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*.	**Case No. 5:24-cv-420-BO**

BRIEF OF AMICUS CURIAE CLEAR CHOICE ACTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTEREST OF AMICUS CURIAE

Amicus Clear Choice Action is a 501(c)(4) organization dedicated to educating the public, protecting the constitutional rights of citizens, and upholding democratic institutions. As part of its mission, Clear Choice Action fights cynical efforts to abuse state ballot-access laws and mislead voters. Clear Choice Action submitted evidence to the North Carolina Board of Elections (the "State Board") in connection with the State Board's consideration of the new-party petition submitted by the Justice For All Party ("JFA"). Plaintiffs' pleadings provide an incomplete and misleading account of the record before the State Board. Clear Choice Action has an interest in defending the State Board's order, which properly rejected what the record showed was a sham petitioning effort marred by fraudulent and misleading signature gathering practices by third-party groups unaffiliated with—and politically unaligned with—the proposed party.

INTRODUCTION

North Carolina makes it quite easy to form a new political party. The main barrier to doing so is a requirement to collect valid signatures from a mere one quarter of one percent of the electorate—for 2024, just 13,865 signatures. Any qualified North Carolina elector may sign, but before they do, the petition circulator must disclose "the general purpose and intent of the new party." N.C. Gen. Stat. § 163-96(b). The Fourth Circuit has stressed that this statutory requirement is no mere nicety: "a new political party *must* satisfy" this requirement to attain recognition. *Buscemi v. Bell*, 964 F.3d 252, 265 (4th Cir. 2020) (citing N.C. Gen. Stat. § 163-96(b)) (emphasis added). This requirement is meant to ensure that signatories know what they are supporting when they sign a new-party petition. In this case, the State Board reasonably declined to recognize JFA—a far-left vehicle for Dr. Cornel West's presidential ambitions—as a qualified political party because JFA admittedly could not show that it complied with the purpose-and-intent requirement.

In support of its effort to obtain recognition as a party, JFA turned in more than 30,000 signatures. But JFA did not gather most of those signatures itself; its chair candidly testified to the State Board that JFA could account for no more than 4,000, which were gathered by its executive committee and a handful of volunteers. Many of the rest were gathered by unaffiliated individuals and entities who JFA did not oversee or train, but whom JFA nevertheless authorized to submit and handle petition sheets on its behalf. JFA's chair admitted to the Board that he had only a faint idea who had managed to obtain many of those signatures and no idea how they had gone about doing so.

These puzzling facts began to make more sense after the County Boards of Elections completed their validation of the submitted signatures. The disqualification rate was shockingly high—just under 45 percent, reducing JFA's signatures to around 17,000—and evidence of fraud was so extensive that the State Board launched a criminal investigation. It soon came to light that Scott Presler—who has been described as a "nationally acclaimed Republican and Trump activist" by the Durham Republican Party—had bragged publicly about recruiting "40+" volunteers to circulate JFA petitions, and was shown urging attendees at a Trump rally to sign because getting Dr. West on the ballot "could take a percentage point away from Joseph Biden." And a Denver-based, Republican-aligned paid canvassing outfit was also linked to the otherwise-inexplicable bumper crop of JFA signatures turned in at the deadline.

Presented with these facts at the first hearing on JFA's petition, the State Board did the reasonable thing: it took time to investigate. Ultimately, a majority of the Board reached two key conclusions. First, because JFA could account for only 4,000 signatures, there was no way to confirm that the statutory purpose-and-intent requirement had been satisfied for the 13,865 signatures required by law not already disqualified by the County Boards. Second, the rate of

apparent fraud among even the signatures that survived County Board scrutiny was very high—for instance, in a survey the Board's staff conducted, 36 percent of purported signatories denied having signed the petition. In light of these facts, the Board voted not to recognize JFA.

This case seeks to override the Board and put JFA on the ballot. But JFA is not a plaintiff and appears to have nothing to do with this lawsuit. Rather, Plaintiffs are three voters who attest to having signed the petition but apparently are *not* willing to say under oath that they will vote for Dr. West if he qualifies or register as members of the JFA party. And they are represented by counsel who is a prominent member of the Republican Party and typically represents Republican interests in election-law matters, not far-left minor parties.[1]

These facts speak for themselves. Politically motivated and conservative-leaning activists, aiming to hurt Democratic candidates, tried to prop up the far-left JFA by submitting fraudulent signatures and signatures procured in violation of the purpose-and-intent requirement. In rejecting the petition, the State Board properly and squarely applied North Carolina law. Now three signers of the petition are asking a federal court to overrule the State Board's exercise of its statutorily conferred discretion and recognize a political party that is *not even before the Court*. The Court should decline that remarkable invitation, not least of all because subject-matter jurisdiction is lacking here—Plaintiffs may not assert injuries that belong to JFA, or seek relief contingent on what JFA itself chooses to do going forward. Moreover, as Judge Dever recognized two years ago,

[1] Among other things plaintiff's counsel is or has been a member of the North Carolina Republican Party's "Election Integrity Committee," *see* https://www.nc.gop/ncgop_election_integrity_committee (June 4, 2021), a member of the Republican National Lawyers Association, *see* https://www.rnla.org/6727 (last accessed July 26, 2024), and currently represents the Republican leadership of the North Carolina Legislature in several cases pending in North Carolina federal courts, *see N.C. State Conf. of NAACP v. Berger*, No. 1:23-cv-01104 (M.D.N.C.); *Democracy N.C. v. Hirsch*, No. 1:23-cv-00878 (M.D.N.C.); *Common Cause v. Moore*, No. 1:22-cv-00611 (M.D.N.C.).

