UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
Civil Action No. 5:22-cv-320-D

DAVID BLACKWELDER, Plaintiff, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS, Defendants.	)	**STATE BOARD'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

NOW COMES Defendant the North Carolina State Board of Elections ("Defendant" or "State Board"), through undersigned counsel, to provide this Memorandum of Law in support of the State Board's Motion to Dismiss Plaintiff's Complaint. [D.E. 1].

NATURE OF THE CASE

Plaintiff filed the Complaint in this action on August 12, 2022. Plaintiff's pleading is entitled "Complaint, Motion for Declaratory Judgment and Injunctive Relief." [D.E. 1]. Despite including the word "motion" in the caption, Plaintiff has not filed a motion or a brief in support of any motion as required by Federal Rule of Civil Procedure 7(b) and Local Civil Rule 7.1(b) and (e). As a result, Defendant interprets Plaintiff's filing as an initial complaint seeking declaratory and injunctive relief, rather than a motion seeking such relief preliminarily.

Plaintiff's Complaint contains two claims. First, he argues that the State Board failed to follow state law by placing a candidate on North Carolina's May 17, 2022 primary ballot who filed a Notice of Candidacy that failed to include a signature. *Id.*, ¶¶ 60-65. According to Plaintiff, the Board's failure to hold the candidate to that requirement was not justified by any legitimate or compelling government interest, and therefore, the Board violated Plaintiff's First

and Fourteenth Amendment rights. *Id.* Second, Plaintiff contends that by placing the candidate on the 2022 primary ballot, and counting votes for that candidate, the State Board violated Plaintiff's substantial right to due process as provided for in the Fourteenth Amendment. *Id.*, ¶¶ 66-69.

These claims should be dismissed because the Court has neither subject matter nor personal jurisdiction, the Court should abstain from exercising jurisdiction on multiple grounds, and Plaintiff has failed to state a claim upon which relief can be granted.

In relief, Plaintiff's Complaint asks the Court to remove the candidate from the ballot for the November 2022 general election and replace the candidate with the runner-up from the primary election. *Id.*, pp. 11-12. Such relief would violate state law governing how party nominees are replaced this close to the election and infringe upon the statutorily granted rights of the relevant political party. *See* N.C.G.S. § 163-182.12(a). Putting aside the legally flawed nature of the relief, this relief would impose an excessive administrative burden due to the proximity of the election. The principle espoused by the Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam), counsels strongly against this Court granting relief of this nature so close to an election, especially when Plaintiff has other options available to him.

For these reasons, this Court should grant the State Board's motion to dismiss.

STATEMENT OF FACTS

A. Relevant State Statutes.

In order to be placed on a primary election ballot in North Carolina, a potential candidate must file a notice of candidacy with either a county board of elections or the State Board, depending upon the office for which the candidate files the notice. N.C.G.S. § 163-106(a). For the office of district attorney, the notice of candidacy must be filed with the State Board. *Id.,* -

106.2(a). As part of that process, "[e]ach candidate shall sign the notice of candidacy in the presence of the chairman or secretary of the board of elections, State or county, with which the candidate files. In the alternative, a candidate may have the candidate's signature on the notice of candidacy acknowledged and certified to by an officer authorized to take acknowledgments and administer oaths, in which case the candidate may mail or deliver by commercial courier service the candidate's notice of candidacy to the appropriate board of elections." *Id.*

Following an election, typically, a registered voter who was eligible to vote in the protested election contest or who was a candidate in that election may file an election protest. N.C.G.S. § 163-182.9(a). This protest must be filed with the county board. *Id.* North Carolina General Statute section 163-182.9(b)(4)(c) provides that election protests, such as the one at issue in this action, "shall be filed no later than 5:00 P.M. on the second business day after the county board has completed its canvass and declared the results." *Id.* If the protest is timely, the county board will consider it and the county board's decision is appealable to the State Board. N.C.G.S. § 163-182.11(a). Decisions on protests issued by the State Board may be appealed by an aggrieved party to the Superior Court of Wake County within 10 days of the date of service of the decision. N.C.G.S. § 163-182.11(b)(5).

