

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

JOHNNY THOMAS ORTIZ II; JIMMIE
GREGORY ROGERS JR.; and WELDON
MURPHY,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF
ELECTIONS; ALAN HIRSCH, in his official
capacity as Chair of the North Carolina State
Board of Elections; JEFF CARMON III, in
his official capacity as Secretary of the North
Carolina State Board of Elections; STACY
EGGERS IV, in his official capacity as
Member of the North Carolina State Board of
Elections; KEVIN N. LEWIS, in his official
capacity as Member of the North Carolina
State Board of Elections; SIOBHAN
O'DUFFY MILLEN, in her official capacity
as Member of the North Carolina State Board
of Elections; and KAREN BRINSON BELL,
in her official capacity as Executive Director
of the North Carolina State Board of
Elections,

Defendants.

Civil Action No.: 5:24-cv-420

**MEMORANDUM OF *AMICI CURIAE* SPEAKER TIMOTHY MOORE, IN HIS
OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF
REPRESENTATIVES; REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS CHAIRMAN OF THE COMMITTEE ON RULES, CALENDAR, AND
OPERATIONS OF THE HOUSE; AND REPRESENTATIVE GREY MILLS, IN HIS
OFFICIAL CAPACITY AS CHAIRMAN OF THE COMMITTEE ON ELECTION LAW
AND CAMPAIGN FINANCE REFORM, IN SUPPORT OF PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION 1

SUMMARY OF FACTS 2

ARGUMENT 6

 A. The State Board Enforces the Political Party Statute Discriminatorily. 7

 B. The State Board’s Refusal to Certify the Justice For All Party Does Not Advance a
 Compelling State Interest Because The State Board Has No Authority to Deny Ballot Access
 when a Party Meets the Petition Requirements. 10

 C. The State Board’s Refusal to Certify the Justice For All Party Is Not Narrowly Drawn
 Because It Relies on a Partisan Survey of a Small, Non-Random, Non-Representative Sample.
 14

CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases	Page
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968).....	1, 8
<i>N.C. Green Party v. N.C. State Bd. of Elections</i> , 619 F. Supp. 3d 547 (E.D.N.C. 2022).....	2, 14
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	2, 7
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	2, 7, 10, 11
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	6
<i>Fusaro v. Cogan</i> , 930 F.3d 241 (4th Cir. 2019)	7
<i>Libertarian Party of Va. v. Alcorn</i> , 826 F.3d 708 (4th Cir. 2016)	7
<i>Masterpiece Cakeshop v. Co. Civ. Rts. Comm’n</i> , 584 U.S. 617 (2018).....	8, 10
<i>Libertarian Party of N.C. v. State</i> , 200 N.C. App. 323, 688 S.E.2d 700 (2009).....	13
<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982).....	14
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984).....	14
<i>In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.</i> , 984 F. Supp. 2d 1021 (C.D. Cal. 2013)	15
<i>Equal Emp. Opportunity Comm’n v. Am. Nat’l Bank</i> , 652 F.2d 1176 (4th Cir. 1981)	16
<i>Alexander v. S.C. State Conf. of the NAACP</i> , 144 S. Ct. 1221 (2024).....	16
<i>Duran v. U.S. Bank Nat’l Ass’n</i> , 325 P.3d 916 (Cal. 2014)	16
<i>United States v. Ahanmisi</i> , 324 F. App’x 258 (4th Cir. 2009)	17
 Statutes	
N.C. Gen. Stat.	

§ 163-22(a).....	14
§ 163-22(d).....	14
§ 163-96(a).....	3, 11, 12, 13
§ 163-96(b).....	11, 12
§ 163-96(c).....	11, 12, 13
§ 163-98	3, 13