"North Carolina has compelling interests in authorizing the Board to properly determine the sufficiency of petitions submitted to it and to authorize the Board to investigate petition fraud." *N.C. Green Party v. N.C. State Bd. of Elections*, 619 F. Supp. 3d 547, 566 (E.D.N.C. 2022). If the facts of this case do not warrant deference to those interests, it is difficult to imagine what would.

BACKGROUND

I. Statutory Framework

A. North Carolina's Requirements for New Party Petitioning

North Carolina law allows a group of voters to obtain recognition as a new political party by filing petitions signed by "one-quarter of one percent (0.25%) of the total number of voters who voted in the most recent general election for Governor." N.C. Gen. Stat. § 163-96(a)(2). This year, meeting that requirement required 13,865 valid signatures.

Determining whether a new party has secured the requisite number of signatures is not a mere tallying exercise—the putative new party must comply with several statutory requirements when obtaining petition signatures. Most relevant here, "the organizers and petition circulators shall inform the signers of the general purpose and intent of the new party." *Id.* § 163-96(b) (the "purpose-and-intent requirement"). The Fourth Circuit has stressed the importance of this requirement for obtaining recognition for a new political party, explaining that the burden it imposes helps to justify "why new political parties have an initial signature requirement lower than the signature requirement for an unaffiliated candidate." *Buscemi*, 964 F.3d at 265.

The State Board clearly advertises this requirement for new party petitioners on its website:

> As required by § 163-96(b), the organizers and petition circulators for the new party are required to inform the signers of the petition of the general purpose and intent of the new party. Once an organizer has collected enough signatures, the State Board will determine the sufficiency of the petition, *and part of its consideration will be whether the organizers and petition circulators met that statutory requirement*. Organizers may submit documentation (e.g., a script that organizers will use when collecting signatures) showing

compliance with the statutory requirement when submitting a petition request form, at the time they submit the petition signatures to the State Board, or any point in between then.[2]

B. North Carolina's Procedures for Reviewing New Party Petitions

State law also sets out the procedures by which a potential new party's petition sheets are reviewed, beginning with the County Boards of Election. *See generally* N.C. Gen. Stat. § 163-96(c). By statute, the "group of petitioners shall submit the petitions to the chairman of the county board of elections in the county in which the signatures were obtained no later than 5:00 P.M. on the fifteenth day preceding the date the petitions are due to be filed with the State Board of Elections as provided in subsection [subdivision] (a)(2) of this section." *Id.* It "shall [then] be the chairman's duty" to review the signatures and compare them to the county's registration records. *Id.* After the Chairs of the County Boards of Elections verify signatures on the petition sheets and return them to the group of voters seeking party recognition, the petitioners "must file their petitions with the State Board of Elections before 12:00 noon on the first day of June preceding the day on which is to be held the first general State election in which the new political party desires to participate." *Id.* § 163-96(a)(2). The State Board "shall forthwith determine the sufficiency of petitions filed with it and shall immediately communicate its determination to the State chair of the proposed new political party." *Id.* North Carolina thus allows a new party to be recognized only once the State Board has "satisfy[ied] its duty to determine the sufficiency of the petitions." *Green Party*, 619 F. Supp. 3d at 566. Notably, the State Board has both the authority and the duty to "investigate when necessary or advisable . . . frauds and irregularities in elections"

[2] *Petition for Recognition as Political Party*, N.C. State Bd. of Elections, https://www.ncsbe.gov/candidates/petitions/petition-recognition-political-party (last accessed July 27, 2024).

and to "report violations of the election laws to the State Bureau of Investigation for further investigation and prosecution." N.C. Gen. Stat. § 163-22.

II. Factual and Procedural History

A. Far-left party Justice For All failed to clear the necessary signature threshold by itself.

This case concerns the unsuccessful effort by JFA to gain recognition as a new party. The record before the State Board established that JFA fell woefully short of meeting the legal requirements. JFA turned in a total of more than 30,000 petition signatures. But the vast majority of those signatures were not gathered by JFA itself. JFA's chair, Italo Medelius, told the State Board that he could account for only "around 4,000" signatures, gathered by himself and a small number of volunteers.[3] He further acknowledged that JFA did not undertake routine protocols to track the origins of petition sheets, such as by having canvassers write their initials on each sheet.[4]

Because JFA's own efforts fell far short of what North Carolina law requires to establish a new party, the organization readily accepted offers from third parties to help prop up its deficient efforts. For example, Medelius accepted help from People Over Party—an organization led by Paul Hamrick, an attorney based in Alabama—to find additional signatures.[5] Hamrick, in turn,

[3] *See* June 26, 2024 State Board of Elections Meeting at 1:51:29 ("June 26 Hearing"), available at https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-06-26/State%20Board%20of%20Elections%20Meeting-20240626%202000-1.mp4.

[4] June 26 Hearing at 1:49:34 (explaining he "wasn't aware of any of our [JFA] petitioners that did that" and that it "was not in the training").

