CASE No. 22-1830

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA GREEN PARTY, *et al.*,
Plaintiffs – Appellees,

—v.—

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

AND

DSCC, *et al.*,
Intervenor Defendants – Appellants.

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

Case No. 5:22-CV-276-D-BM

APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), Counsel for Appellants informed the parties of their intent to file this motion. Counsel for Defendants North Carolina State Board of Elections, Chair Damon Circosta, Stella Anderson, Jeff Carmon, Stacy Eggers, IV, Tommy Tucker, and Karen Brinson Bell indicated that they plan to file a response to this motion. Counsel for Appellees North Carolina Green Party, Tony Ndege, Matthew Hoh, K. Ryan Parker, Samantha Worrell, Samantha Spence, Aaron Mohammed, and Michael Trudeau indicated that they do not consent to this motion but did not indicate whether they intended to file a response.

INTRODUCTION

Just months before an election and days before ballots must be printed, the district court preliminarily enjoined North Carolina's statutory July 1 deadline for new political parties to certify their candidates for ballot access. It concluded that, as applied here, that statute unconstitutionally burdens Plaintiffs' constitutional rights. But the district court did so even though the Plaintiffs below *never alleged* that the statute at issue violated their rights. Instead, Plaintiffs—the North Carolina Green Party (NCGP), along with several of its officers, candidates, and supporters—claimed that a *different* statute impaired their constitutional rights. Specifically, their amended complaint alleges that the North Carolina State Board of Elections (NCSBE or Board) violated the constitution by failing to certify NCGP as a new political party under a different statute; it does not allege that the July 1 deadline is unconstitutional.

The district court correctly ruled that Plaintiffs' certification challenge is now moot, as NCSBE certified NCGP several weeks after it filed suit. But it nonetheless reached beyond the four corners of the complaint to conclude that Plaintiffs were likely to prevail on the merits of a claim they never actually pled—that application of the July 1 deadline to NCGP's candidates here would be unconstitutional. That was error, and the court's preliminary injunction founded upon that error must

immediately be stayed before NCSBE's imminent August 12 ballot printing deadline, at which point relief will be impossible.

Even if Plaintiffs had alleged that the July 1 deadline is unconstitutional as applied—and a review of their pleadings confirms they did not—the court still erred in finding they would likely succeed on that claim. The deadline does not impose a severe burden; this Court and its sister circuits have repeatedly upheld such deadlines and characterized them as only moderately burdensome for diligent actors. NCGP's failure to meet the deadline was due to its own lack of diligence: There is no dispute that the petitions NCGP submitted to support its certification were rife with fake signatures. NCSBE promptly informed NCGP of these fake signatures and asked for its cooperation in investigating them. But NCGP refused to cooperate with investigators until mere days before the July 1 deadline. Even today, NCSBE's investigation into fake signatures in NCGP's petitions is ongoing and remains hampered by the refusal of NCGP circulators known to have committed fraud to cooperate with that investigation. In other words, any burden imposed by the deadline here was the result of NCGP's own misconduct. The court erred in finding the law imposed a severe burden based only on the fact of NCGP's noncompliance

with it—a framework the Supreme Court has rejected for such claims. Its order granting relief on that errant and unpled basis must be stayed.[1]

BACKGROUND

I. NCGP submitted petitions plagued by "blatantly obvious" fraud and delayed complying with NCSBE's subsequent investigation.

NCSBE may recognize a new political party if it files a minimum number of valid signatures—in this case, 13,865—from registered and qualified North Carolina voters. N.C. Gen. Stat. § 163-96(a)(2); A143. Petition gatherers for aspiring parties must follow certain requirements, one of which is to "inform the signers of the general purpose and intent of the new party." N.C. Gen. Stat. § 163-96(b). After these petitions are collected, county boards do an initial check for their validity, *see id.* § 163-96(c), and then the aspiring party must submit their petitions to NCSBE, which "shall forthwith determine the sufficiency of petitions." *Id.* § 163-96(a)(2).