Other Authorities

Michael Scherer, <i>Biden allies form new group to coordinate attacks on third-party candidates</i> , WASH. POST (Mar. 14, 2024), https://wapo.st/4dj0ryE	1, 3, 9
Steve Harrison, <i>Third-party organizer says democrats used ‘mafioso tactics’ against him</i> , WFAE (July 25, 2024), https://bit.ly/4c2rz3V	1
Letter from North Carolina Democratic Party to Karen Brinson-Bell, Executive Director of the N.C. State Bd. of Elections (June 5, 2024), https://bit.ly/3WoY5r5	3
Letter from Clear Choice Action Attorney Jonathan Berkon et al. to Alan Hirsch, Chair of the N.C. State Bd. of Elections (June 13, 2024), https://bit.ly/4bZm8ma	3
CLEAR CHOICE ACTION, https://bit.ly/3WDU9E3 (last visited July 26, 2024)	3
CLEAR CHOICE PAC, https://bit.ly/4cS1dCK (last visited July 26, 2024)	3
<i>About</i> , ELIAS LAW GROUP, https://bit.ly/46oJsZd (last visited July 26, 2024)	3
Gary D. Robertson, <i>NC elections board certifies right-leaning party; 2 others remain in limbo</i> , WCNC CHARLOTTE (July 10, 2024, 12:11 AM), https://bit.ly/4cXMVRd	4
<i>State Board of Elections Meeting June 26, 2024</i> , N.C. STATE BD. OF ELECTIONS, https://bit.ly/3WjT0Ao (last visited July 26, 2024)	4, 8, 9, 10
Rusty Jacobs, <i>Question over recognizing new political parties falls into North Carolina’s GOP vs. Democrat divide</i> , WUNC (July 8, 2024, 1:59 PM), https://bit.ly/3LKOaqE	4, 9
Press Release, N.C. State Bd. of Elections, <i>State Board Recognizes Constitution Party as Official NC Political Party</i> (July 9, 2024), https://bit.ly/3YlqPU1	5
<i>Petition Search</i> , N.C. STATE BD. OF ELECTIONS, https://bit.ly/46qJtvN (last visited July 26, 2024).....	5
<i>Summary Calls to JFA Signers at Random</i> , N.C. STATE BD. OF ELECTIONS, https://bit.ly/3WEzcZS (last visited July 26, 2024)	5, 6, 10, 17
Kyle Ingram, <i>Democratic group targets NC supporters of RFK Jr. and Cornel West in text campaign</i> , THE NEWS & OBSERVER (June 5, 2024, 12:49 PM), https://bit.ly/46oM8pJ	6, 18
<i>Forthwith</i> , CAMBRIDGE DICTIONARY, https://bit.ly/4dlpfpJ (last visited July 26, 2024).....	13
<i>Forthwith</i> , MERRIAM WEBSTER DICTIONARY, https://bit.ly/4cVdHcZ (last visited July 26, 2024).....	13

Forthwith, OXFORD ENGLISH DICTIONARY, <https://bit.ly/4fcuREi>
 (last visited July 26, 2024)13

Confidence Interval Calculator, OMNI CALCULATOR, <https://bit.ly/3WB1tjU> (last visited
 July 26, 2024).....15

James E. Bartlett II, Joe W. Kotrlik, and Chadwick C. Higgins, *Organization Research:
 Determining Appropriate Sample Size in Survey Research*, 19 INFO. TECH., LEARNING
 & PERFORMANCE J. 43, 45 (2001).....15

How Much are Polls Misrepresenting Americans?, NISKANEN CTR. (June 1, 2022),
<https://bit.ly/3ygfJ8s>.....16

Matt Corrigan, *Political Polling: Demographics Are the Key if You Want Accuracy*,
 FLA. TIMES-UNION (Oct. 20, 2012), <https://bit.ly/3WoM7xs>16

Press Release, Cornel West 2024, Dr. Cornel West Announces the Formation of the Justice for
 All Party as Part of His 2024 Presidential Campaign and Beyond (Jan. 31, 2024),
<https://bit.ly/3SttU0D>.....18

Press Release, Cornel West 2024, Dr. Cornel West Surpasses Ballot Access Threshold in North
 Carolina, Signaling Major Strides for Independent Presidential Campaign (May 20,
 2024), <https://bit.ly/4flXK0N>..... 18

INTRODUCTION

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). This right is being undermined today for voters who wish to support the Justice For All Party of North Carolina in the upcoming November 2024 elections. Following an organized campaign by out-of-state political operatives, the North Carolina Democratic Party, and a partisan front group specifically formed to “coordinate attacks on third-party candidates,”¹ the North Carolina State Board of Elections refused to certify the Justice For All Party of North Carolina as a new political party. In doing so, Defendants excluded the Justice For All Party’s candidates, including presidential nominee Dr. Cornel West, from North Carolina’s 2024 general election ballot. And they deprived plaintiffs of their right to cast ballots for him this November.

This is not the first time that Defendants have improperly sought to keep a third-party candidate off the ballot. In 2022, following a similar campaign by Democratic operatives using what one third-party organizer referred to as “mafioso tactics,”² Defendants voted 3-2 along partisan lines to not certify the Green Party as a new political party because they claimed to be investigating allegations of “irregularities.” Defendants only certified the Green Party after legal action was initiated. Even then, Defendants continued to refuse to place Green Party candidates on the ballot until this court ordered them to do so. *N.C. Green Party v. N.C. State Bd. of Elections*, 619 F. Supp. 3d 547, 569–70 (E.D.N.C. 2022).

¹ Michael Scherer, *Biden allies form new group to coordinate attacks on third-party candidates*, WASH. POST (Mar. 14, 2024), <https://wapo.st/4dj0ryE>.

² See Steve Harrison, *Third-party organizer says democrats used ‘mafioso tactics’ against him*, WFAE (July 25, 2024), <https://bit.ly/4c2rz3V>.

The State Board’s current conduct is a minor variation on its 2022 actions. The only difference is that the State Board has refused to certify the Justice For All Party altogether. But the State Board lacks the authority to refuse certification to a party that has complied with statutory petition requirements, which the record indicates the Justice For All Party has done, and the State Board therefore lacks any substantial interest in keeping the Party and its candidates off the ballot. Accordingly, it falls to this Court to once again correct the State Board. Plaintiffs are voters and petition signers who want to exercise their fundamental right as U.S. citizens to vote for their preferred candidate. Defendants’ refusal to certify the Justice For All Party and allow its candidates on the ballot denies Plaintiffs this opportunity, contravening their First and Fourteenth Amendment rights.

