UNITED STATES COURT OF APPEALS
for the
FOURTH CIRCUIT

No. 22-1830

NORTH CAROLINA GREEN PARTY, *et. al.*,

Plaintiff-Appellees,

- v. -

NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*,

Defendants,

and

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, *et al*.,

Intervenor-Defendant-Appellants.

On Appeal From an Order Entered by the United States District Court for the Eastern District of North Carolina

RESPONSE IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
oliverhall@competitivedemocracy.org

Counsel for Plaintiff-Appellees

Plaintiff-Appellees North Carolina Green Party, Anthony Ndege, Michael Trudeau, Matthew Hoh, Samantha Worrell, Samantha Spence, K. Ryan Parker and Aaron Mohammed (collectively, "NCGP") respectfully submit this response in opposition to the Emergency Motion for Stay Pending Appeal filed by Intervenor-Defendants Democratic Senatorial Campaign Committee and North Carolina Democratic Party (together, "DSCC") on August 9, 2022 (Doc. 3) (hereinafter, "Mot.").

INTRODUCTION

This appeal arises from extraordinary facts. At all times relevant to this matter, there has been no genuine dispute between the parties that Appellee North Carolina Green Party ("NCGP") timely complied with all applicable requirements to qualify as a new political party under N.C. Gen. Stat. § 163-96(a)(2) (hereinafter, "§ 163-96(a)(2)") and place its candidates on North Carolina's November 8, 2022 general election ballot pursuant to N.C. Gen. Stat. § 163-98 (hereinafter, "§ 163-98"). That is why the North Carolina State Board of Elections ("NCSBE") ultimately certified NCGP as a new political party on August 1, 2022 – albeit following a two-month delay after NCGP timely submitted its petitions on June 1, 2022, which prevented NCGP and its candidates from complying with the July 1 deadline set forth in § 163-98. It is also why NCSBE – the Defendant in the proceedings below – not only declined to join this appeal, but agreed that the District

Court awarded appropriate relief by enjoining enforcement of the July 1 deadline as applied here.

The DSCC now appeals and moves on an emergency basis for a stay of the District Court's August 5, 2022 Order granting NCGP a preliminary injunction. (ECF No. 64 (hereinafter, "Order").) The DSCC does so with full knowledge that NCSBE must finalize its November 8, 2022 general election ballot for printing just two days from now – on August 12, 2022. (Mot. at 2.) The DSCC also does so on the basis of an incomplete record, having omitted from its "Appendix" (Doc. 4) virtually all of NCGP's evidence on which the District Court's Order relies. Further, the DSCC repeatedly resorts to distortions and misrepresentations in an attempt to convince this Court that the District Court's Order should be stayed.[1]

[1] For instance, the DSCC repeatedly asserts that NCGP's petitions are subject to an ongoing "criminal" investigation, (Mot. at 6, 7, 10, 14), but that has never been true and it is not now. NCSBE is not a prosecutorial body and its investigation into the sufficiency of NCGP's petitions is not criminal in nature. The DSCC further asserts that NCGP "refused to cooperate" with NCSBE's investigation, (Mot. at 2), but that is false. NCGP cooperated fully, promptly and voluntarily, providing comprehensive and detailed responses to NCSBE's questions and producing every record in its possession. (Am. Compl. (ECF No. 27) ¶¶ 57-61, 77.) Further, NCGP repeatedly requested the opportunity to meet with NCSBE to review its petitions and resolve any questions, but NCSBE rebuffed NCGP each time. (*Id.* ¶¶ 28, 59, 77.) The DSCC also asserts that NCGP's petitions are "rife with fake signatures" and "plagued" by fraud, (Mot. at 2, 3), but as the District Court correctly observed, NCSBE has investigated the petitions exhaustively and concluded that they contain 15,472 valid signatures – or 1,607 more than the requirement under state law – and thus there can be no doubt that NCGP has complied with the requirements to qualify as a new political party under North Carolina law. (Order at 9, 26.) These examples

The DSCC apparently hopes to sow confusion just long enough for NCSBE's August 12th ballot-printing deadline to pass, leaving NCGP without a remedy that protects its constitutional right to participate in North Carolina's 2022 general election. But the DSCC cannot overcome a threshold problem in pursuing this appeal. It lacks standing where NCSBE – the agency exclusively charged with enforcing North Carolina's statutory scheme – has declined to appeal and agrees that the District Court properly granted NCGP relief from the July 1 deadline prescribed by § 163-98.

Furthermore, even if the DSCC had standing, to obtain a stay it must make a strong showing that it is likely to prevail on the merits, and the DSCC cannot carry that burden. The District Court's Order is soundly reasoned and faithfully applies binding precedent to the undisputed facts. The DSCC cannot point to any abuse of discretion committed by the District Court, much less any legal error. It therefore fails to provide this Court with any basis to stay the Order.