However, if the initial protest to the county board is untimely, it cannot be heard by the county board and must be forwarded to the State Board. 08 NCAC 02. 0110(b). Pursuant to N.C.G.S. § 163-182.9, the State Board has the discretion to consider an election protest which is not timely filed. *See also* N.C.G.S. § 163-182.12 (providing that the State Board "may consider protests that were not filed in compliance with G.S. § 163-182.9"). However, that discretion ends and the Board loses jurisdiction entirely to consider any protest after a certificate of election or nomination is issued. *See, e.g., In re Protest of Whittacre*, 228 N.C. App. 58, 59, 743 S.E.2d

68, 69 (2013); *In re Election Protest of Fletcher*, 175 N.C. App. 755, 759, 625 S.E.2d 564, 567 (2006).

Nonetheless, a protest regarding the primary election that is dismissed as untimely is not necessarily the end of available administrative remedies as they pertain to an allegedly ineligible candidate. After a primary nominee is certified, a protest may still be filed with respect to the general election in which that candidate participates. Pursuant to N.C.G.S. § 163-182.9(b)(4)(d), if Plaintiff filed a protest regarding the upcoming general election, it would be administratively stayed until after election day because ballots have been printed. See the Declaration of Paul Cox ("Cox Decl."), ¶ 10.

Finally, even if there was a scenario in which the current Democratic nominee for Wake County District Attorney was disqualified, North Carolina statutes dictate that such a vacancy would be filled by appointment by the "[a]ppropriate district executive committee of political party in which vacancy occurs." N.C.G.S. § 163-114(a). If ballots are printed at the time the replacement is appointed, then the county board of elections may determine whether reprinting of ballots is practical or whether the votes cast for the candidate whose name is printed on the ballot shall be counted as a vote for the replacement nominee. *Id.*; N.C.G.S. § 163-165.3(c); 08 N.C.A.C. 06B .0104.

B. Plaintiff's Allegations:

Presenting the facts in the light most favorable to the Plaintiff, he alleges the following:

On December 7, 2021, Nancy Lorrin Freeman submitted to the State Board an incomplete Notice of Candidacy form for the 2022 Democratic primary contest for the Office of District Attorney for North Carolina's Tenth Prosecutorial District. [D.E. 1, ¶ 16]. The Tenth Prosecutorial District is a one-county district covering only Wake County, and Freeman

currently serves as its District Attorney ("Wake County District Attorney"). Plaintiff further alleges that even though Freeman did not sign the Notice of Candidacy form, it was notarized by a State Board notary, attesting that he watched her sign it. *Id.,* ¶ 17.

The form remained incomplete and unsigned when the time for filing Notice of Candidacy forms for the 2022 primary election closed at noon on March 4, 2022. *Id*., ¶ 18. When a member of the public requested a copy of Freeman's Notice of Candidacy form, on April 25, 2022, the State Board notified Freeman that the form was deficient. *Id*., ¶¶ 19-20. Freeman executed a notarized addendum to her Notice of Candidacy form, which was provided to the State Board on or about April 27, 2022. *Id*., ¶¶ 21-22. Plaintiff attaches a copy of Freeman's Notice of Candidacy and addendum to his Complaint. [D.E. 5]. Because the copy Plaintiff attaches is not entirely legible, the State Board has attached a copy of Freeman's Notice of Candidacy and addendum from its files to this Brief. *Id.*, and see Exhibit A attached to the Cox Decl.

The North Carolina Democratic primary election for Wake County District Attorney proceeded on May 17, 2022.[1] Freeman appeared as one of two candidates for the nomination.[1] The Wake County Board of Elections completed its canvass and declared the results of the 2022 primary election on May 27, 2022. Cox Decl., ¶ 5. The State Board certified the 2022 primary election results on June 9, 2022. *Id.,* ¶ 6. On that same date, the Board issued a Certificate of Nomination, certifying Freeman as the Democratic nominee to be placed on the ballot for the November 8, 2022 general election for the Wake County District Attorney. *Id.*; see also the Certificate of Nomination attached to the Cox Decl. as Exhibit B.

[1] See the State Board website, NC SBE Contest Results, https://er.ncsbe.gov/?election_dt=05/17/2022&county_id=92&office=JUD&contest=1028, last visited September 6, 2022.