[5] June 26 Hearing at 1:27:34 to 1:31:24; 1:31:50 to 1:33:59; 1:39:22 to 1:44:08.

hired Blitz Canvassing—a "Colorado-based Republican political firm," according to NBC News——to aid JFA.[6] Their names were apparently provided to JFA by Dr. West's campaign.[7]

In accepting this outside help, JFA and Medelius knew that they would nevertheless need to ensure compliance with the purpose-and-intent requirement. In an email sent to his executive committee on March 3, 2024, Medelius wrote that JFA "need[ed] to inform any signers of the 'general purpose and intent' of the new party," a requirement which JFA could "prove" it had satisfied "by submitting documentation of our compliance with the statute."[8] Medelius acknowledged that the State Board might "throw out" signatures if JFA did not "have the documentation to prove we are informing people of the general purpose and intent of the new party."[9] And in his certification letter to the State Board accompanying the submission of petitions, Medelius certified only that "each of the petition's organizers *and each individual trained by the organization as a circulator* was instructed to clearly inform each potential signer of the general purpose and intent of the new party."[10] But Medelius did not—and could not—certify that

---

[6] *See* Alex Seitz-Wald, *Operatives with GOP ties are helping Cornel West get on the ballot in a key state*, NBC News (June 7, 2024), https://www.nbcnews.com/politics/2024-election/operatives-gop-ties-are-helping-cornel-west-get-ballot-key-state-rcna153110. According to the same NBC News report, Blitz Canvassing has worked for "numerous Republican House and Senate candidates and took in more than $14.6 million in payments working for Never Back Down, the main super PAC that supported former GOP presidential candidate and Florida Gov. Ron DeSantis." *Id.*

[7] *See id.*

[8] *JFA NC – SBOE Responses*, N.C. Justice For All, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/New%20Party%20Petitions/SBOE%20Responses%20JFA%20w%20exhibits.pdf (last accessed July 27, 2024).

[9] *Id.*

[10] *Petition for Ballot Access*, N.C. Justice For All (May 28, 2024), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-06-26/New%20Party%20Petitions/Justice%20for%20All%20Party%20Petition%20Intent%20Document.pdf.

circulators under the control of People Over Party (or any other third party) had complied with the "purpose and intent" requirement.

Despite being on notice of the need to do so, Medelius undertook no effort to ensure that Blitz Canvassing or People Over Party complied with state law in collecting signatures, including by informing signatories of the "general purpose and intent" of JFA—a critical requirement under North Carolina law. *See Buscemi*, 964 F.3d at 265; N.C. Gen. Stat. § 163-96(b). In fact, when asked about how People Over Party went about collecting signatures, Medelius admitted he "really can't speak to what they were doing."[11] By his own admission, the "extent of what [Medelius] knew" about People Over Party was simply that a "gentleman by the name of Paul wanted to collect signatures" on JFA's behalf.[12] He had "no idea" whether these circulators used a JFA-approved script when informing voters about the "general purpose and intent" or the party.[13]

Despite knowing nothing about Hamrick's organization—and without making any effort to ensure Hamrick's efforts complied with the "general purpose and intent" requirement, such as by using an approved party script—Medelius authorized three Blitz Canvassing employees to pick up and drop off signatures on behalf of JFA.[14] When asked how many signatures these paid canvassers collected, Medelius admitted that he did not "know the exact number."[15]

Other conservative operatives also lent their resources toward getting JFA on the ballot. For example, Scott Presler—a "nationally acclaimed Republican and Trump activist,"[16] according

[11] June 26 Hearing at 1:43:41 to 1:44:42.

[12] *Id.* at 1:27:34 to 1:28:52.

[13] *Id.* at 1:30:50 to 1:31:15.

[14] *Id.* at 1:41:57 to 1:43:13.

[15] *Id.* at 1:57:48 to 1:58:15.

[16] https://durham.nc.gop/scott_presler (last visited July 27, 2024).

to the Durham Republican Party—was recorded attending an April 20, 2024, rally for former President Trump in North Carolina, encouraging Trump supporters to sign petitions for JFA.[17] Presler boasted on social media shortly before the event that he had sent "40+ folks to our North Carolina organizer" to help collect signatures to put JFA on the ballot—a volunteer force larger than that mustered by JFA itself.[18]

Prior to that, Presler boasted to Charlie Kirk—another prominent conservative activist with a large online following—that he was "working to get Dr. Cornel West on the ballot in North Carolina."[19]

[17] *Id.* at 1:25:15 to 1:25:51; 1:37:24 to 1:38:48; 1:47:21 to 1:47:48; *see also* @iarnsdorf, X.com (April 20, 2024), https://x.com/iarnsdorf/status/1781777434548846607 ("Pro-Trump activist Scott Presler is at the Trump rally in NC today collecting signatures to get Cornel West on the ballot, which he says will take away votes from Biden").

[18] @ScottPresler, X.com (Apr. 12, 2024), https://x.com/ScottPresler/status/1778823709580476903?lang=bg; June 26 Hearing at 1:54:08 to 1:54:50 (explaining JFA trained "maybe like 35 to 40 people" to gather signatures).

[19] @ScottPresler, X.com (Apr. 2, 2024), https://x.com/ScottPresler/status/1775191176317907291.