The DSCC attempts to carry its burden on the basis of two assertions, neither of which has any merit. First, the DSCC asserts that the District Court improperly "reached beyond the four corners of the complaint" by enjoining the July 1 deadline prescribed by § 163-98. (Mot. at 13.) That assertion is flatly contradicted by

---

demonstrate that the DSCC's overheated rhetoric does not comport with the undisputed facts and evidence.

NCGP's Amended Complaint, which expressly requests that the District Court enter an order "enjoining NCSBE from enforcing the July 1 filing deadline under § 163-98 as applied to Plaintiffs." (Am. Compl. ¶ 93B.) The Amended Complaint also includes numerous specific allegations demonstrating that such relief is warranted because the July 1 deadline is unconstitutional as applied to NCGP in combination with § 163-96(a)(2). (Am. Compl. ¶¶ 24, 29, 31, 32, 33, 34, 64, 69.) Under these circumstances, where a plaintiff expressly requests relief and pleads sufficient facts to support the request, the Supreme Court has squarely rejected the assertion that a district court lacks authority to grant it.

The DSCC's second assertion, that the District Court erred by concluding that the July 1 deadline is unconstitutional as applied here, (Mot. at 16,) likewise runs afoul of binding precedent. Both the Supreme Court and this Court have recognized that filing deadlines such as that prescribed by § 163-98 must be analyzed as applied in combination with a state's ballot access scheme in its entirety, based on the particular facts of each case. It is therefore of no moment that other courts have upheld other filing deadlines based on different facts. The undisputed facts of this case demonstrate that § 163-98 made it impossible for NCGP to place its candidates on the ballot, notwithstanding its compliance with all applicable requirements under North Carolina law. That is the hallmark of a severe burden and the District Court properly enjoined enforcement of § 163-98. The DSCC's motion should be denied.

BACKGROUND

On June 1, 2022, NCGP timely submitted petitions to NCSBE containing 15,953 signatures validated by county boards of elections – or 2,088 more than the 13,865 valid signatures required under state law. (Am. Compl. ¶ 66.) NCSBE was required to certify the sufficiency of the petitions "forthwith," *see* § 163-96(a)(2), but it took no action until June 30, 2022, when it voted 3-2 on party lines not to certify NCGP. (Am. Compl. ¶¶ 29-30.) This delay practically guaranteed that NCGP could not comply with the July 1, 2022 deadline for certifying its candidates under § 163-98. (*Id.*)

NCSBE cited no legal authority for its failure to certify NCGP as a new political party. NCSBE cited no applicable statutory provision, regulation or other legal requirement with which NCGP failed to comply. On the contrary, NCSBE expressly conceded that when it voted not to certify NCGP, county boards of elections had validated 15,953 signatures on NCGP's petitions, which was 2,088 more than the state law requirement. (Am. Compl. ¶ 66.) The only explanation NCSBE gave for its failure to certify NCGP came from its Chair, Defendant Damon Circosta, who stated that he had too many "questions" to vote in favor of certification, because NCSBE staff claimed to be investigating "irregularities" in the NCGP petitions. (*Id.* ¶¶ 66, 73.)

NCSBE never produced evidence of any "irregularities" in NCGP's petitions to NCGP, nor did it provide NCGP with any opportunity to defend the validity of the signatures on its petitions or the integrity of its petitioning process. (*Id.* ¶ 76.) Yet NCSBE undertook a wide-ranging investigation into NCGP's petitions, pursuant to which a team of NCSBE investigators contacted NCGP's petition circulators by telephone and email to request information about virtually every aspect of their petitioning efforts. (*Id.* ¶ 77.) NCGP fully and voluntarily cooperated with NCSBE, promptly providing all information and every record requested by NCSBE's investigators. (*Id.* ¶¶ 57-61, 77.) Further, NCGP repeatedly requested the opportunity to meet with NCSBE to review its petitions and resolve any questions regarding particular signatures, but NCSBE rebuffed NCGP each time. (*Id.* ¶¶ 28, 59, 77.)

Meanwhile, NCSBE continued to invalidate NCGP petition signatures that county boards of elections validated. (*Id.* at ¶ 78.) Of the 15,953 county board-validated signatures on the NCGP petitions as of June 30, 2022, on July 21, 2022, NCSBE credited NCGP with just 15,826. *See* North Carolina State Board of Elections, Petition Search (North Carolina Green Party), *available at* https://vt.ncsbe.gov/PetLkup/PetitionResult/?CountyID=0&PetitionName=NORTH%20CAROLINA%20GREEN%20PARTY (accessed July 21, 2022). That number continued to drop each day as NCSBE's investigation progressed.

