

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

JOHNNY THOMAS ORTIZ II; *et al.*,

Plaintiffs,

v.

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

Defendants.

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

**PLAINTIFFS' REPLY IN FURTHER SUPPORT OF EMERGENCY
MOTION FOR PRELIMINARY INJUNCTION**

Defendants' Response simply demonstrates that the material facts in this matter are undisputed. It is undisputed that the Justice for All Party of North Carolina ("JFA") timely complied with all statutory requirements to be certified as a political party under North Carolina law. First, JFA submitted petitions with 17,362 signatures validated by the County Boards of Election—3,497 above the 13,865 threshold needed for new party certification in 2024. N.C. Gen. Stat. § 163-96(a)(2). (Cox Decl., D.E. 30-1 ¶24; Compl., D.E. 1 ¶22). NCSBE staff confirmed that the total number of validated petition signatures was 17,141—3,276 over the minimum requirement. (Cox Decl. ¶24). NCSBE staff confirmed that the JFA petitions were signed by at least 200 registered voters from each of three congressional districts. N.C. Gen. Stat. § 163-96(a)(2). (*Id.*). The petitions were timely submitted to the County Board of Elections before noon on June 1, 2024. *Id.* (Cox Decl. ¶24; Compl. ¶¶ 23-24, 40). The petitions contained the required statutory language and format. *Id.* at § 163-96(b). (Compl. ¶¶36, 40). The petitions and

corresponding training materials used by JFA and People Over Parties (“POP”)¹ informed petition signers of the general purpose and intent of the new party. *Id.* (Compl. ¶¶36, 40, Ex. 1). Defendants’ inquiry should have ended there. Instead, Chairman Hirsch and the Democratic majority of the NCSBE, arbitrarily and without statutory authority, decided to subjectively probe the purpose and intent of JFA based on submissions by Democratic operatives.

ADDITIONAL FACTUAL BACKGROUND

Since Plaintiffs filed their Emergency Motion for Preliminary Injunction on Monday, July 22, 2024, new details have come to light that show the extent to which Defendants sought to disenfranchise Plaintiffs of their First and Fourteenth Amendment rights. On Tuesday, July 23, 2024, the Oversight and Reform Select Committee of the North Carolina House of Representatives held a hearing where Chairman Hirsch and Executive Director Brinson Bell testified under oath regarding the NCSBE’s decision to not certify JFA as a political party. (*See* Exhibit 2²). The testimony revealed the following:

- The pending criminal investigation cited by Hirsch and the other Democratic members of the Board at the July 16 NCSBE meeting is ongoing, but limited to the *rejected* signatures only. (Ex. 2 at 51:6-:21; 107:5-:20). The investigation does not include the more than 17,000 signatures validated by the County Boards of Election. During the initial validation process, four, maybe five, County Boards of Election had indicated concerns over some

¹ Attached as **Exhibit 1** is the Declaration of Paul Hamrick, submitted in further support of Plaintiffs’ Emergency Motion for Preliminary Injunction. Paul Hamrick is counsel to POP, a 501(c)(4) organization that circulated petitions on behalf of JFA. (Ex. 1 at 1-2).

² Attached as **Exhibit 2** are excerpts cited in this brief from a certified transcript of Hirsch and Brinson Bell’s sworn testimony on July 23, 2024 before the North Carolina House Oversight & Reform Select Committee. Plaintiffs can provide the Court with the certified transcript upon request. However, due to time constraints, Plaintiffs only had portions of the July 23 hearing transcribed, which includes all of Hirsch’s testimony and portions of Brinson Bell’s testimony. Portions of the hearing containing testimony from Dr. Andy Jackson and those heavily related to Voter ID issues were excluded.

signatures. (*Id.* at 106:25-107:25). Those counties include Wake, Edgecombe, Watauga, Beaufort, and maybe Mecklenburg. (*Id.*). Only those rejected signatures are presently the subject of criminal investigation and were never included in the validated signature count at issue here. (*Id.* at 51:6-:21).

- Clear Choice Action, by and through the Elias Law Group, misread SEIMS data when it said that 76 out of the 100 County Boards of Election did not check signatures as required under §163-96. (*Id.* at 73:15-:20, 74:15-75:6). The NCSBE nevertheless surveyed all of the counties identified, and only 10 County Boards of Election did not fully understand that signatures needed to be compared to the signature on file with a voters' registration. (*Id.* at 75:7-:76:4). The 10 County Boards were instructed to go back and complete the work between June 14 to June 19, 2024. (*Id.*). Thus at the June 26, 2024 NCSBE meeting, all counties had performed the validation checks required by § 163-96, including comparing a registered voter's signature on the petition to their signature on file with NCSBE to determine whether there's a "reasonable resemblance"³ between the two signatures. (*Id.* at 75:7-:24, 77:18-:23).
- JFA, We the People, and the Constitution Party all sought certification as political parties for their candidates to be placed on the November 2024 General Election ballot. The respective chairs of all three parties submitted written statements about what their purpose and intent was and testified that they provided that purpose and intent to people signing the petitions. But the NCSBE took the Constitution Party's submissions and testimony at face value, while directing further investigation into only JFA and We the People Parties. (*Id.* at 3:15-:20, 16:19-17:11).

