains in dispute after the next State Board meeting, addressing the constitutional questions raised is unnecessary to resolve the conflict presented, and the determination of whether state law is being applied properly by a state agency is more properly left to a state court.

This is particularly true because Plaintiffs' argument requires this Court to "interpret state statutes in a way that raises federal constitutional questions." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11-12 (1987) ("[A] constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time -- thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.").

Plaintiffs had the opportunity to present their arguments to state court and, if this matter is not mooted, will have another opportunity to present their questions of statutory interpretation to a state court. The resolution of which is entirely dispositive to Plaintiffs' alleged federal claims.

If a state court determines the State Board properly interpreted N.C.G.S. § 163-96(a)(2) to require a determination that the Green Party presented sufficient petitions before certification, Plaintiffs would be unable to present a state law violation to this Court to support their allegations of constitutional violations. Conversely, if a state court determined that the State Board made the wrong decision, and should have immediately certified the Green Party despite significant fraud, the resultant relief would completely resolve Plaintiffs' injuries. For reasons not known, Plaintiffs chose to bypass the state court that could entirely resolve these claims without invoking federal constitutional questions, in order to file in federal court. Under these circumstances, this Court should abstain from exercising jurisdiction over this matter. *See Pennzoil*, U.S. 481 U.S. at 11-12.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Are Unlikely to Succeed on the Merits of Their First and Fourteenth Amendment Claim.

Article I, Section 4 of the U.S. Constitution specifies that it is for the States to prescribe the "time, place, and manner of holding elections." U.S. Const. art. I, § 4, cl. 1. The Constitution leaves it to the states to exercise their "broad power" granted them by the Constitution to regulate their elections in accordance with federal laws and the Constitution. *See Tashjian v. Republican Party*, 479 U.S. 208, 217, (1986). It is well-established that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974), *quoted in Anderson*, 460 U.S. at 788.

State election regulations often "implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments." *Pisano v. Strach*, 743 F.3d 927, 932 (4th Cir. 2014) (citation omitted). "All election laws, including perfectly valid ones, 'inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with

others for political ends.'" *Sarvis v. Alcorn*, 826 F.3d 708, 716 (4th Cir. 2016) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Under the well-established *Anderson-Burdick* framework, to identify those laws that unconstitutionally burden rights guaranteed by the First and Fourteenth Amendments, courts weigh: (1) the character and magnitude of the asserted injury to First and Fourteenth Amendment rights, against (2) the State's interests and justifications for the burden imposed. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The severity of the burden imposed "dictates the level of justification" required: "Severe" burdens trigger strict scrutiny, but if the burden is only "modest," then a state's "important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Pisano*, 743 F.3d at 933.

"[A] State has an interest, *if not a duty*, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972) (emphasis added). States also have an interest in "avoiding confusion, deception, and even frustration of the democratic process at the general election," and "in ensuring orderly, fair, and efficient procedures for the election of public officials." *Pisano,* 743 F.3d at 937 (cleaned up). The State Board asserts these interests here.

North Carolina's statutes defining how to form a new party, namely N.C.G.S. §§ 163-96(a)(2), -96(c), and 163-98, and the State Board's duties to enforce those provisions, serve these objectives. Plaintiffs do not appear to be challenging the above-noted statutes governing the process for certifying new parties, nor would such a challenge be likely to succeed, as it has already been previously adjudicated by the Fourth Circuit in Defendants' favor. *See generally Pisano*, 743 F.3d 927. In *Pisano*, the North Carolina Constitution Party and the Green Party sought to invalidate portions of the statutory scheme by which new parties are certified as violations of the

First and Fourteenth Amendments. *Id.* at 929. They argued that the May 17 deadline, combined with the former requirement of signatures totaling 2% of the voters who voted in the most recent general election for Governor, created an impermissible barrier to ballot access. *Id.* at 930-31. The signature requirement for new political parties has since been pared down to only 0.25% of gubernatorial voters. 2017 Session Law 214, section 1. The Fourth Circuit found that the previous, more onerous ballot-access provisions did not "burden[] them in any meaningful way." *Id.* at 935-36. As such, it imposed only a modest burden. *Id.* at 936.