At NCSBE's June 30, 2022 meeting, Defendant Circosta announced that he "would like" to see NCGP on North Carolina's ballot, but he thought it important to allow NCSBE staff time to conduct their investigation. (*Id.* ¶ 63.) Upon adjourning that meeting, however, NCSBE issued a press release announcing that it had denied certification of NCGP as a new political party because it had found "evidence of fraud and other irregularities" in NCGP's petitions. (*Id.* ¶ 81.) This announcement was widely reported in the news media, causing NCGP and its candidates immeasurable harm at the height of what should have been their campaign for election.

Many of the so-called "irregularities" cited in NCSBE's press release are not irregularities at all – there is nothing whatsoever improper about them – and they provide no legal basis for NCSBE to invalidate signatures on NCGP's petitions. (*Id.* ¶ 82.) To cite just one example, NCSBE announced that NCGP's petitions had been signed by a "deceased" voter, as if that were proof positive of fraud, but NCGP has personal knowledge that at least one petition signer – an NCGP member's mother – died after signing an NCGP petition. (*Id.*) This is the sort of discrepancy that could have been easily resolved if NCSBE had allowed NCGP any opportunity to address the purported "irregularities" it claimed to be investigating.

NCSBE does not speak with a single voice, of course. Its vote not to certify NCGP broke on party lines, with the three Democrats voting against certification,

while the two Republicans voted in favor of certification. (*Id.* ¶ 74.) The difference between the Democratic majority and the Republican minority is not mere partisanship, however: in this case, the minority sought to adhere to the requirements of North Carolina law and NCSBE's own prior practice, whereas the majority flouted them. As Defendant Eggers observed, for instance, contrary to the representations of NCSBE's staff, NCSBE's failure to certify NCGP on June 30, 2022 would indeed "prejudice" NCGP by preventing it from placing its candidates on North Carolina's 2022 general election ballot. (*Id.* ¶¶ 69-70.) Defendant Tucker was even more pointed. He observed that in the 2020 election cycle, NCSBE "did not check nary a signature, not one signature, verified by a county board of elections." (*Id.* ¶ 71.) Moreover, Defendant Tucker observed, NCSBE had received a complaint prepared by the Elias Law Group, "so there must be something advantageous for the Democratic Party not having the Green Party on the ballot." (*Id.*) "I don't understand why we don't certify this," Defendant Tucker concluded. (*Id.*)

The complaint referenced by Defendant Tucker was filed by Michael Vincent Abucewicz, (*id.* ¶ 53), who appears to be a field operative of the North Carolina Democratic Party. (Ndege Decl. (ECF No. 28-1) ¶ 35.) According to Mr. Abucewicz's complaint, "a growing number" of NCGP petition signers "now swear" that they were "misled" as to the purpose of NCGP's petitions. (Am. Compl. ¶ 53.)

But tens of thousands of North Carolina voters signed NCGP's petitions, and tens of thousands more North Carolinians were asked to sign them, and not one appears to have filed a complaint with NCSBE or any county board of elections against NCGP. (Ndege Decl. ¶ 34.)

The allegations in Mr. Abucewicz's complaint rely on selective, misleading quotations from the written instructions that NCGP provided to its petition signers, and which remain publicly available on NCGP's website. (Ndege Decl. ¶¶ 10, 30.) Those written instructions refute Mr. Abucewicz's allegations and confirm that NCGP expressly directed petition circulators to "explain the purpose" of NCGP's petitions to each potential signer – "trying to get the Green Party on the ballot" – while they presented the petition to the potential signer. (*Id.* ¶ 31.) Other evidence confirms that NCGP petition circulators did so. (*Id.* ¶ 5; Seeman Decl. (ECF No. 28-4) ¶¶ 2-3.)

Moreover, the "evidence" on which Mr. Abucewicz's complaint relies consists of a number of declarations, which are identical except for the declarant's name and contact information, and which indicate that they were signed electronically using the "DocuSign" platform. *See* NCSBE File (June 30, 2022 State Board Meeting), *available at* https://dl.ncsbe.gov/index.html?prefix=State_Board_Meeting_Docs/2022-06-30/Green%20Party%20Petition/ (providing link to Mr. Abucewicz's June 28, 2022

letter to NCSBE) (accessed July 21, 2022). It appears to be no coincidence that this "evidence" was submitted following a concerted campaign by Democratic Party operatives to contact NCGP petition signers and convince them to request that their names be removed from NCGP's petitions. (Am. Compl. ¶¶ 35-56.) For example, Clinton Ebadi received a text message requesting that he remove his name from NCGP's petitions, which provided the following link that would enable him to do so: https://ncdems.fyi/Sign-To-Revoke-Signature. (Ebadi Decl. (ECF No. 28-5) ¶ 5.) That link, hosted by the "ncdems.fyi" domain, redirects to a link on the "docusign.net" platform. (*Id.*)