NCGP's petitions here were plagued with problems from the start. In October 2021, at least five county boards reported to NCSBE that NCGP had submitted old signatures that did not qualify for NCGP's latest certification effort. A165–66, ¶¶ 6-8. NCSBE's investigators wrote to NCGP's President—Plaintiff Ndege—but he

[1] Appellants promptly moved for a stay in the district court. A256. Because of the August 12 ballot-printing deadline, Appellants indicated they would need to file a similar motion with this Court no later than the morning of August 9. *Id.* The district court has not yet ruled and, given the exigency, Appellants file this motion now under Rule 8(a)(2). Appellants will apprise this Court of any developments below.

"never responded." *Id.* (noting NCSBE "[f]aced . . . lack of cooperation" from NCGP).

Subsequently, "in early May" of this year, after NCGP submitted additional signatures to county boards of election, "several [boards] alerted the NCSBE of irregularities identified during review of [NCGP's] petitions" and NCSBE "opened an investigation" into the petitions. A149.

NCSBE's investigation uncovered "blatantly obvious" fraud in NCGP's petitions. A133. As NCSBE staff summarized, "[n]umerous petition pages have obvious signs of fraud." A075. Indeed, NCGP's circulators forged signatures detectable to any layperson's eye, as this small sample shows:

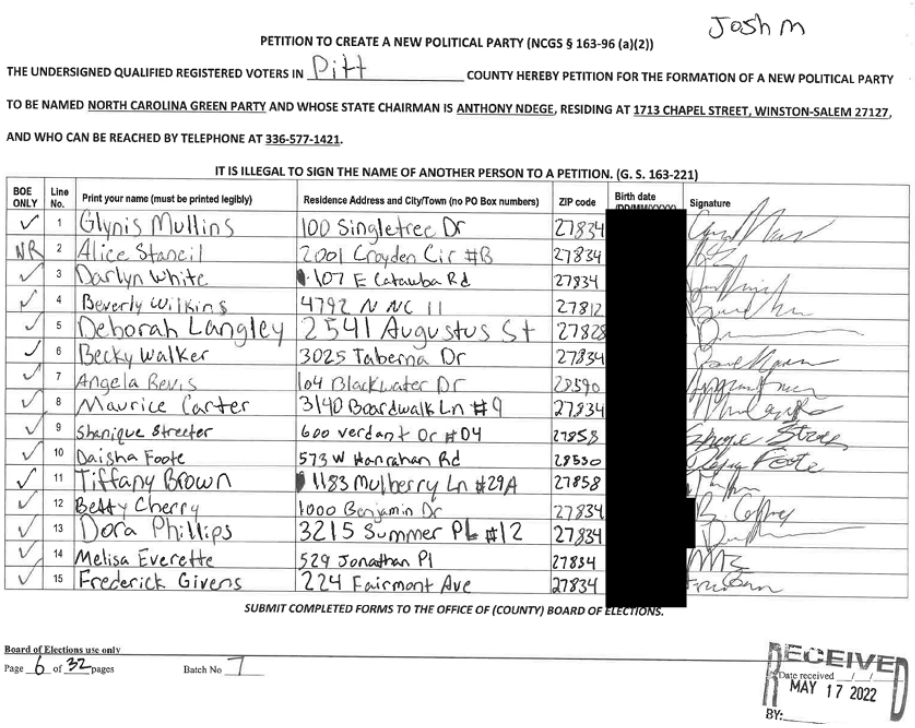
PETITION TO CREATE A NEW POLITICAL PARTY (NCGS § 163-96 (a)(2)) Josh M

THE UNDERSIGNED QUALIFIED REGISTERED VOTERS IN WAKE COUNTY HEREBY PETITION FOR THE FORMATION OF A NEW POLITICAL PARTY TO BE NAMED NORTH CAROLINA GREEN PARTY AND WHOSE STATE CHAIRMAN IS ANTHONY NDEGE, RESIDING AT 1713 CHAPEL STREET, WINSTON-SALEM 27127, AND WHO CAN BE REACHED BY TELEPHONE AT 336-577-1421.