The Supreme Court has established the *Anderson-Burdick* framework to safeguard First and Fourteenth Amendment rights in the election-law context. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 428–29 (1992). Under that framework, a state election restriction that imposes “severe” or discriminatory restrictions upon First and Fourteenth Amendment rights must be “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). This memorandum supplements Plaintiffs’ arguments by showing that the burden imposed on them is both severe (by denying the Justice For All Party a place on the ballot without any substantial justification in state law) and discriminatory (by treating the Justice For All Party worse than other parties). Plaintiffs are likely to succeed on the merits of their constitutional claims, and this Court should grant their motion for a preliminary injunction.

SUMMARY OF FACTS

The Justice For All Party of North Carolina is a political party that has nominated the prominent professor and public intellectual Dr. Cornel West as its presidential candidate for the 2024 general election. There is no genuine dispute that the Justice For All Party has timely complied with all applicable state law requirements to qualify as a new party under N.C. Gen. Stat. § 163-96(a)(2) and place its candidates on the November 5, 2024 general election ballot pursuant to § 163-98 (collectively, “Political Party Statute”).

But on June 5, the North Carolina Democratic Party wrote to the State Board objecting to the Justice For All Party’s petitions.³ Shortly afterwards, on June 13, a group called Clear Choice Action submitted correspondence to the State Board challenging the purpose and intent of the Justice For All Party and alleging that the county boards of election improperly verified signatures.⁴ Clear Choice Action appears to be associated with a Super PAC of the same name.⁵ And it is described by the Washington Post as a partisan group formed specifically for the purpose of attacking third-party candidates.⁶ Clear Choice had help from a firm called Elias Law Group, which describes itself as a “mission-driven firm committed to helping Democrats win.”⁷ Based on these groups’ allegations, the State Board opened an investigation into the county boards’ validated signatures, and on June 26, it voted 3-2 to defer the decision on whether to certify the Justice For All Party as a new political party.

³ Letter from North Carolina Democratic Party to Karen Brinson-Bell, Executive Director of the N.C. State Bd. of Elections (June 5, 2024), <https://bit.ly/3WoY5r5>.

⁴ Letter from Clear Choice Action Attorney Jonathan Berkon et al. to Alan Hirsch, Chair of the N.C. State Bd. of Elections (June 13, 2024), <https://bit.ly/4bZm8ma>.

⁵ See CLEAR CHOICE ACTION, <https://bit.ly/3WDU9E3> (last visited July 26, 2024); CLEAR CHOICE PAC, <https://bit.ly/4cS1dCK> (last visited July 26, 2024).

⁶ Scherer, *supra* note 1.

⁷ *About*, ELIAS LAW GROUP, <https://bit.ly/46oJsZd> (last visited July 26, 2024).

In the State Board’s June 26 meeting, it considered attempts by both the Constitution Party (a “right-leaning political party”)⁸ and the Justice For All Party to officially become political parties in North Carolina. Chairman Hirsch attempted to place the Chair of the Justice For All Party, Mr. Medelius, under oath. He allowed the meeting to move forward only after pushback from other members.⁹ This was despite the fact that the Constitution Party’s chairman—unlike the Justice For All Party’s chairman—had a discrepancy in his residential address that delayed approval.¹⁰ During that meeting, Chairman Hirsch, a Democrat, played a video of an alleged circulator of the Justice For All Petition. That video—submitted by Clear Choice—showed the circulator saying the petition was meant “to help[] take away votes from Joe Biden.”¹¹ Also in that same meeting, Ms. Millen, another State Board member, made statements referring to the potential certification of the Justice For All Party as “rubberstamping thinly veiled so-called parties” and suggesting that the Justice For All Party is a “faux” party and an example of “partisan mischief.”¹²

After deferring consideration, the State Board revisited the issue on July 9—only to once again delay a decision, 3-2. In the meantime, though, the State Board granted approval 5-0 to the Constitution Party without much apparent fanfare or investigation.¹³ That party met the 13,865-signature threshold by a mere 157 votes.¹⁴ By contrast, the Justice For All Party’s approval

⁸ Gary D. Robertson, *NC elections board certifies right-leaning party; 2 others remain in limbo*, WUNC CHARLOTTE (July 10, 2024, 12:11 AM), <https://bit.ly/4cXMVRd>.

⁹ *State Board of Elections Meeting June 26, 2024* at 1:18:25–1:24:05, N.C. STATE BD. OF ELECTIONS, <https://bit.ly/3WjT0Ao> (last visited July 26, 2024) [hereinafter “June 26 Meeting”].

¹⁰ Rusty Jacobs, *Question over recognizing new political parties falls into North Carolina’s GOP vs. Democrat divide*, WUNC (July 8, 2024, 1:59 PM), <https://bit.ly/3LKOaqE>.