At the rally itself, Presler encouraged Trump supporters to sign JFA's petitions because it "helps take away votes from Joe Biden," explaining that if they could "get [Dr. West] on the ballot could take a percentage point away from Joseph Biden."[20] A colleague of Presler's is heard saying "the Trump team is trying to get [Dr. West] on there," referring to the North Carolina ballot.[21] Helping to elect Republicans is *not* the stated "general purpose and intent" of JFA, as Medelius readily conceded to the State Board.[22]

The petitions that JFA submitted were rife with fraud. While the organization submitted over 30,000 signatures to County Boards of Election, those boards could only verify roughly 17,000—a remarkably high rejection rate of nearly 45 percent.[23] And as noted, JFA's own chair initially admitted he could account for only around 4,000 of those signatures and could only "guess[]" where the remaining 26,000 signatures came from or the conditions under which they

[20] *See supra* n.16.

[21] *Id.*

[22] June 26 Hearing at 1:37:24-1:38:48.

[23] *See* Petition Search, N.C. State Board of Elections https://vt.ncsbe.gov/PetLkup/PetitionResult/?CountyID=0&PetitionName=NEW%20PARTY%3A%20JUSTICE%20FOR%20ALL%20PARTY%20OF%20NC.

were collected[24] In fact, in a later response to a subpoena from the State Board, Medelius submitted a spreadsheet showing that in truth he could account for only *2,908 signatures*—nearly 11,000 signatures below the required threshold.[25]

B. The State Board of Elections determined that JFA had failed to satisfy North Carolina's requirements for party recognition.

The State Board held a hearing on several new party petitions on July 26, 2024. In view of the rampant and widely reported issues with JFA's signature gathering process, several board members pressed Medelius to explain how JFA in fact met the signature threshold based on signatures from bona fide JFA supporters who had been properly apprised of the party's purpose and intent. For example, when asked about Hamrick's effort to collect signatures for JFA through his People Over Party group, Medelius admitted he "can't speak for People Over Parties."[26] Board member Siobhan Millen asked Mr. Medelius whether he "kn[e]w if the People Over Parties petition gathers followed the script that [JFA] had online" for informing signatories about the purpose and intent of the party.[27] Medelius responded: "I have no idea. I haven't really had any sort of connection with Paul [Hamrick] except for giving the petition, so I can't really speak to what training those petitioners had."[28] Later in the hearing, Medelius once more acknowledged he had "very, very, very little contact with Paul [Hamrick]" and could not "speak to what they were

[24] June 26 Hearing at 1:52:13 to 1:52:53.

[25] *See* Medelius Subpoena Response to N.C. State Bd. of Elections (July 9, 2024), available at https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/New%20Party%20Petitions/Subpoena%20Responses/Medelius%20-%20JFA%20Response.pdf.

[26] June 26 Hearing at 1:28:52 to 1:29:20.

[27] *Id.* at 1:30:50 to 1:31:15.

[28] *Id.*

doing."[29] Board member Jeff Carmon asked if People Over Party was "paying anyone . . . to collect signatures."[30] Medelius once more said he "[didn't] know that information" and could not speak to "the internal running of People Over Party."[31] Carmon asked if Medelius could "see . . . the dilemma of not having a better control over who was collecting signatures," and Mr. Medelius agreed "100%."[32] Chairman Alan Hirsch next asked Medelius about Presler's efforts, inquiring whether JFA "ha[d] any idea how many" signatures his team had submitted.[33] Medelius once more had no idea.[34]

In view of these and other responses, Chairman Hirsch stated his view that the State Board "need[ed] to do further investigation in order to determine whether [JFA met] the statutory criteria, particularly with respect to purpose and intent."[35] In furtherance of its investigation, the Board issued subpoenas to numerous individuals, including Hamrick and the three the Blitz Canvassing circulators approved by Medelius to deliver signatures.[36] At a subsequent State Board hearing on July 9, Board staff reported on the preliminary findings from their investigation. State Board staff had spoken to several purported JFA signatories who either did not recall signing the petition or

[29] *Id.* at 1:43:41 to 1:44:42.

[30] *Id.* at 1:31:50 to 1:32:19.

[31] *Id*.

[32] *Id.* at 1:33:25 to 1:33:59.

[33] *Id.* at 1:47:21 to 1:49:00.

[34] *Id*.

[35] *Id.* at 2:01:29 to 2:02:35.

[36] *See generally* N.C. State Board of Elections, July 16, 2024 Meeting Documents, Subpoena Responses, available at https://dl.ncsbe.gov/?prefix=State_Board_Meeting_Docs/2024-07-16/New%20Party%20Petitions/Subpoena%20Responses/; *see also* ECF No. 30-1 ¶ 27.

who "said they were not told the purpose and intent" of the party, or "did not understand the purpose and intent in terms of what it was they thought they were signing."[37]

At the State Board's next meeting, on July 16, Board staff further reported that they had placed calls to approximately 250 signatories and spoken with 49 of them. Of those 49 respondents, 18 purported signatories—over 36 percent—indicated that they had not signed JFA's petition.[38] Chairman Hirsch also provided an update on the results of the Board's subpoenas, namely that "Mr. Hamrick refused to comply with the subpoena."[39] Hamrick also informed the State Board that he "represented two of the three [Blitz Canvassing employees]" and that they "also refused to comply."[40]

Chairman Hirsch summarized the problem facing the State Board in fulfilling its duty to "determine the sufficiency of petitions." N.C. Gen. Stat. § 163-96(a)(2). He explained: "As we know, 13,865 signatures are required . . . Mr. Medelius said that his group only submitted 4,000 signatures and the remaining signatures came from somewhere else."[41] Hirsch therefore "ha[d] no confidence that" JFA's signature gathering "was done legitimately" and in compliance with the purpose-and-intent requirement.[42] The Board then voted not to recognize JFA as a political party because it could not determine the sufficiency of its petitions.