Mr. Ebadi is just one of many NCGP petition signers who received text messages, phone calls and visits to their homes from unknown individuals who requested that they remove their names from the NCGP petitions in the weeks preceding the filing of Mr. Abucewicz's complaint. (Gilchrist Decl. (ECF No. 28-6) ¶¶ 4-9; Hammerle Decl. (ECF No. 28-7) ¶¶ 4-5; Harney Decl. (ECF No. 28-8) ¶¶ 8-9; Hicks Decl. (ECF No. 28-9) ¶ 4; Hoh Decl. (ECF No. 28-3) ¶ 6; Mohammed Decl. (ECF No. 28-11) ¶¶ 6-10; Nagel Decl. (ECF No. 28-12) ¶¶ 4-9; Ndege Decl. ¶¶ 27-28; Parker Decl. (ECF No. 28-13) ¶¶ 10-12; Selim Decl. (ECF No. 28-14) ¶¶ 5-7; Trudeau Decl. (ECF No. 28-2) ¶ 6.) These unknown individuals expressly stated that they were making the request because NCGP "takes votes" from Democrats – not due to any alleged impropriety in NCGP's petitioning effort. (*E.g.*,

Gilchrist Decl., Ex. A; Harney Decl., Ex. A; Hoh Decl., Ex. A; Ndege Decl. ¶ 28.) In some instances, the unknown individuals identified themselves as Democratic Party operatives, (*e.g.*, Hicks Decl. ¶ 4; Mohammed Decl. ¶ 9; Parker Decl. ¶ 10; Selim Decl. ¶ 5; Trudeau Decl. ¶ 6), but in others, the unknown individuals falsely stated that they were representatives of NCGP itself or of NCSBE. (*E.g.*, Hammerle Decl. ¶ 5; Harney Decl. ¶ 9; Nagel Decl. ¶ 9; Ndege Decl. ¶ 28.) At least two NCGP petition signers were misled by such misrepresentations, and were fraudulently induced to request that their names be removed from NCGP's petitions. (Ndege Decl. ¶ 26 & Ex. C.)

Thus, there is documented evidence of fraud in this case – NCGP has audio and video recordings proving it, which it is prepared to submit – but it was perpetrated by Democratic Party operatives seeking to gain political advantage in the 2022 general election, not by NCGP. NCGP presented some of this evidence to NCSBE and requested confirmation of receipt, but received no response. (Am. Compl., Ex. 1; Seeman Decl. ¶¶ 5-7.) To date, it does not appear that NCSBE has taken any action to investigate this evidence of fraud and harassment perpetrated by Democratic Party operatives against NCGP petition signers. (Am. Compl. ¶ 56.) Instead, NCSBE confirmed that its investigation of NCGP's petitions was prompted, at least in part, by the allegations in Mr. Abucewicz's complaint. (Am. Compl. ¶ 67.)

NCSBE's decision to investigate NCGP's petitions rather than certify it as a new party, despite NCGP's compliance with all applicable state law requirements, is "unprecedented," as NCSBE's counsel conceded during the District Court's July 18, 2022 status conference. Not only did NCSBE not invalidate a single county board-validated signature on any petition submitted in the 2020 election cycle, (Am. Compl. ¶ 71), but also, Brian Irving, the Executive Director and former Chair of the Libertarian Party of North Carolina ("LPNC"), is unaware of any instance in which NCSBE invalidated a county-board validated signature during any of the nine successful petition drives that LPNC has conducted since 1976. (Irving Decl. (ECF No. 28-10) ¶¶ 9, 14-16.) Mr. Irving was personally involved in and has direct knowledge about LPNC's two most recent petition drives, in 2002 and 2006. (*Id.* ¶¶ 8-14.)

NCGP and its co-plaintiffs filed this action on July 14, 2022 (ECF No. 1) to vindicate rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution, including their rights to cast their votes effectively, to speak and associate for political purposes, to grow and develop their political party, to petition, and their right to due process of law. (Am. Compl. ¶¶ 2, 84-92.) They filed their emergency motion for preliminary injunctive relief on July 21, 2022. (ECF No. 28.) Consistent with the relief requested in the Amended Complaint, (Am. Compl. ¶ 93), that Motion requested that the District Court enter an order that: (1)

directs NCSBE to certify NCGP as a new party entitled to place its candidates on North Carolina's November 8, 2022 general election ballot pursuant to § 163-96(a)(2); (2) enjoins NCSBE from enforcing the July 1, 2022 deadline prescribed by § 163-98 against Plaintiffs; and (3) directs NCSBE to take any and all other action necessary to ensure the inclusion of NCGP's candidates, including Plaintiff Hoh and Plaintiff Trudeau, on North Carolina's November 8, 2022 general election ballot. (*Id.*)

On August 1, 2022, after conducting its "unprecedented" investigation into NCGP's petitions, NCSBE voted unanimously to certify NCGP as a new political party pursuant to § 163-96(a)(2). (Order at 9.) It relied on the county boards of elections' findings that NCGP's petitions contained a total of 15,472 valid signatures – or 1,607 more than the statutory requirement of 13,865 valid signatures. (*Id.*)