IT IS ILLEGAL TO SIGN THE NAME OF ANOTHER PERSON TO A PETITION. (G. S. 163-221)

BOE ONLY	Line No.	Print your name (must be printed legibly)	Residence Address and City/Town (no PO Box numbers)	ZIP code	Birth date (DD/MM/YYYY)	Signature
✓	1	Corinthia Evans	2002 Manderleigh Dr	27545	[redacted]	C. Evans
	2	[redacted]	[redacted]			
✓	3	Keyonte Cherry	812 Terrastone Pl	27519		Keyonte Cherry
✓	4	Demonte Blue	1663 Plexor Ln	27545		
✓	5	Shaneeka Bell	1151 Cannonball Run #301	27545		Shaneeka Bell
✓	6	Jacob Green	2830 Manorcrest Ct #231	27609		Jacob Green
✓	7	Dondre Griffin	5980 Peacenest Dr	27610		Dondre Griffin
✓	8	Ebony Young	506 Glenbrook Dr	27610		Ebony Young
✓	9	Deasia Goodman	5324 Boxwood Forest Dr	27545		Deasia Goodman
✓	10	Summer Hardin	7837 Harps Mill Woods Run	27615		Summer Hardin
✓	11	Kerrin Kennard	2513 Shepherd Valley St	27610		Kerrin Kennard
✓	12	Lofton Woods	2301 Fox Ridge Manor Rd	27610		Lofton Woods
✓	13	Tajasia Pitts	410 Montview Way	27545		Tajasia Pitts
✓	14	Camryn Hunter	404 Little Acres Dr	27545		Camryn Hunter
✓	15	Nyjil Thomas	2253 Ballston Pl	27545		Nyjil Thomas

SUBMIT COMPLETED FORMS TO THE OFFICE OF (COUNTY) BOARD OF ELECTIONS.



Josh M

PETITION TO CREATE A NEW POLITICAL PARTY (NCGS § 163-96 (a)(2))

THE UNDERSIGNED QUALIFIED REGISTERED VOTERS IN Pitt COUNTY HEREBY PETITION FOR THE FORMATION OF A NEW POLITICAL PARTY TO BE NAMED NORTH CAROLINA GREEN PARTY AND WHOSE STATE CHAIRMAN IS ANTHONY NDEGE, RESIDING AT 1713 CHAPEL STREET, WINSTON-SALEM 27127, AND WHO CAN BE REACHED BY TELEPHONE AT 336-577-1421.

IT IS ILLEGAL TO SIGN THE NAME OF ANOTHER PERSON TO A PETITION. (G. S. 163-221)

BOE ONLY	Line No.	Print your name (must be printed legibly)	Residence Address and City/Town (no PO Box numbers)	ZIP code	Birth date (DD/MM/YYYY)	Signature
✓	1	Glynis Mullins	100 Singletree Dr	27834	[redacted]	
NR	2	Alice Stancil	2001 Crayden Cir #B	27834		
✓	3	Darlyn White	1107 E Catawba Rd	27834		
✓	4	Beverly Wilkins	4792 N NC 11	27812		
✓	5	Deborah Langley	2541 Augustus St	27828		
✓	6	Becky Walker	3025 Taberna Dr	27834		
✓	7	Angela Revis	104 Blackwater Dr	27590		
✓	8	Maurice Carter	3140 Boardwalk Ln #9	27834		
✓	9	Shanique Streeter	600 verdant Dr #104	27858		
✓	10	Daisha Foote	573 W Hanrahan Rd	28530		
✓	11	Tiffany Brown	1183 Mulberry Ln #29A	27858		
✓	12	Betty Cherry	1000 Benjamin Dr	27834		
✓	13	Dora Phillips	3215 Summer Pl #12	27834		
✓	14	Melisa Everette	529 Jonathan Pl	27834		
✓	15	Frederick Givens	224 Fairmont Ave	27834		

SUBMIT COMPLETED FORMS TO THE OFFICE OF (COUNTY) BOARD OF ELECTIONS.

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NCSBE staff learned that, in the weeks before its petitions were due, NCGP hired outside vendors and paid circulators, at least some of whom were paid per signature. *See* A054–55. NCSBE's investigators uncovered two paid circulators of particular concern—on information and belief LaCourtney "A.C.E." Griffin and Joshua Mullins—who committed fraud on a wide scale, and who were responsible for submitting a large volume of signatures. A055–56.