---

[37] *See* July 9, 2024 State Board of Elections Meeting at 38:04 to 39:23, available at https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-09/State%20Board%20of%20Elections%20Meeting-20240709%201730-1.mp4.

[38] *See* July 16, 2024 State Board of Elections Meeting at 30:30 to 32:34 ("July 16 Hearing"), available at https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/State%20Board%20of%20Elections%20Meeting-20240716.mp4.

[39] *Id.* at 34:59 to 37:22.

[40] *Id.* at 34:59 to 37:22.

[41] *Id.* at 32:34 to 33:38.

[42] *Id.* at 42:17 to 43:24.

C. Three voters filed this lawsuit—without involvement from JFA itself—challenging the Board's decision.

On July 22, a week after the Board's vote not to recognize JFA, three purported JFA supporters filed suit challenging the Board's execution of its state-law duty to review and assess JFA's petition. *See* Compl., ECF No. 1. The suit is peculiar in numerous respects. Most notably, JFA itself is conspicuously absent from the caption, as is every member of JFA's Executive Committee, including Medelius. Nor do Plaintiffs appear to be in communication with JFA leadership or even remotely familiar with the organization's operations. The Complaint makes allegations "upon information and belief" a remarkable *eight times*, including about basic information that JFA itself would obviously have within its possession, such as:

- Whether JFA in fact timely responded to the State Board's subpoenas and provided the Board with the request information. Compl. ¶¶ 25, 37, 41;
- Whether JFA in fact held a convention to nominate candidates, *id.* ¶ 28;
- Whether Medelius—the chair of JFA—in fact certified Dr. West as JFA's candidate for President, *id.* ¶ 29.

That the Complaint cannot make concrete allegations about these simple facts reveals this effort for what it is—a shell game garbed as a lawsuit.

The Complaint is also conspicuously quiet about the three individual Plaintiffs mustered for this suit. It says nothing about them beyond that each is "a resident of Fayetteville, North Carolina and is registered to vote in Cumberland County, North Carolina." Compl. ¶¶ 7–9. The Complaint makes no allegations about the circumstances under which Plaintiffs signed JFA's petitions, nor does it describe any other involvement with JFA. The carbon-copy, one-page declarations signed by each Plaintiff are no more revealing. *See* ECF Nos. 8-1, 8-2, 8-3. Not one of the declarations states that the Plaintiff in question wishes or plans to vote for Dr. West for President or to support JFA candidates in the future.

LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy." *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 696 (4th Cir. 2019) (quotation marks omitted). The movants bear the burden of establishing that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 102–03 (4th Cir. 2022). When the injunction that is sought is "mandatory"—that is, when it would alter the status quo or require the defendant to take some affirmative action, rather than simply refrain from engaging in some action—the movants' burden is particularly high. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). "Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994). Mandatory injunctions "should be granted only in those circumstances when the exigencies of the situation demand such relief." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003) (quotation marks omitted). Thus, "to justify a mandatory injunction, the movant must demonstrate a clear and convincing probability of success." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 612 F. Supp. 3d 563, 579 (E.D. Va. 2020) (cleaned up); *see also Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 n.8 (4th Cir. 2019) (mandatory injunctive relief is only available where "the applicants' right to relief is indisputably clear" (quotation marks omitted)).

ARGUMENT

I. Plaintiffs lack standing because they are not JFA or its leadership.

The first problem with this case is that Plaintiffs are neither JFA nor its leadership; they are three voters who signed JFA's petition, but do not otherwise allege that have any involvement with JFA's operations or planning. JFA's complete absence from this case creates a threshold legal

problem: lack of standing. To show standing "at the preliminary injunction stage" the movant must show "a clear likelihood" of establishing standing. *Action NC v. Strach*, 216 F. Supp. 3d 597, 628 (M.D.N.C. 2016). Plaintiffs cannot make that showing as to either injury-in-fact or redressability.

Start with injury. JFA and its leadership, of course, were injured by the State Board's rejection of their new party petition, which prevented them from exercising the privileges that North Carolina law accords to recognized political parties. *E.g.*, *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1281 (11th Cir. 2020). But Plaintiffs are just signatories; they have no role with JFA whereby they would have benefitted from such privileges. And while the complaint *alleges* that they "want to vote for JFA's nominee in the November 2024 general election," Compl. ¶ 2, that assertion is strikingly absent from the sworn declarations, which say only that they freely signed the petition and "feel that [their] Constitutional rights have been violated," *see* ECF Nos. 8-1, 8-2, 8-3. Plaintiffs therefore offer no evidence that they in fact plan to vote for Dr. West, so they cannot have standing due to his absence from the ballot. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (holding that plaintiffs lack standing where they described only "'some day' intentions" rather than "concrete plans" to visit the areas affected by their claims).[43]

As for redressability, relieving Plaintiffs' asserted injury would require the active participation of JFA and its leadership. Where redress "depends on the unfettered choices made by independent actors not before the courts . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to . . . permit redressability of injury." *Lujan*, 504 U.S. at 562. An order reversing the rejection of JFA's petition

[43] Moreover, if Plaintiffs do want to vote for Dr. West, they may still write him in. *See* N.C. Gen. Stat. § 163-123. Such votes will not be tabulated, but Plaintiffs do not show any harm from that. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrels." (citations omitted)).

could help Plaintiffs only if JFA responded by exercising its authority as a recognized political party, including by certifying candidates once the order took effect. But Plaintiffs make no showing of how JFA would respond to such an order, and they cannot will into existence a political party where that organization's own leaders have not sought such relief.