¹¹ June 26 Meeting at 1:26:50–1:27:26.

¹² *Id.* at 3:24:45–3:25:19.

¹³ Press Release, N.C. State Bd. of Elections, *State Board Recognizes Constitution Party as Official NC Political Party* (July 9, 2024), <https://bit.ly/3YlqPU1>.

¹⁴ *Id.*

continued to be delayed to investigate the validity of its signatures, which exceeded the threshold by 3,497—just over 22 times larger than the Constitution Party’s margin.¹⁵

Finally, the State Board rejected the Justice For All Party’s candidacy for party status once and for all on July 16. Like all the previous 3-2 votes, this one was along partisan lines, with all Democrats in favor and both Republicans opposed.¹⁶ It did so based on a survey conducted by State Board staff. The Board Survey was badly flawed and not based on accepted statistical principles. Out of the 17,362 signatories, the State Board first excluded those who did not provide a cell phone number. It did not provide a statistical justification for that choice.¹⁷ The State Board then contacted 250 signatories by cell phone—much fewer than would be expected to generate a sample of sufficient size.¹⁸ Only 49 responded, and the sample was unrepresentative. For instance, while Mecklenburg County accounted for 48% of JFA’s signatures, it produced only 21% of respondents—the same share of respondents as New Hanover County, which accounted for only 7% of signatures. And Durham County’s share of respondents (14%) doubled its share of signatories (7%).¹⁹

The State Board asked each respondent whether he or she had signed the Justice For All Party’s petition. Of the 49 respondents, 3 said they did not recall whether they had or had not signed, 18 said they had not, and the other 28 said they had signed the petition. The State Board

¹⁵ *Petition Search*, N.C. STATE BD. OF ELECTIONS, <https://bit.ly/46qJtvN> (last visited July 26, 2024).

¹⁶ *State Board of Elections Meeting July 16, 2024* at 43:46–45:08, N.C. State Bd. of Elections, <https://bit.ly/4dkFcwq> (last visited July 26, 2024) [hereinafter “July 16 Meeting”].

¹⁷ *Id.* at 30:40–32:00.

¹⁸ *See infra* at 14.

¹⁹ For these comparisons, the share of respondents by county is found at *Summary Calls to JFA Signers at Random*, N.C. STATE BD. OF ELECTIONS, <https://bit.ly/3WEzcZS> (last visited July 26, 2024) [hereinafter “Board Survey”]. And the share of signatories by county is found at *Petition Search*, *supra* note 15.

extrapolated those results to the rest of the signatories—an approach the State Board apparently had never used before.²⁰ As we now know, this tactic mirrors a Clear Choice campaign. That group—whose interference inspired the delay in the first place—texted a similar survey to the Justice For All Party’s signatories while encouraging them to help Democrats by removing their names from third-party petitions.²¹

ARGUMENT

To meet the requirements for a preliminary injunction, plaintiffs must show that they are “likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This memorandum addresses the first factor: the merits. In particular, it addresses Plaintiffs’ First Amendment claim, which is governed by the *Anderson-Burdick* framework. Under that framework, courts must first (1) “consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments,” and then (2) “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson*, 460 U.S. at 789. At the first step, courts ask whether the challenged state practice imposes “reasonable, nondiscriminatory restrictions,” or instead imposes “severe” restrictions. *Id.* at 788. The former may be justified by “the State’s important regulatory interests.” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). But the latter category—severe or discriminatory restrictions—must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* (quoting *Norman*, 502 U.S. at 289).

²⁰ July 16 Meeting at 38:00–39:00.

²¹ Kyle Ingram, *Democratic group targets NC supporters of RFK Jr. and Cornel West in text campaign*, THE NEWS & OBSERVER (June 5, 2024, 12:49 PM), <https://bit.ly/46oM8pJ>.

Plaintiffs argue that the State Board’s (mis)application of North Carolina law severely burdens Plaintiffs’ rights. Pls.’ Mem. in Supp. of Prelim. Inj. at 6–8, Doc. 9 (July 22, 2024). This memorandum adds another, independent reason why the compelling interest test must apply: the State Board enforces the law discriminatorily. Accordingly, its restrictions must be narrowly drawn to advance compelling state interests. But the State Board strikes out on both counts. Because North Carolina law entrusts the verification of petition signatures to *county* boards of election, not the *State* Board, the State Board’s practice of second-guessing county-level verification does not even advance a legitimate state interest—let alone a compelling one. And the means by which the State Board seeks to advance this purported interest—a poorly defined survey of a small, non-random sample of Justice For All Party petition signatories—are far from narrowly drawn.

A. The State Board Enforces the Political Party Statute Discriminatorily.

When a state election restriction imposes a “severe burden” on First Amendment rights, “strict scrutiny” applies. *Fusaro v. Cogan*, 930 F.3d 241, 259–60 (4th Cir. 2019). To escape strict scrutiny, the burden must be both “reasonable” and “nondiscriminatory.” *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016). Plaintiffs argue that the First Amendment burden of restrictions like State Board’s that keep third-party candidates off the ballot are not “reasonable”; rather, they are “heavy” and “very severe.” *Williams v. Rhodes*, 393 U.S. 23, 31–32 (1968). As this memorandum explains, regardless of whether the burden is heavy, it is a burden that is applied in a discriminatory manner. That is an independent basis to apply strict scrutiny.