On August 5, 2022, the District Court entered its Order granting NCGP's Emergency Motion for Preliminary Injunction in part and denying it in part. Because NCSBE had voted to certify NCGP as a new political party pursuant to § 163-96(a)(2) on August 1, 2022, the District Court concluded that NCGP's claim for relief from that provision was moot. (*Id.* at12.) The District Court expressly rejected the arguments that the DSCC now asserts to this Court:

> To the extent the intervenors argue that this issue is not moot because the Board improperly certified the Green Party, see [D.E. 57], the court rejects the argument. The intervenors conducted their own investigation and made their fraud arguments to the Board before the Board certified the Green Party

> under N.C. Gen. Stat. § 163-96(a)(2). The intervenors then repackaged those arguments and brought them to this court. After reviewing the entire record, the court acknowledges the Board's decision to certify the Green Party and recognizes the validity of the Board's determination that the Green Party timely submitted more than the statutorily required number of signatures.

(*Id*. at 23.)

Turning to NCGP's request for relief from the July 1 deadline imposed by § 163-98, the District Court concluded that NCGP had demonstrated a likelihood of success on the merits. (*Id.* at 24.) "It is well-settled that a court has equitable authority to order that a candidate's name be placed on the ballot," the District Court observed. (*Id.* (quoting *Buscemi v. Bell*, 964 F.3d 252, 261-62 (4th Cir. 2020); citing *McCarthy v. Briscoe*, 429 U.S. 1317, 1322-23 (1976) (Powell, J., in chambers); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968)).)

The District Court then applied the analysis prescribed by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). (Order at 25-28.) It found that § 163-98 "imposes a severe burden on the Green Party's right to have candidates appear on the November general election ballot. (*Id.* at 26.) That burden, it concluded, was not justified by any compelling state interest:

> North Carolina has compelling interests in authorizing the Board to properly determine the sufficiency of petitions submitted to it and to authorize the Board to investigate petition fraud. See N.C. Gen. Stat. §§ 163-22(d), 163-96(a)(2). But once the Board has made a final decision to certify a party under N.C. Gen. Stat. § 163-96(a)(2), those interests become less compelling because the Board has determined the sufficiency of the petitions. Moreover,

> such a decision indicates that any further investigation into matters such as fraud is no longer connected to the Board's duty to determine the sufficiency of the petitions for purposes of party certification under N.C. Gen. Stat. § 163-96(a)(2). After all, the Board has made its decision.

(*Id.*)

The District Court also found that North Carolina's interest in ensuring sufficient time to print accurate ballots was insufficient to justify the burden imposed by § 163-98 as applied here. It observed that NCSBE had announced in an August 1, 2022 press release that "Ballot preparation begins in mid-August, so there is still time to add Green Party candidates to the ballot if the court extends the statutory deadline." (*Id.* at 27 (quoting N.C. State Bd. of Elections, State Board Recognizes Green Party as N.C. Political Party (Aug. 1, 2022).) The "rigid inflexibility" of the July 1 deadline, however, "provides the Board with no avenues to ensure ballot access if it finishes its work after the candidate-filing deadline but ultimately certifies the new party in time for ballot printing." (*Id.* at 28.) Because "[t]hat is a severe burden," which is "not narrowly tailored to North Carolina's interests," the District Court concluded that the July 1 deadline was not justified by any compelling or even legitimate state interest. (*Id.* at 28 & n.12.)

The DSCC appeals from the District Court's Order and requests a stay pending appeal. Such a stay, if granted, would effectively guarantee that NCGP does not appear on North Carolina's November 2022 general election ballot, because

NCSBE must finalize ballots for printing on August 12, 2022 – just two days from now.

LEGAL STANDARD

A stay is an "intrusion into the ordinary processes of administration and judicial review," and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 129 S.Ct. 1749, 1757 (2009) (citations omitted). Instead, a stay is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.,* at 1760 (citation omitted). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *See id.* at 1761 (citations omitted).

A court considering whether to grant a stay must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (citation omitted). The first two factors are the most critical, and "It is not enough that the chance of success on the merits be better than negligible." *Id.* (citation and quotation marks omitted). Likewise, simply showing some "possibility of irreparable injury," fails to satisfy the second factor. *Id.* (citation omitted).

This Court reviews the granting of a preliminary injunction for an abuse of discretion. *See NC State Conference of NAACP v. Raymond*, 981 F. 3d 295, 302 (4th Cir. 2020) (citation omitted). "A district court abuses its discretion by applying an incorrect preliminary injunction standard, by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation. *Id.* (citation omitted). Factual findings are reviewed for clear error and legal conclusions de novo. *See id*. (citations omitted).