II. This case belongs in state court.

To the extent this case belongs anywhere, it belongs in state court. Plaintiffs do not argue that governing North Carolina statutes are facially unconstitutional. Nor could they. The Fourth Circuit upheld an earlier version of Section 163-96 against a facial constitutional challenge. *Pisano v. Strach*, 743 F.3d 927, 930–31, 936 (4th Cir. 2014). Rather, Plaintiffs focus entirely on the State Board's application of the statutory requirements. The core of their claim is that JFA "fully complied with all applicable requirements under state law." ECF No. 9 at 5. But this Court is jurisdictionally barred from hearing that argument; Plaintiffs must take it to state court. And the Court should abstain until they do so.

A. The Court lacks jurisdiction to adjudicate Defendants' compliance with state law.

This Court lacks jurisdiction to grant relief to Plaintiffs based on a finding that the State Board violated state law. "[W]hen a plaintiff alleges that a state official has violated *state* law, . . . the entire basis for" permitting federal injunctive relief against state officials "disappears." *Pennhurst State Sch. & Hosp v. Halderman*, 465 U.S. 89, 106 (1984). "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* 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.* For that reason, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment." *Id.* at 117.

Relief on the basis of state law is just what Plaintiffs seek. Their entire argument for a federal constitutional violation is based on the premise that JFA "fully complied with all applicable requirements under state law." ECF No. 9 at 5. They argue, for example, that the Board had no interest in "denying ballot access to candidates or parties who comply with the state's ballot access requirements" and that North Carolina law may not constitutionally allow the Board "to deny certification to any party, despite the party's timely compliance with the[] requirements." *Id.* at 9. The State Board no doubt agrees: it nowhere claimed for itself the power to deny petitions that complied with state law, and indeed it certified two other petitions, rejecting only JFA's. It did so because it concluded that JFA's petition did *not* comply with North Carolina law. The Court cannot rule for Plaintiffs without rejecting that conclusion as a matter of state law, which the Court is jurisdictionally barred from doing.

Green Party is not to the contrary. 619 F. Supp. 3d at 558. There, unlike here, the State Board voted to *recognize* the political party, so there was no need to "address any request from plaintiffs to evaluate whether the Board violated state or federal law regarding its certification of the Green Party." *Id.* The sole question was whether the candidate-filing deadline could constitutionally be applied where a party was not recognized until after that deadline had passed. *Id.* That, the court explained, was entirely a question of federal law. *Id.* Here, however, Plaintiffs seek exactly what was unnecessary in *Green Party*: an evaluation of whether their petition satisfied the requirements of North Carolina law. Their claims turn entirely on that state-law question.

B. At a minimum, the Court should abstain under *Burford*.

Even if this case presented the possibility of a federal question, the Court should still abstain under the *Burford* doctrine, which demands that federal courts "decline to interfere with the . . . orders of state administrative agencies" in two circumstances:

> (1) where there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) (quotation marks omitted).

Here, while the state law question is not particularly "difficult"—the problems with JFA's petition were clear—the second criterion is met. The question of new party recognition is a matter of substantial public concern, and North Carolina has "compelling interests in authorizing the Board to properly determine the sufficiency of petitions submitted to it and to authorize the Board to investigate petition fraud." *Green Party*, 619 F. Supp. 3d at 566. North Carolina law therefore "allow[s] the Board to undertake important investigative work to satisfy its duty to determine the sufficiency of the petitions." *Id.* at 567. And if the party disagrees with the Board's determination, North Carolina law allows that party to sue in state court. N.C. Gen. Stat. § 163-22(*l*). For this Court to step in and grant federal relief on the assumption that the State Board misapplied North Carolina law would badly disrupt North Carolina law's policy of committing that decision to the State Board and the state courts.

Plaintiffs' effort to reframe their state law claim as an as-applied federal constitutional challenge does not change this. Courts have seen that gambit before, and they still abstain under *Burford* where, "[a]lthough the plaintiffs contend that their claim raises federal issues . . . a careful review of their allegations discloses a claim that is, at bottom, a collateral attack on [a state agency's] decisions." *Jamison v. Longview Power, LLC*, 493 F. Supp. 2d 786, 787 (N.D. W. Va. 2007). Thus, the Fourth Circuit held *Burford* abstention appropriate where a land developer alleged that the misconduct of county officials in rejecting his subdivision plan constituted violations of

federal due process and equal protection guarantees. *Pomponio v. Fauquier Cnty. Bd. of Sup'rs*, 21 F.3d 1319, 1325 (4th Cir. 1994), *overruled in part on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728–31 (1996). As the Fourth Circuit summarized in a later case, "the dispute was essentially about '[w]hether the zoning ordinance was incorrectly construed.'" *Johnson v. Collins Ent. Co.*, 199 F.3d 710, 721 (4th Cir. 1999) (quoting *Pomponio*, 21 F.3d at 1322). The court "thus observed that '[t]he federal claims [were] really state law claims' because local zoning laws and decisions were the bases of the federal claims." *Id.* (quoting *Pomponio*, 21 F.3d at 1326).