Of course, North Carolina’s laws governing political party access to the ballot are not discriminatory as written. But that does not mean that the way the State Board has *applied* those laws does not discriminate based on views protected by the First Amendment. First Amendment plaintiffs can generally prove that a law is discriminatorily applied in either of two ways. First,

they can point to “hostility” reflected in “statements” at “public hearings.” *Masterpiece Cakeshop v. Co. Civ. Rts. Comm’n*, 584 U.S. 617, 634–35 (2018); *see also id.* at 636 (addressing “statements made by lawmakers” while “determining whether a law intentionally discriminates”). Second, they can identify a “difference in treatment” between their case and the cases of those with a different viewpoint. *Id.* at 636–37. Both routes work here.

Start with the statements at public hearings. In the June 26 hearing, Ms. Millen, a State Board member, referred to the Justice For All Party as a “thinly veiled so-called party,” a “faux part[y],” and an example of “partisan mischief.”²² There is no better word for the State Board’s attitude towards the Justice For All Party than “hostility.” *Masterpiece*, 584 U.S. at 634. Far from treating the Party neutrally, the State Board appears to have succumbed to external, partisan pressure that sought to hamstring the Justice For All Party due to disagreement with its viewpoint. From the initial delay of proceedings to the final rejection based on a questionable survey, the State Board took its cues from Clear Choice—a group openly dedicated to keeping third-party candidates off the ballot to protect Democrats.²³

Now consider the treatment of the Justice For All Party relative to a party on the opposite end of the political spectrum that was also going through the approval process at the same time: the Constitution Party. To start, the State Board’s Chairman attempted to place the proposed party chair of Justice For All Party under oath in the June 26 meeting, even though he did not attempt the same for the Constitution Party chair.²⁴ That fact alone would not demonstrate viewpoint discrimination. But it is only one part of an array of evidence that demonstrates discrimination. The trouble holding up the Constitution Party’s approval was a discrepancy *in the party chair’s*

²² June 26 Meeting at 3:24:45–3:25:19.

²³ Scherer, *supra* note 1.

²⁴ June 26 Meeting at 1:18:23–1:24:05.

*information*²⁵—whereas the State Board’s purported suspicions about the Justice For All Party’s signatures had nothing to do with the party chair directly. If anything, the State Board’s Chairman should have attempted to put the Constitution Party chair under oath, not the Justice For All Party chair.

The State Board’s differing treatment of the Constitution Party and the Justice For All Party did not end there. In the July 9 meeting, the State Board approved the Constitution Party’s petitions but deferred on the Justice For All Party’s.²⁶ What makes that example so troubling is that if either party’s petitions should have been held up due to concerns regarding the signature threshold, it should have been the Constitution Party’s. The Constitution Party barely met the 13,865-signature threshold. But the Justice For All Party was well over. It could afford to lose *22 times as many signatures as the Constitution Party* (3,497 vs. 157) and still have a sufficient number.²⁷ Finally, at the July 16 meeting, the State Board ruled against the Justice For All Party on the basis of a scientifically unsound survey.²⁸ That survey was both unreliable and invalid due to its small, unrepresentative sample. There is no indication that the State Board has ever denied a party access to the ballot on the basis of such flimsy evidence.

There is no “principled rationale for the difference in treatment” between the Constitution Party and the Justice For All Party. *Masterpiece*, 584 U.S. at 638. The examples of divergent treatment between the two parties—and between the chair of each party—are exactly opposite of what would be rational and principled. The only explanation for these differences in treatment is the State Board’s hostility to the Justice For All Party, or at least its acquiescence in Clear Choice’s

²⁵ Jacobs, *supra* note 10.

²⁶ Press Release, N.C. State Bd. of Elections, *supra* note 13.

²⁷ See *Petition Search*, *supra* note 15.

²⁸ July 16 Meeting at 38:00–39:00.

hostility. Because the State Board applied the law to discriminate against Plaintiffs in their exercise of First and Fourteenth Amendment rights, strict scrutiny applies. *Burdick*, 504 U.S. at 434.

It is not difficult to guess the reason behind the hostility. Both the decisions to delay and ultimately deny certification were 3–2 party line decisions, with the Democratic members voting to deny and the Republican members voting in favor. The investigations were prompted by Democratic Super PACs and law firms. And the Democratic Chairman of the commission, Chairman Hirsch, began his questioning in the June 26 meeting by showing a video submitted by Clear Choice Action which displayed an alleged circulator stating the alleged purpose of the petition was “to help[] take away votes from Joe Biden.”²⁹ By contrast, all five members of the Board—even the Republicans—voted to certify the Constitution Party, a conservative party which posed no threat to the Democrats. The Board put the thumb of the state on the scale of the election process. Only this court can restore balance.