Over a month later, on July 19, 2022, Plaintiff filed a candidate challenge to Freeman's candidacy with the State Board of Elections, relying on N.C.G.S. §§ 163-127.1, et seq. [D.E. 1, ¶ 26]; and Cox Decl., ¶ 7. The challenge was untimely because a candidate challenge must be filed within 10 business days after the close of the filing period, which closed on March 4, 2022. *See* N.C.G.S. § 163-127.2(a). In notifying Blackwelder that his candidate challenge could not be heard, Assistant General Counsel Lindsey Wakely informed him, "If a challenger discovers one or more grounds for challenging a candidate after the deadline, the grounds may be the basis for an election protest. More information about election protests can be found in the Election Protest Procedures Guide, a copy of which is also attached to this email." See the July 25, 2022 email from the State Board to Plaintiff, attached to the Cox Decl. as Exhibit C, p. 2.

On July 29, 2022, Plaintiff filed an election protest with the Wake County Board contesting the results of the May 17, 2022 primary election for the Wake County District Attorney. Cox Decl., ¶ 8; and Plaintiff's July 29, 2022 election protest attached to the Cox Decl. as Exhibit D. In responding to question four on the protest form, directing the protestor to list all election contests subject to the protest, Plaintiff listed the "Democratic Primary – District Attorney." Ex. D, pp. 2-3. Relevant to the instant action and similar to Plaintiff's assertions in this Court, he alleged in his protest that Freeman's Notice of Candidacy was incomplete, and therefore she should not have been placed on the ballot for the primary election, should be removed from the ballot for the 2022 general election and replaced with the runner-up from the Democratic primary, Damon Chetson. *Id.*, p. 5.

On July 31, 2022, State Board Associate General Counsel Paul Cox notified Plaintiff that the county and State Board lacked jurisdiction to hear his protest because it contested the primary election and was filed after the Certification of Nomination issued for that election. Cox

Decl., ¶ 9; see also the July 31, 2022 email from the State Board to Plaintiff, attached to the Cox Decl. as Exhibit E, p. 2. Cox explained that while the State Board does have authority to hear untimely protests submitted to county boards, that authority ends when a certificate of nomination has been issued in a protested contest, which occurred in this contest on June 9, 2022. *Id.*

Plaintiff's remaining allegations make unfounded accusations that unnamed "democratic party operatives" at the State Board engaged in "disparate treatment" to "non-democratic party members." [D.E. 1, p. 5]. He supports these allegations by referring to the recent successful petition by the Green Party to be recognized as a political party in North Carolina and the guidance that was provided to a prior candidate during the 2020 election cycle regarding the candidate filing requirements. *Id.*, ¶¶ 27-45, 50-52, 58. These allegations are irrelevant to this action and Plaintiff, as an individual voter, cannot assert an injury on behalf of another person or organization.

LEGAL ARGUMENT

I. PLAINTIFF'S CLAIM SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

This Court lacks both personal jurisdiction and subject matter jurisdiction as Plaintiff's claims are not ripe, he lacks standing, and the State Board is entitled to sovereign immunity.

Standard of Review

The standard of review for lack of subject matter jurisdiction pursuant to a motion to dismiss under Rule 12(b)(1) is set forth generally in *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Plaintiff bears the burden of proving subject matter jurisdiction on a motion to dismiss. *Id.*; *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). When a defendant challenges the factual predicate of subject matter jurisdiction, a court "is to regard the pleadings'

allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991.

In response to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the burden is on the plaintiff to demonstrate that jurisdiction is proper. *Mylan Labs, Inc. v. Akzo, N.V.*, 2 F.3d 56, 59-60 (4th Cir. 1993); *Simmons v. Corizon Health, Inc.*, 122 F. Supp. 3d 255, 269 (M.D.N.C. 2015). Although a Plaintiff who opposes a motion to dismiss for lack of personal jurisdiction is entitled to have all reasonable inferences drawn in his favor, the court is not required to look solely to plaintiff's proof in drawing those inferences. *Mylan Labs*, 2 F.3d at 60; *IHFC Props. LLC v. APA Mktg.*, 850 F. Supp. 2d 604, 616 (M.D.N.C. 2012). Pursuant to Rule 12(b)(2), if a court does not have jurisdiction over a defendant, that defendant is entitled to an order entered granting his motion to dismiss. *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 (4th Cir. 2003) (affirming dismissal pursuant to Rule 12(b)(2) for lack of personal jurisdiction).