The same is true here. When "stripped of the cloak of their federal constitutional claims," this case is simply a dispute over how the Board performed its duty under state law. *Pomponio*, 21 F.3d at 1326. If, as the Board found, JFA's petition violated North Carolina law, then Plaintiffs are left with no argument that the rejection of the petition was unconstitutional. No one is arguing that the State Board was entitled to reject JFA's petition if it in fact complied with North Carolina law. But the determination of the petition's state-law compliance is a question for the Board and the North Carolina courts, not one this Court may or should resolve.

Here too, *Green Party* is not to the contrary. There, Judge Dever held abstention inappropriate because the State Board had voted to certify the Green Party, so there was no remaining underlying dispute of state law that was committed to the Board's resolution. 619 F. Supp. 3d at 560. The sole remaining issue in that case—whether the Court could set aside the July 1 nomination deadline—did not implicate abstention. *Id.*

III. Plaintiffs' claims fail on the merits.

Plaintiffs' claims also fail on the merits. The Board did not act unconstitutionally under the *Anderson-Burdick* doctrine, and it did not violate Plaintiffs' due process rights.

A. *Anderson-Burdick*

As a threshold matter, there is no disputing that North Carolina's requirements for new party recognition are *facially* constitutional. The Supreme Court has recognized "an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The purpose-and-intent requirement directly furthers that interest by ensuring that signatories understand what they are supporting when they sign a new-party petition. And it also makes it *easier* for new parties to get their candidates on the ballot: in return for compliance with the purpose-and-intent requirement, "new political parties" are granted "an initial signature requirement lower than the signature requirement for an unaffiliated candidate." *Buscemi*, 964 F.3d at 265. A state need not "make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986).

Recognizing that a facial challenge would go nowhere, Plaintiffs seek to make out an as-applied challenge instead. But the sort of claim Plaintiffs seek to raise—a third-party challenge to the State Board's fact-bound application of an otherwise-valid state law to deny recognition Plaintiffs' preferred party—is not cognizable under *Anderson–Burdick* at all. "When, as here, a plaintiff challenges a Board of Election decision not as stemming from a constitutionally or statutorily invalid law or regulation, but rather as contravening a law or regulation *whose validity the plaintiff does not contest*, there is no independent burden on First Amendment rights when the state provides adequate procedures by which to remedy the alleged illegality." *Rivera-Powell v. N.Y.C. Bd. of Elections*, 470 F.3d 458, 469 (2d Cir. 2006) (emphasis added). In other words, insofar

as North Carolina provides adequate state-law process to test the state-law validity of the State Board's decision, the federal courts are not open to Plaintiffs. A contrary rule "would permit any plaintiff to obtain federal court review of even the most mundane election dispute merely by adding a First Amendment claim." *Id.* Here, Plaintiffs do not argue that state-law process is not available, nor could they credibly do so. *See supra* Section II.B; N.C. Gen. Stat. § 163-22(*l*).

Even if this type of *Anderson-Burdick* claim were cognizable, Plaintiffs' claim would fail. *Anderson-Burdick* claims are assessed in two stages: a determination of the severity of the burden on constitutional rights, followed by consideration of whether that burden is justified by the state's interest in imposing it. *See Burdick*, 504 U.S. at 434. Where "a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Here, the State Board's decision rested on "reasonable, nondiscriminatory" application of longstanding state-law requirements for new parties that did not severely burden any constitutional rights. Cast in general terms, the State Board's decision about JFA suggests that a party will not be recognized when (i) its county-validated signatures barely clear the threshold for recognition; (ii) the party's own proponents admit that they do not know who procured those signatures or under what circumstances and therefore cannot certify that a sufficient number of qualified signers were informed of the general purpose and intent of the new party; (iii) much of the signature gathering was conducted by third parties with ulterior motives; (iv) the State Board's investigation suggests that thousands of signatures are likely fraudulent; and (v) the petitioning process involved such egregious irregularities that a criminal investigation was necessary. Plainly, declining to recognize a party when those five circumstances exist is "reasonable."

Moreover, Plaintiffs' insinuations of discrimination ring hollow: under North Carolina law, state officials are presumed to act out of good-faith, nondiscriminatory motives absent evidence to the contrary, and the mere fact of the State Board's decision is not evidence of bad faith. *See, e.g.*, *Bartley v. City of High Point*, 2022-NCSC-63, ¶ 21, 381 N.C. 287, 873 S.E.2d 525. Neither Plaintiffs nor the legislator *amici* show that JFA's petition was similarly situated to the We the People Party and Constitution Party petitions that the State Board certified this year. *Cf. Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (requiring a plaintiff claiming an equal protection violation in the absence of a suspect class to "allege[] that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"). And the record before the Board revealed substantially more, and different, problems with the JFA petition that did not apply to the other petitions. *Supra* Background, Section II.A.