B. The State Board’s Refusal to Certify the Justice For All Party Does Not Advance a Compelling State Interest Because The State Board Has No Authority to Deny Ballot Access when a Party Meets the Petition Requirements.

To pass strict scrutiny, the State Board’s application of the political party statute must be narrowly drawn to advance a compelling state interest. Its most glaring flaw is that it does not even advance a *legitimate* state interest let alone a compelling one. *Burdick*, 504 U.S. at 428–29. North Carolina’s legislature—not its State Board of Elections—decides which agencies are responsible for investigating petition fraud for purposes of ballot access. Because the General Assembly vested that power in *county* boards of elections, the State Board does not advance the state’s interests when it usurps that authority. Rather, it is acting in an ultra vires manner.

²⁹ June 26 Meeting at 1:26:50–1:27:26.

The process of creating a new political party is laid out in N.C. Gen. Stat. § 163-96. To start, a new party must create petitions. *Id.* § 163-96(b). The statute tells the party how—even down to the font, title, and party name. *Id.* Then, the aspiring party must obtain signatures from registered voters—a total of 0.25% of the number who voted in the last gubernatorial election, including 200 or more from each congressional district. *Id.* § 163-96(a)(2). By May 17, it must present each petition to “the chairman of the board of elections of the county in which the signatures were obtained[.]” *Id.* § 163-96(c). After a petition is submitted, “it *shall be the chairman’s duty*” to “examine the signatures on the petition and place a checkmark on the petition by the name of each signer who is qualified and registered to vote in his county.” *Id.* §§ 163-96(c), (c)(1) (emphasis added). And it is “*the chairman’s duty*” to attach a signed certificate stating that “the signatures on the petition have been checked against the registration records” and “[i]ndicating the number found qualified and registered to vote in his county.” *Id.* § 163-96(c), (c)(2) (emphasis added). Only then—after verification—does the party file the certified petitions with the State Board, which “shall forthwith determine the sufficiency of petitions filed with it” and “immediately communicate its determination to the State chair of the proposed new political party.” *Id.* § 163-96(a)(2). That process is largely ministerial. It occurs *after* verification and certification—a task explicitly given to the county boards. Lest there be any doubt, the final portion of § 163-96(c) confirms that it is “the chairman of the county board of elections” who “shall proceed to examine and verify the signatures under the provisions of this subsection.” *Id.* § 163-96(c). The State Board’s duty is simply to ensure that the petitions as they are presented meet the statute’s requirements, including a certain number of signatures validated by the county boards of elections.

If the text could be any clearer, it is only because context corroborates it. The statute identifies one specific basis upon which the State Board can use discretion to reject an application to form a new party: “if, in the State Board’s opinion, the name [of the party] is so similar to that of an existing political party recognized in this State as to confuse or mislead the voters at an election.” *Id.* § 163-96(b). It is unlikely that the General Assembly would specifically assign this one specific discretionary authority while leaving unspoken the discretionary authority to exclude a party from the ballot on the basis of half-baked suspicions of impropriety in obtaining signatures that already have been validated by the county boards.

The way that Section 193-96 deals with timing also demonstrates that the State Board cannot hold party certification hostage to a full-blown investigation. Each county board of elections has two full weeks to “examine and verify the signatures.” *Id.* § 163-96(c). But the State Board, which of course must consider the party’s submission for the State as a whole rather than one of its 100 counties, must determine the sufficiency of new party petitions “forthwith” and return the results “immediately.” *Id.* § 163-96(a)(2). These adverbs are synonyms; the ordinary meaning of “forthwith” is “immediately.”³⁰ The General Assembly did not require one board of elections to *immediately* complete a task that takes one hundred boards working simultaneously multiple weeks to accomplish. Rather, the General Assembly divided the labor. It gave the county boards the task of “examin[ing] and . . . verify[ing]” petitions. *Id.* § 163-96(c). The State Board then adds up the numbers from the county boards’ certificates to “determine the sufficiency of petitions”—that is, to tally the total number of signatures and determine whether they reach the

³⁰ See *Forthwith*, CAMBRIDGE DICTIONARY, <https://bit.ly/4dlpfpJ> (last visited July 26, 2024) (defining “forthwith” as “immediately”); *Forthwith*, MERRIAM WEBSTER DICTIONARY, <https://bit.ly/4cVdHcZ> (last visited July 26, 2024) (defining “forthwith” as “without any delay: IMMEDIATELY”); *Forthwith*, OXFORD ENGLISH DICTIONARY, <https://bit.ly/4fcuREi> (last visited July 26, 2024) (defining “forthwith” as “[i]mmediately, at once, without delay or interval.”).

0.25% sufficiency threshold. *Id.* § 163-96(a)(2). That is why North Carolina state courts cite this provision in cases about whether a party’s petitions are “sufficient” in the “*number*” of votes or signatures they reflect, not in the *validity* of those metrics. *Libertarian Party of N.C. v. State*, 688 S.E.2d 700, 705 (N.C. Ct. App. 2009) (emphasis added). This reading of the statute respects the meaning of the words the General Assembly used and treats § 163-96 as a coherent whole.