Thus, "North Carolina's 'asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on plaintiffs' rights.'" *Id.* at 936-37 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). The Fourth Circuit found that North Carolina's stated interest in regulating the election process was sufficient to justify the May 17 deadline. *Id.* at 937. Specifically, the Fourth Circuit noted that the "deadlines permit the government *to verify signatures* and prepare the ballot before the November election." *Id.* (emphasis added). This is precisely the same interest the State Board asserts here. As such, even if Plaintiffs' claims can somehow be viewed as a challenge to the statutes at issue, they are unlikely to succeed on the merits, as there is existing controlling authority dictating an outcome in Defendants' favor.

Plaintiffs' argument that the State Board's application of state law somehow violates the Constitution is fundamentally flawed. Contrary to Plaintiffs' contentions, the State Board is following its statutory duties to determine that Plaintiffs' petitions are sufficient. The governing statute requires that the State Board "forthwith determine the sufficiency of petitions filed with it and shall immediately communicate its determination to the State chair of the proposed new political party." N.C.G.S. § 163-96(a)(2). The certification process is ongoing, but when the State Board found at its June 30, 2022 Board meeting that it would be unable to determine whether the

Green Party had fully complied with its statutory obligations and certify it as a party in advance of the July 1, 2022 candidate deadline, the State Board immediately notified the Green Party, whose counsel was in fact in attendance and given an opportunity to be heard at the meeting. This is not a case where either the statute infringing on Plaintiffs' rights or the application of the statute by the State Board infringed on those rights. Rather, the statute, and the State Boards' application of the statute, are "reasonable, nondiscriminatory restriction[s]" that are justified by the very regulatory interests that the Fourth Circuit highlighted when upholding North Carolina's new party petition law. *Pisano*, 743 F.3d at 937.

Plaintiffs disagree, contending instead that the State Board cannot assert "any legitimate state interest that is served by its denial of ballot access [to] a party and its candidates *who fully complied with all applicable requirements under state law*." [D.E. 30 at 9]. But, again, this argument is fundamentally flawed because it relies on a faulty reading of state law: that the State Board may only rubber stamp the initial county board review of petition sheets for a new statewide political party. Again, to conclude that there is no role for the State Board to ensure that petition signatures are validly counted by the county boards for a statewide party petition would be to render null an express provision of state law requiring the State Board to determine the sufficiency of petitions "filed with it." N.C.G.S. § 163-96(a)(2). It would also ignore the duties of the State Board as set forth in state law to "have general supervision over the primaries and elections in the State," to "compel observance of the requirements of the election laws by county boards of elections," and to "investigate when necessary or advisable, the administration of election laws, frauds and irregularities[.]" *Id.* §§ 163-22(a), (c), (d). Plaintiffs' interpretation of the State Board's role in the statewide petition process is completely foreign to North Carolina election law. So is the suggestion that the State Board must ignore plain evidence of fraud or irregularities sufficient

in scope to potentially invalidate a new party petition. In light of the obvious signs of fraud or irregularities found by State Board staff, the Green Party's compliance with section 163-96 was not established when the State Board considered the recognition request on June 30. (1:15:50-1:17:05)[8]; *see also* Ex. 8, p. 12; Cox Decl., ¶¶ 24-25; and Martucci Decl., ¶ 25. This attempt to fashion a federal constitutional claim based on a misreading of state law must fail.

Moreover, on August 1, 2022, the Green Party will either be certified because it has met the necessary qualifications under the statute, or it will not be because it failed to meet those qualifications. Under either scenario, Plaintiffs cannot demonstrate a likelihood of success on the claim that they were wrongfully denied access to the ballot. Notably, this further demonstrates that at its heart, Plaintiffs' claim is nothing more than a state law claim about interpreting a state statute shoehorned into a federal claim. In any regard, they cannot show a likelihood of success.

B. Plaintiffs Are Unlikely to Succeed on the Merits of Their Procedural Due Process Claim.

It is an open question whether procedural due process in an elections case should be analyzed under the *Anderson-Burdick* framework or the traditional *Mathews* framework.[9] To the extent the Court applies *Anderson-Burdick* only, the State Board relies on its arguments above in Part II-A.