A. Plaintiff's Claims Are Not Ripe for Adjudication.

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 Plaintiff are not yet ripe for this Court's review because Plaintiff can still file a protest challenging Freeman's appearance on the November 2022 general election ballot. *See* N.C.G.S. § 163-182.9(b)(4)(d). As recited in the Statement of Facts above and shown in the supporting documents attached hereto and to Plaintiff's Complaint, his prior election protest was dismissed because it was a protest of the May 17 primary election submitted two months after it occurred. However, state law requires such filings be submitted no later than two days after the county board has completed its canvass. *Id.,* § 163-182.9(b)(4)(c). It was therefore properly rejected as untimely. *See id.*

But nothing is stopping Plaintiff from submitting an election protest with respect to the general election, which will occur on November 8, 2022. *Id.,* §163-182.9(b)(4)(d). As ballots have been printed for elections in Wake County (Cox Decl., ¶ 10), the protest would be stayed until after the election, at which time it would be heard by the county board of elections. *Id.* If Plaintiff is unsatisfied with that decision, he would have the opportunity to appeal to the State Board. If the State Board rejects his protest, as an "aggrieved party" he can appeal that decision to the North Carolina Superior Court of Wake County, N.C.G.S. § 163-182.11(b)(5), and he can appeal of right an adverse decision, if any, from the Superior Court 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 from the Court of 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, Plaintiff still has an avenue to seek a remedy from the State Board and adequate judicial review exists for State Board decisions. Thus, the alleged harm is entirely dependent on "future uncertainties [and] intervening agency rulings." *Charter Fed. Sav. Bank*, 976 F.2d at 208-09. It follows that analysis under the above-noted first prong of the ripeness test establishes Plaintiff's claim is not ripe.

As to the second prong, withholding court consideration until a later date presents no hardship to Plaintiff. Plaintiff is free to file an election protest at any time between now and two days after the county board has completed its canvass of the November general election, or approximately November 22, 2022. *See* discussion of state protest statutes *supra*. Therefore, interceding now is entirely unnecessary and not doing so presents no hardship to Plaintiff as his protest can still be heard.

For these reasons, Plaintiff's claims are not ripe and should be dismissed for lack of subject matter jurisdiction.

B. Plaintiff Lacks Standing.

Under Article III of the United States Constitution, this court's subject matter jurisdiction is limited to deciding "cases" and "controversies." *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). Standing is "an integral component of the case or controversy requirement." *Miller*, 462 F.3d at 316 (internal quotation marks omitted).

To satisfy Article III's standing requirement, a plaintiff must establish the following:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005).

Plaintiff bears the burden of establishing the elements of standing and must support each element with sufficient factual allegations. *Id.* at 458. This he cannot do.

First, as addressed above, it cannot be said that by having his candidate challenge and election protest dismissed as untimely that Plaintiff suffered an injury. It was Plaintiff's delay that led to those dismissals, thus, to the extent he has suffered an injury, those injuries were self-inflicted. Even if that were not true, the fact that Plaintiff has the ability to file a new election protest focused on the general election at any time between now and two days after county canvass, firmly establishes that he has not suffered any injury. Accordingly, for the same reasons discussed above, Plaintiff cannot demonstrate that any act by the State Board caused him injury.

Moreover, Plaintiff's requested remedy is for this Court to compel the State Board to certify a different candidate as the Democratic nominee for the 2022 general election. To the extend this indicates Plaintiff is bringing this action on behalf of that other candidate, this is an insufficient basis to allege injury for the purpose of establishing standing, as he cannot assert an injury on behalf of another candidate who is not a party. Simply being a voter is not enough. *See, e.g., Buscemi v. Bell*, 964 F.3d 252 (4th Cir. 2020); c*f. Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998) (providing that voters cannot establish standing solely on basis that their candidates have been unfairly treated).

Finally, even assuming arguendo Plaintiff has suffered an injury, it is not redressable by the remedy he seeks in the present case. This is because as noted in Part IV *infra.*, the relief

requested by Plaintiff is unavailable under state law and is not within the authority of the State Board to grant. If a party's nominee for district attorney were disqualified, only the district executive committee of that party may select a replacement nominee.

As Plaintiff lacks standing[2], the Court has no subject matter jurisdiction, and the present case should be dismissed.

C. Defendant is Entitled to Eleventh Amendment Immunity.

The Eleventh Amendment guarantees that "nonconsenting States may not be sued by private individuals in federal court." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 363, 121 S. Ct. 955, 962 (2001). It shields States from such lawsuits because the States are not "a person" within the meaning of Section 1983. *See Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (stating that the Eleventh Amendment bars suits brought against state officials if the "state is the real, substantial party in interest"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (holding that the State is not a person within the meaning of Section 1983 and therefore is not a proper party under Section 1983). 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. Congress may abrogate that immunity or a State may waive it, but that has not happened here, nor has it been alleged.