There is another timing point that cuts against the State Board’s claimed authority. Party applications must be filed by June 1 of an election year. *See* N.C. Gen. Stat. § 163-96(a)(2). And the candidate filing deadline—a filing that can only happen after party certification—is July 1. *See id.* § 163-98. As this case demonstrates, a fulsome and thorough investigation into the petition process is unlikely to be accomplished in one month. Indeed, even the flimsy and insubstantial investigation the State Board conducted in this case stretched well beyond the July 1 candidate filing deadline. The General Assembly did not give the State Board the impossible task it has claimed for itself, and a decision that must issue “forthwith” certainly is not one that can stretch beyond the candidate filing deadline.

The State Board cannot cite any other statute for the authority for its actions in this case. Its powers and duties include “general supervision,” but only over “primaries and elections,” not party creation. *Id.* § 163-22(a). The State Board does have investigatory authority over “the administration of election laws” and “frauds and irregularities in elections.” *Id.* § 163-22(d). But even if this authority extends to new party petitions, the *result* of any such investigation would not be denial of access to the ballot but rather to “report violations of the election laws to the State Bureau of Investigation for further investigation and prosecution.” *Id.*³¹

³¹ Accordingly, the Court’s passing mention of § 163-22(d) as a theoretical means by which the State Board could investigate fraud in another case is inapposite. *N.C. Green Party*, 619 F. Supp.

State entities have “no legitimate interest in” addressing matters over which they lack “jurisdiction.” *Edgar v. MITE Corp.*, 457 U.S. 624, 643–44 (1982). And North Carolina chose to vest jurisdiction over verifying petition signatures for purposes of ballot access in county boards of elections, not the State Board. Therefore, the State Board was not legitimately advancing North Carolina’s interest when it usurped the county boards’ verification role.³² Since any interests the State Board’s restrictions serve are not even *legitimate*, they fall far short of being *compelling*.

C. The State Board’s Refusal to Certify the Justice For All Party Is Not Narrowly Drawn Because It Relies on a Partisan Survey of a Small, Non-Random, Non-Representative Sample.

The unscientific, unprofessional, and unreliable survey relied on by Defendants to justify their denial of the Justice For All Party’s certification cannot be “narrowly drawn” because it is hopelessly methodologically flawed. The State Board staff attempted to contact a list of 250 individuals out of approximately 17,362 signatures. Board Survey at 1. Of the 250, it was able to reach only 49 individuals. *Id.* Of those 49 individuals, 18 said they did not sign the petition, and 3 said they did not recall. *Id.* Twenty-eight acknowledged that they signed and were asked follow-up questions. *Id.* This minuscule sample was too small, too unrepresentative of the population of signatories, and insufficiently random.

First, the sample size is too small to generate reliable results. 49 individuals surveyed out of a 17,362 population size amounts to a 14% margin of error at a 95% confidence level.³³ This is

3d at 566. That remark, of course, was dicta. The State Board in that case had already determined the petitions at issue to be sufficient. *Id.*

³² Note that neither the plaintiffs nor we are asking a federal court “to enjoin” the State Board “on the basis of . . . state law.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124–25 (1984). Instead, the fact that the State Board lacked state-law authority for its investigation simply demonstrates that it was not acting pursuant to an interest that could excuse its infringement on *federal* constitutional rights—the basis of plaintiffs’ claims.

³³ Calculated using Confidence Interval Calculator, OMNI CALCULATOR, <https://bit.ly/3WB1tjU> (last visited July 26, 2024).

far outside the acceptable margin of error for survey research and renders the survey unusable. See James E. Bartlett, II et al., *Organization Research: Determining Appropriate Sample Size in Survey Research*, 19 INFO. TECH., LEARNING & PERFORMANCE J. 43, 45 (2001) (“The general rule relative to acceptable margins of error in educational and social research is as follows: For categorical data, 5% margin of error is acceptable, and, for continuous data, 3% margin of error is acceptable.”). And this alone is enough to render this survey inadmissible as evidence in many courts. See *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 984 F. Supp. 2d 1021, 1033 n.7 (C.D. Cal. 2013) (“The Court uses the maximum margin of error of ± 10 percentage points for the analysis of the admissibility of the Case-Specific Reports because it represents the largest maximum margin of error proposed by the experts.”). Besides, whether they perform margin-of-error calculations or not, courts consistently cite small sample size as a reason to discredit statistical evidence in a variety of contexts. See *Equal Emp. Opportunity Comm'n v. Am. Nat'l Bank*, 652 F.2d 1176, 1193 (4th Cir. 1981) (“Samples too small are suspect as a basis upon which to infer any pattern of discrimination in making employment decisions.”); *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1248 (2024) (criticizing the sample size of a study in the redistricting context); *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 940 (Cal. 2014) (judging a survey of a few class members to be too small a sample size to support an extrapolated class-wide liability finding).