NCSBE's investigation was hampered by the refusal of NCGP and its agents to cooperate. In early May 2022, after multiple county boards informed NCSBE of obviously fake signatures in NCGP's petitions, NCSBE again reached out to Plaintiff Ndege to discuss the matter, but he disclaimed responsibility for the petitions and refused to engage with NCSBE. A176–77 ¶¶ 4-7. As NCSBE

continued to receive complaints from other county boards about NCGP's petitions, it began a criminal investigation. A177–78 ¶¶ 8-14. NCGP's president remained unresponsive to requests to meet with NCSBE investigators. A178–79 ¶¶ 15-17. The two circulators suspected of fraud, along with one of NCGP's vendors, refused to respond to NCSBE's subpoenas during this time. A057.

NCGP later acknowledged it contracted with these individuals and, after the Board's preliminary findings, did not dispute the existence of some fraud in its petition sheets. A028–29 ¶ 60; A098; A130–31.[2] But only on June 22—over a month after NCSBE first contacted NCGP and days before NCSBE was scheduled to first meet to consider the sufficiency of NCGP's signatures—did NCGP finally agree to speak with NCSBE investigators and provide limited information about contractors hired by NCGP who were known to have engaged in widescale fraud. A028–29 ¶ 60; A179–180 ¶¶ 18-20.

Soon after that, Appellants became aware of additional problems with NCGP's petition sheets, namely that many signatories—including Appellants' members and supporters—were misled into signing. A054; A086 ¶¶ 3-4, 6. For example, one Democratic Party member believed he was signing a petition to legalize marijuana, only learning later that his signature helped to place a rival party

[2] *See* Shadowproof, *Democrats Unfairly Block Disabled Marine Veteran and US Senate Candidate from Ballot*, Youtube, (June 30, 2022), https://www.youtube.com/watch?v=vQ20m3BKf-k&t=1s at 2:15; 3:05 (A258 n.1).

on the ballot. A086 ¶¶ 3-4, 6. This deception was consistent with instructions promulgated by NCGP, which advised its circulators to avoid discussing the party's ideology or leadership, contrary to the requirements of N.C. Gen. Stat. § 163-96(b). A163. NCSBE staff also reported that they had spoken with voters who *had* signed the petition, but who were never informed about the purpose or intent of the petition. *See* A054, A079.

The Board first met to consider the sufficiency of NCGP's signatures at a previously scheduled meeting on June 30. NCSBE staff recommended the Board "table consideration [of NCGP recognition] to a future date" because "the number of "known questionable signatures exceeds the [] threshold" needed for certification, and determining the sufficiency of the petitions would "[r]equire[] further investigation, including subject interviews." A080.

Consistent with staff's recommendation, Chairman Circosta explained he would not be comfortable certifying the NCGP "today" because "[t]here's enough questions, including a criminal investigation, into the signature petition gathering process" and thus in "good conscience" he could not vote to certify that day in view of the statutory requirement "to verify these signatures." June 30 Hearing at 1:30:54-

31:16, 1:36:20-40.[3] Stacy "Four" Eggers IV, a Republican board member, stated he had a "significant number of questions as to whether the [signature] threshold was actually met" and "those questions at this point remain unanswered." *Id.* at 1:39:20; *see also id.* at 1:40:10 (expressing "concerns as to whether, are these signatures all properly valid"). He nonetheless "reluctantly" voted in favor of certifying NCGP due to the consequences of delaying certification. *Id.* at 1:40:30.

The Board voted 3-2 *not* to certify NCGP on June 30 due to the open investigation into its fraudulent petitions. As a result, NCGP was not a certified party on July 1, the date by which NCGP needed to be certified to have its candidates placed on the November 2022 general election ballot. *See* N.C. Gen. Stat. § 163-98.

II. NCGP files lawsuit seeking recognition.

Two weeks after the Board declined to certify NCGP as a new political party, NCGP sued NCSBE, its Board members, and one staff member.[4] Its amended complaint asserted two claims: (1) an *Anderson-Burdick*-style claim challenging "NCSBE's failure to certify NCGP as a new political party"; and (2) a Fourteenth Amendment claim that "NCSBE's failure to certify NCGP as a new political party"

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[3] Video of NCSBE's June 30 meeting is available here: https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-06-30/State%20Board%20of%20Elections%20Meeting-20220630%201300-1.mp4. ("June 30 Hearing") (A029).