[2] To the extent Plaintiff's complaint can be read to assert injuries or claims on behalf of non-parties (D.E. 1, ¶¶ 27-45, 50-52, 58), he has failed to establish standing to such claims, nor can he assert injuries or claims on behalf of non-parties or candidates. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) ("The standing requirement applies to each claim that a plaintiff seeks to press."); *see also Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001)("[A] voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate.").

Here, Plaintiff's claims are based upon the State Board's alleged failure to follow state law in accepting Freeman's Notice of Candidacy. He claims that by permitting a candidate to amend their notice of filing prior to the election to correct a deficiency that was not noticed at the time of filing, the State Board violated N.C.G.S. § 163-106, which requires the certification of candidacy be signed. Such an argument is entirely based upon state law and the application of state law to a state administrative process.

While Plaintiff alleges that his claims arise under federal law, the resolution of the question of state law will be dispositive. Merely calling an alleged state-law violation a federal one, as Plaintiff has done here, does not transform the nature of the claim as a matter of law. *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, Plaintiff is asking this Court to find that the State Board's decision violated state laws, and the requested remedy is for this Court to compel the State Board to certify a different candidate as the Democratic nominee for the 2022 general election. Not only is Plaintiff asking this federal Court to interpret state law and order state officials to act accordingly, but in so doing, Plaintiff is also asking this Court to directly contravene state law by imposing a remedy that is at odds with North Carolina election law, which grants a political party's executive committee the right to appoint a replacement nominee where an original nominee is disqualified. See N.C.G.S. § 163-114(a). Such relief not

only violates applicable state law, but also runs afoul of *Pennhurst's* requirement that federal courts not instruct state officials how to interpret state law.

For these reasons, Defendant is entitled to sovereign immunity, and this Court should dismiss for lack of personal jurisdiction.

II. THIS COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION.

A. 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). As explained above in section on the ripeness of Plaintiff's claims, he is still free to file a protest challenging Freeman's appearance on the November 2022 general election ballot. *See* N.C.G.S. 163-182.9, *et al.* Any adverse administrative decision on the protest could be appealed to state court, then the N.C. Court of Appeals, and possibly the North Carolina Supreme Court. N.C.G.S. §§ 163-22(*l*), 163-

182.11(b)(5); 7A-27(b)(1); 7A-30; 7A-31. Thus, more than adequate judicial review exists for Plaintiff's claims.

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 should be noted that Plaintiff's claims were dismissed because they were untimely. The State Board never took up his claims on the merits, and therefore, it cannot be said what that state agency would decide when adjudicating Plaintiff's claims.

Nonetheless, the facts as alleged assert that the State Board mistakenly accepted an incomplete notice of candidacy from Freeman, failed to note the mistake, and upon learning of that mistake several months later, permitted her the opportunity to amend her notice of candidacy to correct this technical mistake. It is the State Board's position in this litigation that this does not present a difficult question of state law.

Instead, federal review would 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 requires this Court to substitute its judgment for that of the State Board, when the State Board has not yet had the opportunity to review these claims. If the Court were to draw its own conclusions about the proper application of a state statute, it would also severely disrupt the State's efforts in establishing a coherent public policy for how to do so. *See id.* Likewise, due to Plaintiffs' choice not to file a protest concerning the general election and to seek review in state court, he is asking this Court to make determinations where the state courts had not been given a chance to review the proper 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.) (exercising *Burford* abstention where case would have required "an interpretation of North Carolina statutes involving issues that neither the NCDOI nor a North Carolina court has yet decided."), *aff'd*, 72 F.3d 127 (4th Cir. 1995).

The Fourth Circuit has 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, where Plaintiff's claims are entirely dependent on how state law should be applied to a state administrative process.

B. Constitutional Avoidance Counsels against Exercising Jurisdiction.

Similar to *Buford* abstention, 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 did not properly apply a state statute, and because it was not properly applied under state law, the candidate in

question should not have been on the primary ballot or general election ballot. Following the logic of Plaintiffs' argument, if the state statute was properly applied, whether it results in the removal of the candidate or not, it 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 federal question jurisdiction. 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.").