Second, the survey is unrepresentative, and its results therefore cannot be extrapolated to the full population of petition signers. For example, it suffers from significant nonresponse bias. Only 49 out of 250 respondents who were contacted responded to the survey. The demographic of individuals who respond to phone surveys differs significantly from the general population. See *How much are polls misrepresenting Americans?*, NISKANEN CTR. (June 1, 2022), <https://bit.ly/3ygfJ8s>. “[P]eople who refuse to participate in polls are [often] less educated and less

interested in politics.” *Id.* Even among partisans, “the partisans who do respond aren’t representative of those who don’t.” *Id.*

Because of these sampling issues, actual pollsters devote significant time to balancing responses from various demographics in order to get an accurate picture. *See* Matt Corrigan, *Political polling: Demographics are the key if you want accuracy*, FLA. TIMES-UNION (Oct. 20, 2012, 10:00 PM), <https://bit.ly/3WoM7xs>. However, the State Board’s amateur survey makes no such attempt. This alone should be enough to discredit the survey. But it gets worse. Mecklenburg County, which accounted for 48% of the required signatures, produced only 6 responses (21% of those surveyed), the same number as New Hanover County, which accounted for only 7% of the signatures.³⁴ By contrast, Durham County was vastly overrepresented in the survey (14% of those surveyed) while only accounting for 7% of the signatures.³⁵ Accordingly, the survey evidence fails a key criterion of usefulness in judicial decisions: representativeness. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459–60 (2016).

Third, Defendants’ own methodology shows that the survey was not randomly sampled. The methodology was described in the State Board’s July 16, 2024 meeting.³⁶ To come up with the list of 250 individuals, the Board “first ran a report to limit that group to a list for which we had an actual phone number in the voter record for that individual . . . sort of a pre-sort based on the availability of a phone number, and then we created a random list of 250 individuals to contact from that.” *Id.* at 30:40. This is not a random sample. It is unclear how many of the 17,362 petitioners had phone numbers in the voter record. And it is certainly unclear how representative

³⁴ For quantities of petitions sorted by county, *see Petition Search*, *supra* note 15. *Compare id.* with Board Survey.

³⁵ *Id.*

³⁶ July 16 Meeting at 30:55–32:30.

voters with phone numbers are with respect to petition signers in general. Because of these issues, courts tend to be skeptical of extrapolating from “non-random sample[s]”; it is questionable whether the sample is “representative of the entire universe” of data. *United States v. Ahanmisi*, 324 F. App’x 258, 259–60 (4th Cir. 2009); *see also Alexander*, 144 S. Ct. at 1248 (discounting statistical evidence because it was based on “a small, highly non-random sample”).

The survey’s methodological flaws are reason enough to question its value even if every respondent answered truthfully and with crystal-clear recollection. But both premises are themselves doubtful. For one thing, it appears that Clear Choice pressured voters to disavow their signatures. The group—founded by supporters of President Biden (then the presumptive Democratic nominee) with the purpose of stifling third-party turnout—sent text messages to those who signed Justice For All’s petitions.³⁷ Through those targeted messages, Clear Choice criticized Justice For All and sent surveys of its own prompting Justice For All’s signatories to “sign a signature withdrawal form” or report whether they “remember signing the petition.”³⁸ These messages were sent out in June while the State Board was considering Justice For All’s petitions.³⁹ So when voters received calls from the State Board asking if they recalled signing a petition, they may have felt pressure to say they did not recall signing the petition—perhaps simply to stop the barrage of texts and calls from unknown numbers asking about their political choices. Besides, the State Board’s investigation in late June and early July came several months after Dr. West established Justice For All in January,⁴⁰ and at least a month after he had already obtained the

³⁷ Ingram, *supra* note 21.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Press Release, Cornel West 2024, Dr. Cornel West Announces the Formation of the Justice for All Party as Part of His 2024 Presidential Campaign and Beyond (Jan. 31, 2024), <https://bit.ly/3SttU0D>.

required number of signatures to make it onto the North Carolina ballot.⁴¹ It is highly plausible that several respondents—say, people who quickly signed a Justice For All petition in February and then forgot about it—simply did not remember that they had done so when asked on the spot in June or July. Therefore, whether because of pressure, annoyance, or forgetfulness, it is possible that some number of the (small, non-random, non-representative) sample of respondents who claimed they did not sign the petitions actually did so.

Defendants' flimsy survey is not narrowly drawn. It does not pass muster for a middle school science fair project, let alone a high school statistics class. And it definitely does not suffice for the purpose of stripping away countless North Carolinians' rights to vote for their preferred candidate.

CONCLUSION

Plaintiffs are likely to succeed on the merits. For the foregoing reasons, *Amici* respectfully request that the Court grant Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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⁴¹ Press Release, Cornel West 2024, Dr. Cornel West Surpasses Ballot Access Threshold in North Carolina, Signaling Major Strides for Independent Presidential Campaign (May 20, 2024), <https://bit.ly/4fLXK0N>.

CERTIFICATE OF SERVICE

I certify that on July 26, 2024, I caused a true and correct copy of the foregoing to be served electronically via the Court's CM/ECF system on all counsel registered to receive such notices.

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