The Board therefore acted constitutionally if its actions were justified by North Carolina's "important regulatory interests." *Burdick*, 504 U.S. at 434. Plainly, they were. As the Supreme Court has explained, "the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support" is not "open to debate." *Lubin v. Panish*, 415 U.S. 709, 715 (1974). And as Judge Dever recognized in *Green Party*, "North Carolina has compelling interests in authorizing the Board to properly determine the sufficiency of petitions submitted to it and to authorize the Board to investigate petition fraud." 619 F. Supp. 3d at 566. These interests plainly justify the Board's application of state statutes to deny recognition to a party that (i) did not show sufficient prospects of support from members of the public who were informed of the party's actual purpose and (ii) appeared to benefit from extensive third-party petition fraud.

In fact, the State Board's decision would be constitutional even if its decision imposed a severe burden, because Section 163-96's requirements are "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. Judge Dever in *Green Party* recognized that the State's interests in determining the sufficiency of petitions and investigating petition fraud are "compelling." *Green Party*, 619 F. Supp. 3d at 566. Plaintiffs' only contrary argument is their assertion that North Carolina cannot have "a compelling interest" in "denying ballot access to candidates or parties who comply with the state's ballot access requirements." ECF No. 9 at 9. But that assumes JFA complied with the state's requirements. For good reason, the Board found that it did not, and this Court cannot and should not hear Plaintiffs' contrary argument. *Supra* Section II.A.

As to narrow tailoring, nothing could be more narrowly tailored to the above state interests than Section 163-96's application to deny recognition to a party where (i) the party's own proponents admit that they do not know whether any signatures beyond the 4,000 they submitted were procured consistent with the purpose-and-intent requirement and (ii) both the County Boards' verification of signatures and the State Board's investigation revealed such marked evidence of fraud that a criminal investigation was necessary. Plaintiffs suggest, in this connection, that the State Board is claiming "unfettered discretion to deny certification to any party." ECF No. 9 at 9. But the Board made no such claim: it denied certification because of the substantial problems with JFA's petition.

B. Procedural Due Process

Plaintiffs' procedural due process claim fails on the merits as well. Plaintiffs complain that the State Board "failed to provide Plaintiffs with constitutionally sufficient due process" and "failed to notify Plaintiffs of the evidence on which it relied upon to discredit any county board-validated signature on JFA's petitions." ECF No. 9 at 11. But Plaintiffs seem to forget that they

are not JFA or JFA's leadership; they are just three of more than 30,000 purported signatories on the JFA petition. They have not asked the State Board to do anything and so cannot have suffered any deprivation of a liberty or property interest. *See, e.g.*, *Sherman v. Univ. of N.C. at Wilmington*, No. 7:07-cv-167-FL, 2008 WL 11432185, at *6 (E.D.N.C. Dec. 18, 2008) (where plaintiff was deprived of no interest, "no process was due"). They do not explain why the Board had any obligation to notify them, as mere signatories, of anything. ECF No. 9 at 11. And while Plaintiffs then go on to invoke the rights of JFA, a party seeking third-party standing must show "a close relationship" with the possessor of the right and that "there is a hindrance to the possessor's ability to protect his own interest." *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 215 (4th Cir. 2020). Plaintiffs have not made and cannot make either showing. They show no relationship with JFA beyond having placed their signatures on the petition, and there is absolutely no barrier to JFA bringing its own case to assert its own rights.

If JFA did so, however, it would lose. JFA received due process and more. The record demonstrates that JFA leadership was aware of the purpose-and-intent requirement and that a failure to comply with it was a valid basis to deny its petition. JFA had an opportunity to certify compliance with that requirement for all individuals who circulated JFA petitions and was unable to do so. The State Board gave JFA notice of the June 26 meeting, that meeting itself was a hearing at which JFA's representatives appeared and defended their petition, and the Board then held two additional publicly noticed meetings. Plaintiffs suggest that this was not "a full opportunity to defend" because "Chairman Hirsch had predetermined the outcome." ECF No. 9 at 11. But Plaintiffs just cite the Complaint to support that scurrilous allegation. And the overall sequence of events confirms that neither Chairman Hirsch nor any other board member had predetermined anything—after declining to recognize three parties at the June 26 meeting, Chairman Hirsch and

another Democratic board member both voted to *recognize* two of those other political parties at subsequent meetings based on the results of the Board's investigations. Plaintiffs also suggest that the Board did not give JFA sufficiently *timely* notice to "cure any perceived deficiencies." ECF No. 9 at 11. But in fact JFA did attempt to meet the evidence of deficiencies; the problem was that Medelius himself *admitted* that he had no way to show, among other things, compliance with the purpose-and-intent requirement. JFA had ample opportunity to address the Board's concerns—it was just unable to do so because of the serious problems with its petitioning process.

CONCLUSION

For the reasons above, amicus curiae Clear Choice Action respectfully requests that the Court decline to enter a mandatory injunction.

Dated: July 27, 2024

Respectfully submitted,

/s/ Narendra K. Ghosh
Narendra K. Ghosh, NC Bar No. 37649
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Telephone: 919.942.5200
nghosh@pathlaw.com

David R. Fox*
Christopher D. Dodge*
Samuel T. Ward-Packard*
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4490
Facsimile: (202) 968-4498
dfox@elias.law
cdodge@elias.law
swardpackard@elias.law

Counsel for Amicus Curiae Clear Choice Action

* Notice of Special Appearance Forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused the foregoing document to be filed and served on all counsel of record by operation of the CM/ECF system.

DATED: July 27, 2024

/s/ Narendra K. Ghosh
Narendra K. Ghosh, NC Bar No. 37649
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Telephone: 919.942.5200
nghosh@pathlaw.com