Procedural due process, as guaranteed by the Fourteenth Amendment "prevents mistaken or unjust deprivation[.]" *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 145 (4th Cir. 2014). To show entitlement to due process, plaintiffs must establish "(1) a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that

[8] *See n.2 supra.*

[9] *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1195 (9th Cir. 2021); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 233-35 (5th Cir. 2020); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *compared with Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 226 (M.D.N.C. 2020).

the procedures employed were constitutionally inadequate." *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019) (citation omitted). "At bottom, procedural due process requires fair notice of impending state action and an opportunity to be heard." *Snider*, 739 F.3d at 146 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

First, the State Board does not dispute that Plaintiffs' asserted interests are cognizable. *See Democracy N.C.*, 476 F. Supp. at 227 (collecting right-to-vote cases). However, the State Board has not deprived Plaintiffs of those interests, and is following the constitutionally adequate procedures.

As to the alleged deprivation, the State Board made clear during the June 30 meeting that it had not yet reached a determination as to the sufficiency of the petition and required further time to investigate. Because the determination of the sufficiency of Plaintiffs' petition is a matter to be taken up on August 1 by the State Board, at which time a final decision on certification will be made, it cannot be said that Plaintiffs have suffered a deprivation based on their current claims arising out of the June 30 meeting. This is an ongoing matter, and until it is resolved there is no deprivation. Nonetheless, as stated above, and as noted in the June 30 meeting, the State Board does recognize the conflict this presents with the candidate filing deadline and reiterates that it does not object to relief that resolves that issue.

Finally, the notice and opportunity to be heard were adequate. Notice and hearing are two separate showings governed by two different standards. *Snider*, U.S. at 146. Notice "must be reasonably calculated to convey information concerning a deprivation." *Id.*

Here, there can be no dispute that notice was adequate. This is not a situation where the state initiated an action in which a deprivation might occur, and the party deprived was unaware such a proceeding would take place or what the proceeding would encompass. Here, Plaintiffs

initiated the petition process, with full knowledge of the statutory framework, requiring the State Board to determine the sufficiency of the petition, before it could confer recognition on a new political party. *See* N.C.G.S. § 163-96(a)(2). Thus, Plaintiffs were aware that the petition would be reviewed by the State Board, and that a determination would be made by the State Board at an announced public meeting. Above and beyond that threshold showing, Plaintiffs were also notified *repeatedly* that the State Board was conducting investigations into fake signatures and other irregularities, thus putting them on further notice that there were questions about the sufficiency of their petition prior to the hearing. Cox Decl., ¶¶ 7-9, 11-12, 14-15, and Ex. 2, 4, 5, 7; Martucci Decl., ¶¶ 5-7, 12, 15-20, and Ex. 11-15. As with all public meetings, the State Board posted a notice of public meeting on its website.[10] The meeting notice provided direct access to all meeting materials, including all documents related to the Green Party petition that were to be presented during the meeting, such as the Director's Report detailing the status of the investigation and specific examples of the fake signatures encountered in that investigation.[11] Finally, the attached Martucci Declaration detailing communications about the investigation so far (Martucci Decl., ¶¶ ¶¶ 5-7, 12, 15-20), and the factual presentation provided at the June 30 State Board meeting (Statement of Facts, Part C), provided Plaintiffs with ample notice of the issues with their petitions, the status of the State Board's investigation into those issues, and how the State Board planned to reach a determination on the certification.

Regarding the hearing, the Supreme Court "set forth the familiar three-step inquiry for determining the adequacy of the opportunity to be heard: [a] a balancing of the private interest and

[10] The meeting notice was posted on the State Board's website and is still available online: https://www.ncsbe.gov/news/events/board-meeting-june-30-2022, last visited July 28, 2022.

[11] All such materials remains available online: https://dl.ncsbe.gov/index.html?prefix=State_Board_Meeting_Docs/2022-06-30/Green%20Party%20Petition/, last visited July 28, 2022.

the public interest, [b] along with 'the risk of an erroneous deprivation of such interest through the procedures used, and [c] the probable value, if any, of additional or substitute procedural safeguards.'" *Snider*, U.S. at 146 (quoting *Mathews*, U.S. at 333). Prior to being heard at the meeting, Plaintiffs made lengthy written submissions to the State Board.[12] However, at the hearing, Plaintiffs' counsel spoke for less than two minutes in support of the petition without addressing any other issues. (1:05:20 to 1:07:00).[13] Following that statement, the State Board detailed the reasons why it could not make a final determination at that time regarding certification, including that the number of signatures in question surpassed the margin of error for the petition. (1:07:30-1:21:00). The State Board Chair informed Plaintiffs that the investigation would continue in order to reach a determination and indicated a willingness to reconsider the decision at that time. (1:36:15-1:37:11). Plaintiffs' counsel was then recognized again to speak but, ignoring the prior presentation of evidence, he asked whether there was any question as to the validity of the signatures above the necessary threshold, the answer to which was expressly addressed by the Executive Director when she stated that enough signatures were in question to drop below that minimum threshold. (*Compare* 1:20:18-1:21:00 and Ex. A, p. 17 *with* 1:37:12-1:37:31)