[4] DSCC and the North Carolina Democratic Party (NCDP) promptly moved to intervene. The district court granted that motion. A216. Given the posture of this appeal, this brief refers to DSCC and NCDP as "Appellants."

violated due process. A036 ¶¶ 86-88, 91. It sought an order declaring and requiring that NCGP be certified as a political party in North Carolina. A014 ¶ 2; A034 ¶¶ 79-81; A036 ¶¶ 86-88, 91-92. It also requested an injunction barring "NCSBE from enforcing the July 1 filing deadline under § 163-98." A037 ¶ 93(B). Nowhere, however, did NCGP's amended complaint allege that the July 1 deadline itself violated its constitutional rights, or that it imposed any unreasonable burden as applied to them. Neither of its claims even reference § 163-98. A036 ¶¶ 84-92.

NCGP moved for preliminary relief on July 21. A100–01. It continued to take issue with the Board's decision not to certify NCGP at its June 30 meeting, and it asked for injunctive relief compelling the Board to certify NCGP as a political party despite the ongoing investigation into "blatantly obvious" fraud in its petitions. NCGP's motion pivoted substantially from its amended complaint; whereas its pleading exclusively alleges claims concerning NCSBE's decision not to recognize NCGP under § 163-96(a)(2), A036 ¶¶ 86-88, 91-92, its motion expanded NCGP's grievances to include NCSBE's application of *both* N.C. Gen. Stat. § 163-96(a)(2) and § 163-98, which NCGP deemed the "Challenged Provisions." A113. The party's briefing nonetheless, like the pleading, focused on the burdens imposed by NCSBE's choice not to certify NCGP under § 163-96(a)(2), and only passingly discussed the July 1 deadline in § 163-98. Nowhere did NCGP explain why the deadline itself burdened NCGP's constitutional rights, particularly given that NCSBE's inability to

certify by that date was due to NCGP's failure to cooperate and its submission of fraudulent petition sheets requiring *criminal* investigation.

Both NCSBE and Appellants opposed NCGP's request for preliminary relief, explaining its claims were unripe; that the court had a duty to abstain from exercising jurisdiction; and that NCGP had shown little likelihood of prevailing on the merits. Both explained that NCSBE did not violate NCGP's constitutional rights by declining to certify it at NCSBE's June 30 meeting in the face of an ongoing investigation into "an organized effort to falsify petition signatures." A054.

III. NCSBE reverses course and certifies NCGP on August 1.

On August 1, NCSBE met again to consider NCGP's certification. NCSBE staff explained there were still many questions about the scope of fraud in NCGP's petitions. It still "remains unknown" whose petition "sheets are not identifiable"; "[w]hether fraudulent signatures were submitted by any other contractors or petitioners paid by the Green Party," and "[w]hether the two collectors [Griffin and Mullins] submitted additional petition sheets that did not contain their name or initials." A197. The matter remains under criminal investigation. A198. Nonetheless, under pressure from NCGP's lawsuit, NCSBE certified NCGP. A184.

Shortly thereafter, the district court invited NCGP and NCSBE to submit proposed consent orders that would allow NCGP to place candidates on the November 2022 ballot, *see* A188, even though NCGP missed the July 1 deadline

and had demonstrated no violation of its rights. In its response to the court's order, NCSBE maintained that the court lacked jurisdiction, but nonetheless submitted a proposed order that would enjoin the July 1 deadline. A210; A214. NCSBE nowhere conceded that application of the deadline itself was a constitutional violation, or that NCGP had suffered *any* constitutional violation. A209–14. NCGP submitted a competing proposed order, which likewise failed to ask the district court to find that any constitutional violation occurred. A202–08.

On August 5, the district court entered an order that, as relevant, preliminarily enjoined NCSBE "from enforcing the July 1 filing deadline in N.C. Gen. Stat. § 163-98 as applied to the Green Party and its candidates." A246. The court noted NCGP sought such relief in its motion, but nowhere explained where NCGP actually pled a claim relating to the July 1 deadline. The court *sua sponte* found that application of the deadline to NCGP constituted a "severe burden"—an allegation never made in the complaint—and that the deadline was not narrowly drawn in view of the one-month-plus gap between the date and the state's ballot printing deadline—an allegation likewise nowhere in the pleadings. A240–42. Notably, the court found the NCGP's demand for recognition under § 163-96(a)(2)—the actual basis of its claims—to be moot.[5] A225–26.