ARGUMENT

I. The DSCC Lacks Standing to Pursue This Appeal as an Intervenor-Defendant.

The DSCC has no standing under either federal or state law to complain about North Carolina's placement of a competitor on the ballot. "[T]here is no constitutional right to keep competitors off the ballot and no general constitutional right to access courts …." Mark R. Brown, *Policing Ballot Access: Lessons From Nader's 2004 Run for President*, 35 Cap. U. L. Rev. 165, 235 (2006). "This model, moreover, is the norm in other public rights settings. For example, crime victims have no standing to challenge prosecutors' decisions, either under state laws or under federal statutes." *Id*. at 235-36.

In *Goodall v. Williams*, 2018 WL 2008849 (D. Colo. 2018), for example, the Court ruled that Republican party agents challenging the ballot access of a competitor lack a sufficient interest to justify intervention as of right or permissively.

There, a candidate (Lamborn) who had been excluded for non-compliance with Colorado's signature collection rules – he had used a non-resident circulator – sued in federal court to challenge Colorado's requirement that circulators be residents. "[A] group of individuals" including those who had successfully challenged the candidate's signature collection efforts and had him removed from the ballot, a competitor, and even "an individual who alleges that he was misled into signing Congressman Lamborn's nominating petition," *id*. at *1, attempted to intervene in the federal litigation.

The putative intervenors collectively asserted four interests to support intervention: (1) preserving Colorado's residency requirement; (2) preventing party raiding by ensuring that circulators of nominating petitions are registered with the same party as the candidate for whom they are circulating the petitions; (3) ensuring the honesty and integrity of the signature collection process; and (4) avoiding the uncertainty and difficulty in campaigning for office caused by Congressman Lamborn's delay in bringing this lawsuit. *See id*. at *5.

The District Court rejected all four asserted interests. The first was "too conclusory and generalized." *Id.* The second, party raiding, lacked any connection to the federal litigation: "the intervenors do not draw any connection between this requirement and the issue of party raiding." *Id*. The third, "ensuring the honesty and integrity of circulators," the Court found, "is a generalized concern shared by every

participant in Colorado's electoral process." *Id*. at *6. Further, "the intervenors have not explained how their interest in ensuring the honesty and integrity of circulators could be impeded by the outcome of this lawsuit." *Id*. That interest therefore could not support intervention. The last interest, the Court concluded, while "sufficiently particularized," could not be shown to pose any threat; intervenors "failed to demonstrate that this interest could be impeded if Congressman Lamborn is included on the primary ballot." *Id*; *see also Moore v. Johnson*, 2014 WL 2171097 (E.D. Mich. 2014) (rejecting intervention in almost-identical situation for same reasons).

The Court in *League of Women Voters of Virginia v. Virginia State Board of Elections*, 2020 WL 2090679 (W.D. Va., Apr. 30, 2020), recently catalogued the numerous cases rejecting voters' attempted interventions to assist elections officials under various circumstances. Like the DSCC here, the intervenors in that case argued that intervention was allowed as a matter of course in election matters. The Court disagreed after reviewing the seventeen cases cited by the putative intervenors, finding the cases either inapposite or contradicting the intervenors' position: "Those courts that have addressed intervention motions from similarly situated prospective intervenors bringing similar claims have regularly denied intervention as of right under Rule 24(a)." *Id.* at *4 (citing *Lee v. Va. Bd. of Elections*, 2015 WL 5178993, at *3 n.7 (E.D. Va. 2015); *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015); *United States v. Florida*, No. 4:12-

cv-285, slip op. at 3 (N.D. Fla. Nov. 6, 2012); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 251 (D.N.M. 2008); *Am. Civil liberties Union of N.M. v. Santillanes*, 2006 WL 8444081, at *3 (D.N.M. 2006)). In likewise denying intervention, the Court added that "Courts are typically disinclined to allow intervenors who merely assert a generalized public policy interest shared by a substantial portion of the population."

Here, while Federal Rule of Civil Procedure 24 may permit a private party to intervene, it does not guarantee that the intervenor will possess the Article III standing needed to defend the constitutionality of a state law challenged under section 1983. On the contrary, the Supreme Court has suggested that private parties will rarely if ever have Article III standing to defend state laws when they are not named as defendants in the case. *See Hollingsworth v. Perry*, 570 U.S. 693 (2013).

In *Hollingsworth*, challengers sued state officials in federal court claiming California's popularly enacted ban on same-sex marriage violated the Fourteenth Amendment. When California refused to defend the ban, the measure's private proponents intervened in an effort to do so. Notwithstanding that California's Supreme Court ruled that these intervenors were "authorized" to defend the law, the Supreme Court ruled that that they lacked standing. "We have repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing." *Id.* at 706 (citation omitted). Private litigants, even those who proposed

the popular measure at issue, "have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of California." *Id.* at 707 (citation omitted). Their lack of an "injury in fact, … giving [them] a sufficiently concrete interest in the outcome of the issue in dispute" beyond vindicating California law, meant that they could not intervene to defend California's law in federal court.

