

No. 22-1830

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA GREEN PARTY; TONY NDEGE; MATTHEW HOH; K. RYAN PARKER; SAMANTHA WORRELL; SAMANTHA SPENCE; AARON MOHAMMED; MICHAEL TRUDEAU,

Plaintiffs - Appellees

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; CHAIR DAMON CIRCOSTA, in his official capacity as a member or employee of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as a member or employee of the North Carolina State Board of Elections; JEFF CARMON, in his official capacity as a member or employee of the North Carolina State Board of Elections; STACY EGGERS, IV, in his official capacity as a member or employee of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as a member or employee of the North Carolina State Board of Elections; KAREN BRINSON BELL, in her official capacity as a member or employee of the North Carolina State Board of Elections,

Defendant - Respondents

and

DSCC; NORTH CAROLINA DEMOCRATIC PARTY,

Intervenors/Defendants - Appellants

On Appeal from the United States District Court
for the Eastern District of North Carolina

**DEFENDANT – RESPONDENTS’ RESPONSE TO
INTERVENOR/DEFENDANTS-APPELLANTS’
EMERGENCY MOTION FOR STAY PENDING APPEAL**

Dated: August 10, 2022

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NOW COME Defendant-Respondents, the North Carolina State Board of Elections, its members, and its Executive Director in their official capacities (“State Board” or “Defendants”), pursuant to Appellate Rule 27(a)(3), to provide this response to Intervenor-Appellants’ motion for an emergency stay. The State Board is the agency of the State of North Carolina that oversees the conduct of elections in North Carolina, including the process by which a new party is certified and placed on the ballot. N.C.G.S. § 163-96, *et seq.*

State Board’s Position

Intervenor-Appellants are asking this Court to stay the district court’s August 4, 2022 order enjoining the State Board from enforcing North Carolina’s July 1, 2022 candidate-filing deadline against the Green Party and its candidates, and ordering the State Board to place two Green Party candidates, if qualified, on the ballot for the November 8 general elections. [D.E. 64 at 12; A246-47].

The State Board takes no position on the relief requested by Intervenor-Appellants. However, the State Board submits this response to provide the Court with important information related to the administrative deadlines for the November 2022 general election that is relevant to the Court’s consideration of the motion for emergency stay. For the reasons stated below, the State Board respectfully submits that it would aid the administration of elections if the Court were to resolve this motion by August 12.

Preliminarily, Defendants note that the emergency motion filed by Intervenor-Defendants presents many of the same legal arguments put forward by Defendants below in opposition to Plaintiffs' request for a preliminary injunction, including arguments that the district court lacked jurisdiction to issue the requested relief. [See D.E. 51]. Nonetheless, the State Board has not filed an appeal, not sought to stay the district court's injunctive order, and has instead acted and will continue to act in accordance with that order absent contrary direction from a court.

To that end, on Monday, August 8, 2022, the State Board accepted for processing the candidate filings of Plaintiff, and Green Party candidate for U.S. Senate, Matthew Hoh. On Tuesday, August 9, 2022, the Wake County (N.C.) Board of Elections accepted for processing the candidate filings of Plaintiff, and Green Party candidate for N.C. Senate, Michael Trudeau. If no adverse rulings occur, those filings will continue to be processed and, if qualified, the candidates will be placed on the November 2022 general election ballot, which must be finalized on August 12 to meet the September 9, 2022 absentee distribution deadline, as discussed below.

The practical effect of the ruling below is therefore to extend the State's candidate-filing deadline to allow the Green Party to place its candidates on the ballot. As a matter of election administration, the State Board does not oppose

this relief, which is consistent with its certification of the Green Party as a new political party on August 1, 2022. [D.E. 54; A184-85].

The State Board took a similar approach in the district court. During the proceedings below, the State Board maintained its legal defenses to Plaintiffs' claims, especially with respect to subject matter jurisdiction over Plaintiffs' state-law claims, while also acknowledging that if the district court found it had jurisdiction, and the State Board did certify the Green Party, it would be an appropriate and fair outcome for the candidate-filing deadline to be extended.

It appears that inartful or imprecise drafting by undersigned counsel in the expedited response to Plaintiffs' preliminary injunction motion led to a misunderstanding of the State Board's position below. This only became apparent when the district court directed the parties to submit a proposed consent order or separate proposed orders to resolve the remaining claims by enjoining the candidate filing deadline, following the State Board's recognition of the Green Party. [D.E. 55; A186-188]. While Defendants did not oppose this ultimate outcome, that position was intended to be conditional on the court having jurisdiction to enter relief in the first place. The Defendants did not intend to give the impression that they would waive all jurisdictional defenses, and thoroughly briefed its objections to the exercise of federal court jurisdiction in its arguments in opposition to the preliminary injunction motion. [D.E. 51, pp. 16-21]. When

undersigned counsel attempted to clarify this position in a subsequent filing that Defendants were not waiving jurisdiction, [see D.E. 62, pp. 2-3; A210-211 (citing D.E. 51, pp. 16-21)], the district court interpreted that clarification as a change in position, characterizing it in its injunctive order, not as inartful or imprecise, but as bad faith. [D.E. 64 at 21].