Plaintiff has an opportunity to present his protest to the State Board and, if he is unsatisfied, the state courts. And resolution by the state courts would be entirely dispositive to Plaintiff's alleged federal claims. If a state court determines the State Board acted properly, Plaintiff would be unable to present a state law violation to this Court to support his allegations of constitutional violations. Conversely, if a state court determined that the State Board made the wrong decision, the resultant relief would resolve Plaintiffs' injuries. Assuming Plaintiff is aware that he may still file a general election protest, it is not known why he has chosen not to seek relief through that vehicle. Regardless, that state process remains available to him, such that this Court need not invoke federal jurisdiction to resolve federal constitutional questions at this time. Under these circumstances, this Court should abstain from exercising jurisdiction over this matter. *See Pennzoil*, U.S. 481 U.S. at 11-12.

III. PLAINTIFF'S CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Plaintiff has failed to state a claim for which relief can be granted, and therefore, his Complaint should be dismissed under Rule 12(b)(6).

When considering a Rule 12(b)(6) motion, "a court must accept the factual allegations of the complaint as true." *G.E. Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter . . . 'to state a claim to relief that is plausible on its face.'" *Id.* at 663 (quoting *Twombly*, 550 U.S. at 570)).

A claim is only facially plausible when it sets forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id*. (quoting *Twombly*, 550 U.S. at 555, 557) (internal brackets and quotation marks omitted). The Fourth Circuit has held that courts are not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002).

In evaluating a Rule 12(b)(6) motion, the Court considers the allegations in the Complaint and any materials incorporated therein, as well any document submitted by the movant that is "integral to the complaint and there is no dispute about the document's authenticity." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Court may also take judicial notice of public records when considering a Rule 12(b)(6) motion. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (recognizing that a court may consider during Rule 12(b)(6) review any "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *Hall v. Virginia*, 385 F.3d

421, 424 & n.3 (4th Cir. 2004) (taking judicial notice of information publicly available on official government website). *See also* Fed. R. Evid. 201.

A. Plaintiff Fails to State A Claim under 42 U.S.C. § 1983.

Plaintiff purports to bring suit in federal court raising claims under 42 U.S.C. § 1983. Those claims must be dismissed because he has failed to meet the basic requirements under that statute. Section 1983 was created by Congress to be a vehicle for private citizens to access federal court to seek a remedy for violations of their constitutional rights by *persons* using the claimed authority of state law. *See Mitchum v. Foster*, 407 U.S. 225, 239 (1972). The statute provides, in part:

> Every *person* who, under color of [law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...

42 U.S.C. § 1983 (emphasis added). The State Board is not a person within the meaning of 42 U.S.C. §1983. *Will v. Michigan Dep't of State Police,* 491 U.S. 58 (1989). This principle is not a determination that the immunity shields the state agency from liability but rather that there can be no action against a state agency at all pursuant to section 1983. *Id.* Accordingly, because the State Board is not a "person," it is not a proper party for a section 1983 claim, and this matter should be dismissed accordingly.

B. Plaintiff has Failed to State a Claim for a Violation of his First and Fourteenth Amendment Rights.

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.

First, Plaintiff's alleged injury is that he will be unable to vote for the runner-up from the May Democratic primary when he votes in the November general election. As argued above, Plaintiff has failed to properly assert an actual injury to himself, much less a significant burden to his First and Fourteenth Amendment Rights. He remains free to bring an election challenge aimed at the general election and it can be heard by the State Board. Instead, he filed untimely

filings with the county board and state board resulting in procedural dismissals of his protests. Had Plaintiff filed an election protest for the general election on the same day he filed this action, he could have had his protest heard by the county board of elections.[3] Instead, he has taken no action during the interim time period. Thus, to the extent any injury exists here, Plaintiff's own choices are the sole cause of those injuries.

Moreover, even if Freeman were removed from the ballot, it would not automatically result in the runner-up in the primary being placed on the ballot. Thus, even if Plaintiff obtained the relief he is seeking, it would not redress his alleged injury. And given the timing of Plaintiff's complaint, it is extremely unlikely that the names on the ballot for the general election will change, because the ballots have been prepared and are being printed. Even if Plaintiff obtained a disqualification at this stage in the election cycle, and the county determined it was practical to reprint ballots, the choice of replacement falls to the local district executive committee of the political party, not the State Board or Plaintiff. *See* N.C.G.S. § 163-114(a). That body is under no obligation to select Damon Chetson, even assuming he would be willing to be a candidate. Rather, the district executive committee is free to select any other qualified person, including Freeman, as nothing in the statute prevents such an appointment. *See id.*