Like the putative intervenors in *Hollingsworth*, the DSCC lacks standing to pursue this appeal for the purpose of defending a statutory scheme that NCSBE itself declines to defend. The DSCC's motion for a stay should be denied on that basis, and its appeal should be dismissed.

II. The Court Should Deny the DSCC's Request for a Stay Because the DSCC Fails to Make a Strong Showing That It Is Likely to Succeed on the Merits.

Even if the DSCC had standing to pursue this appeal, its motion for a stay should be denied because it cannot make the strong showing of a likelihood of success on the merits that is required to warrant a stay. *See Nken*, 129 S.Ct. at 1761. To demonstrate a likelihood of success, the DSCC must demonstrate that the District Court abused its discretion or committed an error of law. *See NC State Conference of NAACP*, 981 F.3d at 302. The DSCC fails to carry that burden.

A. The District Court Correctly Concluded That NCSBE's Failure to Certify NCGP Prior to the July 1 Deadline Violated Appellees' First and Fourteenth Amendment Rights and Properly Enjoined the Deadline.

The DSCC asserts that the District Court erred in granting NCGP relief from § 163-98 "because NCGP's asserted claims exclusively concerned the appropriateness of [NCSBE's] action under § 163-96(a)(2). (Mot. at 12.) That is incorrect for several reasons.

First, NCGP's Amended Complaint expressly requests, in its Prayer for Relief, that the District Court enter an order "enjoining NCSBE from enforcing the July 1 filing deadline under § 163-98 as applied to Plaintiffs." (Am. Compl. ¶ 93B.) The Amended Complaint also includes numerous specific allegations demonstrating that such relief is warranted because the July 1 deadline is unconstitutional as applied to NCGP in combination with § 163-96(a)(2). (Am. Compl. ¶¶ 24, 29, 31, 32, 33, 34, 64, 69.) These undisputed facts demonstrate that the July 1 filing deadline prevents NCGP from placing its candidates on the ballot, notwithstanding its timely compliance with § 163-96(a)(2), merely because NCSBE failed to certify NCGP before that date, and even though NCSBE has expressly conceded that there is still time to place NCGP's candidates on the ballot. The District Court correctly concluded that § 163-98 is severely burdensome under these facts, and that it is not sufficiently tailored to further any compelling or legitimate state interest. (Order at

26-28 & n.12.) It therefore properly enjoined enforcement of that provision as applied to NCGP.

According to the DSCC, the District Court's preliminary injunction is "overly broad because it reaches beyond the scope of the complaint…," (Mot. at 13 (citation omitted)), but that simply is not so. The Amended Complaint expressly requests relief from § 163-98 and pleads adequate facts to support that request. (Am. Compl. ¶ 93; *id.* ¶¶ 24, 29, 31, 32, 33, 34, 64, 69.) That is all that NCGP's pleading must do.

Second, the Supreme Court has squarely rejected the heightened pleading standard that the DSCC would have the Court impose here. *See Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346 (2014) (*per curiam*). In that case, the Fifth Circuit affirmed entry of summary judgment against plaintiffs who asserted violations of their Fourteenth Amendment due process rights because they failed to invoke 42 U.S.C. § 1983 in their complaint. *See id.* The Supreme Court summarily reversed. *See id*.

As the Court explained:

> Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. See Advisory Committee Report of October 1955, reprinted in 12A C. Wright, A. Miller, M. Kane, R. Marcus, and A. Steinman, Federal Practice and Procedure, p. 644 (2014 ed.) (Federal Rules of Civil Procedure "are designed to discourage battles over mere form of statement"); 5 C. Wright & A. Miller, § 1215, p. 172 (3d ed.

> 2002) (Rule 8(a)(2) "indicates that a basic objective of the rules is to avoid civil cases turning on technicalities").

Id. at 346-47. The Court thus rejected a "heightened pleading rule" that would required the plaintiffs "to invoke § 1983 expressly in order to state a claim." *Id.* at 347 (citation omitted).

In *Johnson*, the Court distinguished its decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on the ground that "they concern the *factual* allegations a complaint must contain to survive a motion to dismiss." *Id.* at 347. Those cases, the Court observed, instruct that a plaintiff "must plead facts sufficient to show that her harm has substantive plausibility." *Id.* The Court concluded that the plaintiffs had done so: "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.*

The rationale of *Johnson* applies here with even greater force. Unlike the plaintiffs in that case, NCGP did not "fail to invoke" § 163-98, but expressly requested relief from that provision in their Amended Complaint and pled sufficient facts to support that request. The DSCC's assertion that the District Court erred in granting that relief cannot be reconciled with *Johnson*.