³ Brinson Bell also clarified that "reasonable resemblance" errs on the side of the signee. (*Id.* at 70:3-71:4).

- After the June 26, 2024 meeting, the NCSBE started its investigation by calling 66 individuals who indicated in written statements submitted by Clear Choice Action on June 13, 2024 that they wanted their name to be withdrawn from JFA petitions. (*Id.* at 80:21-81:6). Twelve of those 66 allegedly told NCSBE staff that they did not sign the petition. (*Id.*). A similar investigatory process was used for the We the People Party, but not the Constitution Party. (*Id.* at 16:19-17:11).
- Next, the Democratic majority of the Board directed NCSBE staff to call 250 additional signatories from an alleged random sampling of signatories of the JFA party, but not the We the People Party. (*Id.* at 81:11-86:5). Each name was called only once from a NCSBE number between 9a.m.-5p.m. (*Id.*). Unsurprisingly, only 49 people—less than 20% of the sample and only 0.28% of the 17,362 signatories—answered the single phone call. (*Id.*). Of those 49, 18 purportedly did not sign the JFA petition and 3 did not recall signing. (*Id.*). Hirsch used those responses to discredit the remaining number of signatures collected by outside groups. (*Id.* at 7:22-8:11). As explained *infra*, this, along with Hirsch’s other rationales for denying certification, crumble under the slightest scrutiny.

I. Defendants’ Arguments on Standing, Immunity, and Abstention Fail.

Defendants’ argument that Plaintiffs lack standing relies on circular logic. Defendants argue that Plaintiffs’ sworn statements that they wish to vote for JFA’s nominee for president does not show an intent to associate with any party. But how can Plaintiffs vote for a party’s nominee if that party cannot put their candidate on the ballot? Because of the Board’s arbitrary and unconstitutional conduct, Plaintiffs will not be able to vote for their candidate. There is no more “personal stake in the outcome of th[is] controversy.” *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Defendants next argue, unpersuasively, that they are entitled to Eleventh Amendment Immunity under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107-17, 124-25 (1984). While states and agencies are generally immune from suit in federal court, *see Sossamon v. Texas*, 567 U.S. 277, 284 (2011), federal courts may exercise jurisdictions over claims against state officials where plaintiffs are “at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective.” *Republic of Paraguay v. Allen*, 134, F.3d 622, 627 (4th Cir 1998); *N. Carolina Green Party v. N. Carolina State Bd. of Elections*, 619 F. Supp. 3d 547, 558 (E.D.N.C. 2022), *dismissed*, No. 22-1830, 2022 WL 18586807 (4th Cir. Aug. 30, 2022). However, a federal court may not enjoin state officials solely on the basis of state law. *Pennhurst*, 465 U.S. at 124-25.

Here, Plaintiffs meet both prongs of *Allen*, and seek relief under federal law. First, Plaintiffs are suffering from ongoing violations of federally protected rights by Defendants. Specifically, Defendants ongoing refusal to certify the JFA’s petition for party certification and place its candidate on the ballot, prevents plaintiffs from voting for their candidate of choice. Plaintiffs seek prospective relief, in the form of an order from this Court enjoining the NCSBE from enforcing the July 1, 2024 party certification deadline, and ordering the NCSBE to certify JFA as a party and place its candidates on the November 5, 2024 ballot. This injunction, is not a state law issue. Rather, “it is a federal constitutional issue concerning whether applying the July 1...deadline... violates [P]laintiffs’ rights under the First and Fourteenth Amendments.” *N. Carolina Green Party*, 619 F. Supp. 3d at 558. Therefore, the injunction Plaintiffs seek here “would not enjoin state officials on the basis of state law, but rather on the basis of the First and Fourteenth Amendment.” *Id.* Moreover, as Plaintiffs’ complaint shows, NCSBE’s failure to follow state law is evidence in Plaintiffs’ constitutional claims—namely that the Board was not acting

pursuant to a compelling state interest when it trampled on Plaintiffs' First and Fourteenth Amendments rights.