Since that time, the State Board has received more evidence of issues with the petition process, but still remains on track to complete its investigation and reconsider the certification of the Green Party on August 1. The governing statutes demand that the State Board make this determination, such that this procedural history was unavoidable given the scale of the investigation that was required. Had the State Board certified the party with such evidence of

[12] Plaintiffs' written submissions were part of the State Board's meeting materials and remain publicly available at: https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-06-30/Green%20Party%20Petition/NCGP%20Email%20to%20State%20Board%206-30-22.pdf, last visited July 28, 2022.

[13] *See* n.2, *supra*.

fraud on June 30, as Plaintiffs demand, the State Board would have violated its statutory duties and risked an erroneous decision which, itself, could be subject to judicial reversal under N.C.G.S. §§ 163-22(*l*) and 150B-51. Moreover, to ensure the interests of Plaintiffs and the public are met, State Board staff has invested significant time and resources into this petition review, will hold two meetings on the certification, and has done so as quickly as possible and in the face of minimal cooperation from the Green Party and its agents.

For these reasons, Plaintiffs have failed to demonstrate a likelihood of success on their procedural due process claim.

III. PLAINTIFFS HAVE NOT DEMONSTRATED THEY WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED.

Under the second *Winter* factor, Plaintiffs cannot make a clear showing that they will suffer irreparable harm if an injunction is not issued. *Winter*, 555 U.S. at 20. In fact, Plaintiffs cannot demonstrate *any* harm arising from the State Board carrying out its statutory duties to determine their petition's sufficiency pursuant to N.C.G.S § 163-96(a)(2). Once the State Board completes that process on August 1, Plaintiffs will be unable to demonstrate any irreparable harm. The State Board will have finished its review and either certified the Green Party, or denied certification because the party did not meet the required qualifications. Under either scenario, the statute will have been applied lawfully, and Plaintiffs will be unable to show that it is "likely" that they will suffer irreparable harm absent an injunction. *Winter*, 555 U.S. at 22.

Plaintiffs' only potential irreparable harm arising from the State Board's continued consideration of their certification is that the candidate filing deadline passed on July 1, 2022 pursuant to N.C.G.S. § 163-98. The State Board does not dispute that if certification were to occur on August 1, relief from the Court allowing for the extension or temporarily enjoining of the candidate deadline would be appropriate to ensure access to the November general election ballot.

IV. THE EQUITIES TO THE PARTIES AND THE PUBLIC INTEREST WEIGH AGAINST AN INJUNCTION.

The final two *Winter* factors require Plaintiffs to demonstrate that the equities tip in their favor and that an injunction is in the public interest. *Winter*, 555 U.S. at 20. In cases involving challenges to governmental action, courts typically consider the balance of the equities and the public interest factors together. *Taliaferro v. N.C. State Bd. of Elections*, No. 5:20-CV-411-BO, 2020 WL 5709252, at *3 (E.D.N.C. Sept. 24, 2020). Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 602 (4th Cir. 2017).

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). Moreover, the State Board, as the state agency charged with enforcement of North Carolina's election laws, represents the public interest in this case, for the laws being enforced undoubtedly reflect the public's interest. *See Jackson v. Leake*, 476 F. Supp. 2d 515, 530 (E.D.N.C. 2006).

The public interest strongly favors the State Board investigating evidence of fraud in Plaintiffs' petitions sufficient in scope to undermine the sufficiency of the overall petition, before making a final determination on whether to certify a new party. To require the State to brush past such evidence and certify a petition of uncertain sufficiency would undermine the public's interest in both the integrity of the election process and the legitimate policy of ensuring that only political parties that demonstrate the requisite support among the electorate may place their candidates on the general election ballot.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted this the 29th day of July, 2020.

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