Dismissing Plaintiff's untimely protest imposed no burden on Plaintiff, such that the analysis under *Anderson-Burdick* can end here. Nonetheless, with respect to the State's interests,

[3] For instance, on August 15, 2022, an election protest was filed in Currituck County regarding a candidate for N.C. Senate District Three. As the ballots were not yet printed for that election, the State Board directed the affected county boards to delay printing so that the election protest could be heard as required by N.C.G.S. § 163-182.9(b)(4)(d). A hearing was held at the county level on August 23, 2022, a written order was issued on August 25, 2022, followed by an appeal to the State Board, which held a hearing on September 2, 2022. *See* State Board website, https://dl.ncsbe.gov/index.html?prefix=State_Board_Meeting_Docs/2022-09-02/Hanig%20Protest/, last visited September 6, 2022.

it is important to note the State has 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.

With respect to the action taken here by the State Board to dismiss the election protest as untimely, the State had an interest in upholding the deadlines found in statutes for the efficient and orderly consideration of election protests. N.C.G.S. § 163-182.9. Moreover, when someone fails to meet those deadlines, the controlling statutes still provide for the State Board to consider untimely protests, so long as they are brought within a reasonable amount of time. N.C.G.S. § 163-182.12. However, as stated in the dismissal to Plaintiff, and asserted above, that statutory authority ends and the State Board loses jurisdiction when the election is certified. The State Board's interest in enforcing the requirements and deadlines found within the statutory scheme created by North Carolina to address election protests is considerable and designed to ensure "orderly, fair, and efficient procedures for the election of public officials." *Pisano,* 743 F.3d at 937.

Finally, regarding the requirement that a signature be included on the notice of candidacy, the purpose of that requirement was met by allowing the candidate to correct that deficiency. The purpose of the signature required by N.C.G.S. § 163-106 and found on the notice of candidacy form is plain on its face. It seeks to ensure that all candidates for office provide a sworn statement that they "swear or affirm that the statements on [the] form are true, correct and complete to the best of [their] knowledge or belief" and to notify the candidate that providing a false statement is a Class I Felony. Ex. A, p. 3. This further serves to guard against frivolous or fraudulent candidacies. *Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("[A] State has

an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."). These same interests were met when the Correction Addendum to Freeman's Notice of Filing was attached by the candidate to the original Notice of Filing. Ex. A, p. 4.

Because North Carolina's asserted regulatory interests in conducting orderly and fair elections are sufficiently weighty, and Plaintiff's asserted burden is minimal, if not non-existent, any limitation imposed are justified. *Pisano*, 743 F.3d at 936-37 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). It follows that Plaintiff has failed to state a claim for a violation of his first and fourteenth amendment rights, and the claim should be dismissed per Rule 12(b)(6).

C. Plaintiff has Failed to State a 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 procedural due process framework discussed below.[4] To the extent the Court applies *Anderson-Burdick* only, the State Board relies on its arguments above in Part III-B.

Assuming, however, that traditional framework does apply, plaintiff still cannot state a procedural due process claim. 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

[4] *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).

some form of state action; and (3) that 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)).

The State Board does not dispute that Plaintiff, a voter, has a generalized cognizable interest as it relates to North Carolina's elections. *See Democracy N.C.*, 476 F. Supp. at 227 (collecting right-to-vote cases). However, Plaintiff did not participate in the Democratic primary. In fact, he was a candidate in the Republican primary for Wake County Sheriff, voted in that election, and thus appears to have had no specific interest in this election.[5] In fact, his voter history records indicate that since he started voting in 2008, he has only voted in Republican primaries. *See* n.5 *supra.*

Importantly, and as has been explained above, Plaintiff still has the opportunity to bring an election protest challenging Freeman's candidacy as it relates to the general election. Therefore, to the extent he does have a cognizable interest in a primary for which he did not participate, the State Board has not deprived him of that interest, and he need only file a protest aimed at the general election to assert that interest.