Third, NCGP would be entitled to relief from § 163-98 even if it had not expressly requested such relief, because it is settled law that the District Court was

required to analyze the burden imposed by § 163-96(a)(2) in the context of North Carolina's entire statutory scheme. "When deciding whether a state's filing deadline is unconstitutionally burdensome, we evaluate the combined effect of the state's ballot-access regulations." *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) (citing *Wood v. Meadows,* 207 F.3d 708, 711 (4th Cir. 2000) ("When determining whether a given state's filing deadline unconstitutionally burdens candidates' and voters' rights, a court must examine that state's ballot access scheme in its entirety.")); *see also Lee v. Keith*, 463 F.3d 763, 770 (7th Cir. 2006) ("[W]e are required to evaluate challenged ballot access restrictions together, not individually, and assess their combined effect on voters' and candidates' political association rights.") (citing *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004)); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006) ("Our inquiry is not whether each law individually creates an impermissible burden but rather whether the combined effect of the applicable election regulations creates an unconstitutional burden on First Amendment rights") (citation omitted). This precedent is grounded in the Supreme Court's long-standing recognition that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974).

The DSCC's assertion that NCGP's pleading is insufficient to support the District Court's grant of relief from § 163-98 is especially untenable in light of this

well-settled line of precedent. Under *Pisano*, *Wood* and the many cases in accord with them, the District Court was not only permitted but required to analyze the burden imposed by § 163-96(a)(2) as applied in combination with the other applicable provisions of North Carolina law. The District Court was therefore well within its discretion to grant relief from § 163-98, particularly here, where NCGP expressly requested that relief as well as "other and further relief as the Court deems proper." (Am. Comp. ¶¶ 93B, 93C.)

B. The District Court Correctly Concluded That The July 1 Deadline Is Unconstitutional as Applied.

The DSCC's assertion that NCGP "failed to show any likelihood of success on the merits" of its claim for relief from § 163-98 fails for similar reasons. (Mot. at 16.) According to the DSCC, the conclusion that § 163-98 is severely burdensome as applied here "is impossible to square" with *Pisano*, because *Pisano* upheld the May 17 deadline for a new party to submit its petitions to county boards of elections. (Mot. at 16-17.) The DSCC makes passing reference to a number of other cases which, it asserts, establish that that "run-of-the-mill filing deadlines" only impose "modest burdens," (Mot. at 16-17), but the DSCC fails to grapple with the particular facts of this case. Under those facts, § 163-98 makes it impossible for NCGP to place its candidates on the ballot, notwithstanding its compliance with all other requirements under North Carolina law, simply because NCSBE failed to certify NCGP for two months after it submitted its petitions. That is the *sine qua non* of a

severe burden. *See Libertarian Party of Ky. V. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) ("The hallmark of a severe burden is exclusion or virtual exclusion from the ballot."); *Schmitt v. LaRose*, 933 F.3d 628, 639 (6th Cir. 2019) (same).

Given the undisputed facts of this case, which demonstrate that NCGP timely complied with all applicable requirements to qualify as a new political party under North Carolina law, the District Court correctly concluded that § 163-98 severely burdened NCGP by blocking it from placing its candidates on the ballot. The District Court also correctly concluded that the July 1 deadline is not sufficiently tailored to further any compelling or legitimate state interest, because NCSBE has conceded that there is still time to include NCGP's candidates on North Carolina's November 2022 general election ballot. (Order at 27.)

The DSCC does not and cannot show that the District Court abused its discretion or committed any error of law in reaching these conclusions. It simply attacks NCGP based on false allegations and asserts that NCGP's "inability to achieve certification by July 1 was self-inflicted…." (Mot. at 17.) That simply is not so. *See supra* n.1. NCGP has surmounted an unprecedented effort to block its access to North Carolina's November 2022 general election ballot, which was largely if not exclusively orchestrated by the DSCC itself, and it is entitled under North Carolina law and the Constitution to participate in that election.

The DSCC's motion for a stay should be denied.

III. The Remaining Factors Weigh Against Granting a Stay.

The remaining factors of the *Nken* test for granting a stay also weigh against the DSCC. These factors – irreparable harm, balance of the equities and the public interest – parallel those of the test for granting a preliminary injunction. The District Court correctly concluded that each factor weighs in NCGP's favor, (Order at 28-30), and the DSCC fails to establish that this conclusion rests on an abuse of discretion or error of law. The DSCC thus fails to demonstrate its entitlement to a stay of the District Court's Order.

CONCLUSION

For the foregoing reasons, the Court should deny the DSCC's motion to stay the District Court's Order granting NCGP preliminary injunctive relief.

Dated: August 10, 2022

Respectfully submitted,

/s/ Oliver B. Hall

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, DC 20009
202-248-9294
oliverhall@competitivedemocracy.org
D.C. Bar No. 976463

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2022 the foregoing document was filed using the Court's CM/ECF system, which will effect service upon all counsel of record.

/s/Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Federal Rules of Appellate Procedure 27(d)(2)(A), 32(A)(5), and 32(g)(1), because it has 6,749 words and was prepared using Times New Roman typeface in 14-point font.

/s/Oliver B. Hall
Oliver B. Hall