Defendants' call for this court to abstain from hearing this matter under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) is also misplaced. Abstention is "the exception, not the rule" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989), and the *Burford* doctrine allows courts to abstain only in a "narrow range of circumstances" that are not present here. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726, (1996). First there are no difficult questions of state law for the Court to grapple with. *New Orleans*, at 361. Defendants clearly violated state law with respect to JFA. In fact, all of Defendants' justifications for the actions taken against JFA are not authorized by the statute. Second, it is undisputed that the Board treated other parties for certification, not only differently, but better than JFA based on the views those parties espouse. Thus, an order from this court enjoining Defendants' conduct and ordering Defendants to place JFA on the ballot would not "disrupt the state's efforts in establishing a coherent public policy for how to evaluate the sufficiency of petitions," (Def. Br. 18), but enforce consistency. Finally, as stated above, NCSBE's violations of state law are evidence of Plaintiffs' claims under the United States Constitution, which this Court has a "virtually unflinching obligation" to exercise jurisdiction to decide. *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988).

II. Defendants' Treatment of JFA Imposed a Severe Burden on Plaintiffs' First and Fourteenth Amendment Rights.

As applied in this case, N.C. Gen. Stat. § 163-96 imposes a severe burden on Plaintiffs' right to "associate for the advancement of political beliefs and ideas[,] including the formation of a political party and the right to place their candidate's name on the election ballot." *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 755-56 (4th Cir. 2010); *Buscemi v. Bell*, 964 F.2d 252, 261-62 (4th Cir. 2020). Defendants' Response shows how the NCSBE treated JFA's

petition process drastically different than other political parties seeking ballot access in 2024. In fact, Defendants concede that the NCSBE effectively waived the express statutory requirement that the “petitions must state the name and address of the State chairman” for the Constitution Party of North Carolina—which it also does not have authority to do. (Def. Br. at 7). Comparatively, JFA was met with open hostility and subjected to unenumerated requirements that few, if any, potential parties could actually meet. (*See* Def. Br. at 20). Such difference in treatment can only be attributed to viewpoint discrimination. *See Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 584 U.S. 617, 634-35 (2018).

III. The NCSBE’s Justifications for Denying Certification Are Not in Furtherance of Legitimate Regulatory Interests.

While NCSBE has regulatory interests in preventing election fraud, *see North Carolina Green Party v. North Carolina State Board of Elections*, 619 F. Supp. 3d 547, 566 (E.D.N.C. 2022), the Democratic majority of the Board was not acting in furtherance of that interest when it denied JFA’s certification. Sworn testimony before the North Carolina General Assembly on July 23, 2024 proved as much. In his written statement to the North Carolina House Oversight & Reform Select Committee, Hirsch claimed that the NCSBE declined to certify JFA for five reasons: (1) JFA “itself only submitted four thousand signatures,” while the remaining signatures were collected by outside groups or people; (2) a “substantial portion” of the signatories on the petition pages collected by outside groups advised NCSBE that they did not sign; (3) “[m]any other [signatories] were not told the purpose of the group, as required by law;” (4) the outside petition gatherers “refused to provide information” in response to NCSBE’s subpoena; and (5) County Boards of Elections “also identified fraudulent signatures, and that matter is currently

under investigation.” (See Exhibit 3⁴). But each of these rationales were quickly rebutted by sworn testimony of Executive Director Brinson Bell and written submissions by JFA and POP.

First, as acknowledged by Hirsch himself, there is absolutely no prohibition on outside groups collecting or submitting petition signatures on behalf of potential political party. (Ex. 2 at 36:20-37:6). The fact that an outside group like POP was involved is irrelevant. Defendants’ arguments that JFA somehow had to prove that it had control over every aspect of signature collection has no basis in North Carolina law. (Def. Br. 20).

Second, even under the most deferential math, only a small fraction of JFA petition signatories actually advised NCSBE that they did not sign. The majority of the NCSBE instructed staff to attempt to contact a random sample of 250 signatures from the JFA petitions to form the basis of an investigation. Of the 49 people NCSBE staff actually reached, 3 stated that they did not recall signing and 18 stated that they did not sign—amounting to approximately 43% of the small sample of people that staff actually reached. (Exhibit 4⁵ at 16). A similar survey was conducted when investigating the North Carolina Green Party’s petitions in 2022, where the NCSBE attempted to reach 200 signatories of the Green Party’s petition. *N. Carolina Green Party*, 619 F. Supp. 3d at 555. Of the 54 people that staff were able to reach, 12 did not remember whether they signed and 28 stated that they did not sign—amounting to approximately 74% of respondents. *Id.* Nevertheless, the NCSBE ultimately certified the Green Party. *Id.* at 556. It is unclear how a 74%

⁴ Attached as **Exhibit 3** is a copy of Hirsch’s written submission to the Oversight & Reform Select Committee, available at <https://webservices.ncleg.gov/ViewDocSiteFile/88608>.