Even if filing a new protest were unavailable to Plaintiff, the State Board's adherence to statutory deadlines was constitutionally adequate. First, Plaintiff filed a candidate challenge on July 19, 2022, long after the time for doing so had passed. When his challenge was dismissed as

[5] See NC SBE Contest Result, https://er.ncsbe.gov/?election_dt=05/17/2022&county_id=92&office=LOC&contest=16, last visited September 6, 2022; and Voter Search, https://vt.ncsbe.gov/RegLkup/, last visited September 2, 2022.

untimely, State Board staff took the extra step to inform him that he could still file an election protest and provided him with the State Board's "Election Protest Procedures Guide" containing instruction on how to do so. Ex. C, pp. 2, 11-26. Plaintiff then filed an election protest, but protested the May 17 primary rather than the general election. Ex. D, pp. 2-3. He was then notified by staff that the State Board no longer had jurisdiction to hear a protest over a primary nomination. Ex. D, p. 2. As stated in the section immediately above, the State Board has a strong interest in following statutory deadlines governing the election protest process to ensure orderly and efficient elections and, in fact, has no authority to hear untimely protests after the election has been certified. Nothing about this process was constitutionally inadequate, nor could it be at this juncture, as the option remains available to Plaintiff to file a protest of the general election.

To the extent Plaintiff seeks to apply procedural due process to the State Board's acceptance of Freeman's correction of her Notice of Candidate form, Plaintiff's claim similarly fails. Plaintiff alleges that Freeman filed her Notice of Candidacy form, and the State Board staff failed to notice that it was deficient at that time. When apprised of the mistake, staff notified the candidate and allowed her to correct the deficiency. Thus, even assuming Plaintiff's allegations are true, this appears to be nothing more than a constitutionally adequate process to ensure that the candidate's due process rights were protected after an honest mistake. And nothing in the Complaint explains how that would infringe upon Plaintiff's rights.

For these reasons, Plaintiff fails to state a claim that his procedural due process rights were violated.

IV. Relief Requested Is Administratively Infeasible.

In the Complaint, Plaintiff requests that this Court order the State Board to remove Freeman from the general election ballot for Wake County District Attorney, and replace her

with Damon Chetson, who was the runner-up in the recent primary. Putting aside that this would violate state law for filling vacancies among party nominees, *see* N.C.G.S. § 163-114, and would violate the clear will of tens of thousands of voters who participated in the Democratic primary, such relief would run afoul of the Supreme Court's repeated stance that federal courts should not interfere on the eve of elections.

"[F]or many years, [the Supreme Court] has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election." *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of application for stay); *see Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam) This "bedrock tenet of election law," *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays), is grounded in the recognition that late-breaking judicial intervention risks impinging upon the right with the "most fundamental significance under our constitutional structure"—the right to vote. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (cleaned up); *see also Purcell*, 549 U.S. at 4-5, "Last-minute changes to election processes may baffle and discourage voters; and when that is likely, a court has strong reason to stay its hand." *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 42 (2020) (DNC) (Kagan, J., dissenting); *Purcell*, 549 U.S. at 4-5 (When courts revise a State's elections rules or procedures too close to an election, their orders "can themselves result in voter confusion and consequent incentive to remain away from the polls."). But it is not just voters who may suffer because of a court's intercession. "Late judicial tinkering with election laws can lead to . . . unanticipated and unfair consequences for candidates [and] political parties, . . . among others." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays).

The *Purcell* principle forecloses the relief that Plaintiff seeks here. He requests that a federal court intervene in an election to order the alteration of ballots that have already been finalized, proofed, and are being printed. Within two days of the filing of this motion, the Wake County Board of Elections will begin distribution of absentee ballots to voters who have requested same. Cox Decl., ¶ 10; *see also* 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). Contests on those ballots include not just the race for District Attorney; they include contests for the U.S. Senate and House of Representatives, the N.C. General Assembly, state judicial contests at all levels, and Wake County offices.

Thus, the relief requested by Plaintiff would significantly interfere with the ongoing efforts to prepare for and administer the November 2022 general election in Wake County and statewide. If granted, the injunction Plaintiff requests would jeopardize state and Wake County elections officials' efforts to prepare for and administer the District Attorney and other races on Wake County ballots as scheduled. And it would threaten precisely the "unanticipated and unfair consequences for candidates, political parties, and voters" that the *Purcell* principle seeks to avoid. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays); *see Purcell*, 549U.S. at 5. Also, *Purcell* warns that late-breaking intervention by federal courts can impose significant costs and create widespread confusion. *Purcell*, 549 U.S at 5; *see also Milligan*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring in grant of applications for stays). That would undoubtedly be the case here.

For those reasons, the relief requested by Plaintiff at this late date should not be granted.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed.

Respectfully submitted this the 6th day of September, 2022.

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