Again, this misperception likely arose from inartful drafting by undersigned counsel, not bad faith, and was premised on the understanding that a ruling that the court had jurisdiction is always a necessary prerequisite to any requested relief. *See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982) (summarizing limited authority of courts based on subject matter jurisdiction).

Nonetheless, it has been, and remains, the position of the State Board that the claims by Plaintiff below raised state law questions not implicating the federal Constitution. Furthermore, it has been, and remains, the position of the State Board that the district court did not have jurisdiction to enter the requested relief, but if the court determined it *did* have jurisdiction, the Board did not oppose an outcome that extended the candidate filing deadline for Green Party candidates, as that would be consistent with the State Board's decision to recognize the Green Party under North Carolina law.

Timing Considerations Regarding Absentee-Ballot Deadlines

Defendants are cognizant that timing considerations are important to the Court, just as they are to the orderly administration of elections in North Carolina. This response therefore focuses on informing the Court of relevant statutory deadlines and the time it will take to complete all the necessary tasks ahead of those deadlines.

On November 8, 2022, North Carolina is scheduled to hold its 2022 statewide general election.¹ Contests on the ballot include the U.S. Senate and House of Representatives, the N.C. General Assembly, state judicial contests at all levels, district attorneys, and county offices.

The State Board faces a deadline, dictated by state statute, of September 9, 2022 to commence distribution of absentee ballots to registered voters who have applied for them in advance of the November general election. *See* N.C.G.S. § 163-227.10(a) (providing that absentee ballots are to be mailed to voters who requested them beginning 60 days before the general election). This deadline constitutes a policy choice by North Carolina to provide its voters with 60 days to complete the absentee voting process, and the State Board and county boards of elections are busy preparing for distribution on this date.

In the event of exigent circumstances, the statutes contain safety-valve

¹ *See* the North Carolina State Board of Elections, Calendar of Events, website: <https://www.ncsbe.gov/current-sbe-events>, last visited August 9, 2022.

provisions by which the time period for distribution of absentee ballots may be reduced, if “there shall exist an appeal before the State board or the courts not concluded, in which case the board shall provide the ballots as quickly as possible upon the conclusion of such an appeal,” *id.* § 163-227.10(a), or alternatively, if such ballots “are not ready by [the 60-day deadline], the State Board of Elections shall allow the counties to mail them out as soon as they are available,” *id.* § 163-22(k). Up until this point in the litigation, it was not anticipated that these provisions would become relevant to these proceedings. As this matter appears to be moving in an expedited fashion, the Board’s preferred outcome would be not to utilize these safety-valve provisions, if possible, as that would reduce the time during which absentee-ballot voters are able to vote.

Federal law, specifically the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), also mandates the floor for distribution of ballots to overseas and military voters at 45 days before the election. *See* 52 U.S.C. § 20302(a)(8), (g). The Board has no discretion to move this deadline without securing a waiver from the federal government.² *Id.*

Before ballots can begin to be distributed by these deadlines, county board

² Requesting a UOCAVA waiver is no small matter. In seeking a waiver, the Board is required to present a comprehensive plan that provides absentee UOCAVA voters sufficient time to receive and submit absentee ballots they have requested in time to be counted in the federal election. *See* 52 U.S.C. § 20302(a)(8), (g); https://www.fvap.gov/uploads/FVAP/EO/2012_waiver_guidance.pdf, last visited Aug. 9, 2022.

and State Board staff need to finalize ballot styles for use across the state, a process that involves the preparation and proofing of all ballot styles. A ballot style is the specific combination of contests that appears on a voter's ballot, based on that voter's voting jurisdictions. There are typically thousands of unique combinations of contests that are possible across the state, meaning that there are typically thousands of ballot styles that must be prepared. Even if only one candidate is added to a ballot, especially a top-of-the-ballot candidate for U.S. Senate like Plaintiff Hoh, the down ballot races in each ballot style must be adjusted to accommodate the change.

The process of generating and proofing ballots is complex and involves multiple technical systems and quality-control checkpoints that precede ballot printing and the coding of voting machines. This includes proofing each ballot style for content and accuracy, ballot printing, and delivery of all ballot materials to county boards. There must also be time for vendors to print ballots. And critically, given the well-documented paper shortage that is plaguing elections officials across the country,³ it is likely not possible to secure enough paper stock to reprint ballots if a statewide change is made after ballots have been printed in significant quantities.

³ See Scott Bauer, Elections officials urged to prepare for shortages, delays, AP (July 19, 2019), <https://apnews.com/article/2022-midterm-elections-politics-wisconsin-fcbdc502c5095985dbc5839f571a161d>.

To ensure that ballots are prepared, printed, and delivered to county boards in time to meet the September 9, 2022 distribution deadline for the November 8, 2022 election, ballots must be finalized by this Friday, August 12, 2022. This time is required to ensure State Board and county board staff can code all ballot styles with the proper content (including candidates), proof the ballots, have ballots printed by vendors, and have those ballots delivered to the county boards.

Defendants stand ready to provide additional information to the Court upon request.

Conclusion

Defendants take no position on the requested relief and respectfully submit the above-noted information to the Court for its consideration.

Respectfully submitted on August 10, 2022.

/s/ Terence Steed

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Certificate of Compliance

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) as it contains 1,746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface and type-style requirements of Fed. R. App. 32(a)(5) & (6).

Respectfully submitted on August 10, 2022.

/s/ Terence Steed

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