⁵ Attached as **Exhibit 4** is Brinson Bell’s presentation and written submission to the Oversight & Reform Select Committee, available at <https://webservices.ncleg.gov/ViewDocSiteFile/88609>.

potential error rate could pass muster while 43% cannot⁶. The only logical explanation is discrimination against JFA and those who support it.

Moreover, it is undisputed that “JFA submitted 3,276 validated and reviewed signatures over the requirement and had more than 3 congressional districts with greater than 200 signatures.” (Ex. 4 at 15). After removing persons who asked that their signatures be removed, JFA is still well in excess of the margin needed for certification.⁷ (See Cox. Decl. ¶24).

Next, submissions by JFA and other petition circulators showed that signers were informed of the general purpose and intent of the new party. As shown by the sworn affidavit of Paul Hamrick, contrary to Hirsch’s claims, POP did in fact respond to NCSBE’s inquiries before the June 26, 2024 meeting. (*See* Ex. 1). Hamrick provided substantive responses to in-house counsel for the NCSBE on June 13—both in writing and over the phone. (*Id.* at 1, 5-15). Furthermore, POP’s submissions to the NCSBE show that POP trained its petition circulators to inform all signatories of the purpose and intent of JFA as a political party, and all with the express permission of the JFA Chair Italo Medelius. (*Id.*; Ex. 2 at 6:1-:10). That’s all that is necessary under the law. Defendants’ dissatisfaction with that stated purpose is irrelevant. (Ex. 2 at 4:5-4:19).

Lastly, as to the County Boards of Election that raised concerns about signatures, Brinson Bell clarified that those counties were limited to Wake, Edgecombe, Watauga, Beaufort, and maybe Mecklenburg. (*Id.* at 106:25-107:25). But even if all signatures from Wake, Edgecombe, Watauga, and Beaufort Counties⁸ were invalidated, which they were not, JFA would still exceed the 13,865 validated signatures needed for certification as a political party.

⁶ To the extent that Defendants claim an additional 8 respondents of the 49 should be counted because they did not recall the purpose and intent of the party, a total of 29 out of 49 respondents still only amounts to 59.2%. (*See* Def. Br. at 14).

⁷ This is unlike the delay in *N. Carolina Green Party*, where the number of signatures in question exceeded the margin needed for certification. 619 F. Supp. 3d at 555-56.

⁸ The total for all four counties was approximately 1,868. (Compl. ¶22).

IV. The NCSBE Deprived Plaintiffs (and JFA) Due Process of Law Without the Opportunity to Cure.

Plaintiffs were denied due process of law. First, the Board lacked the authority to waive a statutory deadline⁹. *See N. Carolina Green Party*, 619 F. Supp. 3d at 567. Therefore, the Board's decision to delay the certification decision until after July 1, 2024 is arbitrary and not permitted under the statute. Thus, Plaintiffs require this Court to right this wrong. *See id.* ("If the Board determines after the July 1 deadline that a party's timely filed petitions are sufficient, it appears that nothing short of a court order or an act of the North Carolina General Assembly can provide relief to ensure the new party's candidates appear on the ballot.").

Furthermore, Plaintiffs and JFA were not put on proper notice because the NCSBE never provided actual, concrete evidence of what was wrong with petition signatures during any NCSBE meeting. This stands in stark contrast to the North Carolina Green Party's hearing in 2022, where the Board presented specific evidence of problematic petition pages to justify further investigation into issues. (*See Exhibit 5*¹⁰ at 14-15). No such examples were provided here.

CONCLUSION

For these reasons, and as set forth in Plaintiffs' Emergency Motion for Preliminary Injunction [D.E. 8], exhibits thereto [D.E.8-1 to 8-3], and Memorandum in Support [D.E. 9], Plaintiffs respectfully request this Court grant their Emergency Motion for Preliminary Injunction in its entirety such that JFA and its candidates may be placed on North Carolina's November 5, 2024 general election ballot.

Respectfully submitted, this the 29th day of July, 2024.

⁹ It is unclear why Mr. Cox believes there is no statutory deadline for newly recognized political parties to submit the names of their presidential candidates. (*Compare Cox Decl.* ¶32 with N.C. Gen. Stat. §163-98).

¹⁰ Attached hereto as **Exhibit 5** is Executive Director Brinson Bell's presentation to the Board on June 30, 2022, which was attached to the Affidavit of Paul Cox in the *N. Carolina Green Party* litigation. No. 5:22-cv-00276, at D.E. 52, 52-8 (E.D.N.C. July 29, 2022).

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification to counsel of record.

By: /s/ Phillip J. Strach
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