[5] The court instructed that "absent a contrary order from a federal appellate court," NCSBE must follow its order, regardless of state proceedings initiated by NCDP.

LEGAL STANDARD

To merit a stay pending appeal, Appellants must show that they are likely to succeed on the merits, they will be irreparably injured absent a stay, the equitable balance favors a stay, and a stay benefits the public. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

ARGUMENT

I. Appellants are likely to succeed on the merits.

A. Plaintiffs' claims, as pled, are moot and the district court erred in finding a constitutional violation not alleged in the complaint.

NCGP alleged two claims, both asserting that NCSBE unconstitutionally declined to certify it as a political party under § 163-96(a)(2). A036. But NCSBE now *has* certified NCGP. The district court properly "denie[d] as moot plaintiffs' request for a preliminary injunction ordering the Board to certify the Green Party as a new North Carolina political party." A226. That should have ended the litigation because NCGP's asserted claims exclusively concerned the appropriateness of the Board's action under § 163-96(a)(2). A036.

A245. NCDP's lawsuit, filed shortly after NCSBE certified NCGP, challenges whether the Board violated its duty to "determine the sufficiency" of NCGP's petitions under N§ 163-96(a)(2). It poses a separate issue from whether the deadline in § 163-98 unconstitutionally burdens NCGP, the only violation found by the district court. The court's order elides this distinction and, in essence, seeks to strip the state court of jurisdiction to consider a state law dispute over the duty imposed on NCSBE by § 163-96(a)(2). Should NCDP prevail in its suit, the premise of the district court's injunction—that NCGP is a certified political party—will be removed.

But the district court went further. Reaching beyond the four corners of the complaint, the court found NCGP was likely to prevail on the merits of a claim it never actually asserted—that the July 1 deadline, as applied here, is unconstitutional. A242. That was error—a "court's equitable power lies only over the merits of the case or controversy before it. When a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015).

The Supreme Court recently reaffirmed the bedrock principle that "in both civil and criminal cases, in the first instance and on appeal, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (cleaned up). In the context of a request for a preliminary injunction, that means "there is no substantial likelihood that [a] Plaintiff will prevail on the merits of assertions that he has not pled." *Marable v. Dep't of Com.*, No. 3:18-CV-3291-N-BN, 2020 WL 10964604, at *1 (N.D. Tex. Apr. 6, 2020). Here, "[t]he injunction is therefore overly broad because it reaches beyond the scope of the complaint and enjoins government regulations that were explicitly never challenged or litigated." *Church of Holy Light of Queen v. Holder*, 443 F. App'x 302, 303 (9th Cir. 2011); *see also Santiago v. S. Health Partners*, No. 1:15CV589, 2015 WL 8179617, at *1

(M.D.N.C. Dec. 7, 2015) (same); *City of Hurricane v. Disposal Serv. Inc.*, No. CIV.A. 3:14-15850, 2014 WL 7005888, at *5 (S.D.W. Va. Dec. 10, 2014).

As this Court has explained, "a preliminary injunction may never issue to prevent an injury or harm which not even the moving party contends was caused by the wrong claimed in the underlying action." *Omega World Travel, Inc. v. Trans World Airlines*, 111 F.3d 14, 16 (4th Cir. 1997). Thus, the "party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." *Id.* But Plaintiffs have never done so here. The gravamen of their amended complaint is that the Board violated NCGP's rights by refusing to recognize it on June 30. A036. But the district court never reached that question because it is moot. And both NCSBE and Appellants explained below why the Board acted within its discretion in denying recognition to NCGP at that time—NCSBE was actively investigating the scope of criminal fraud in NCGP's petitions.

Nowhere has NCGP separately alleged that it would be a violation of its constitutional rights for NCSBE to apply the July 1 candidate-naming deadline even if it certified the party *after* that date. Nor is any such claim plausible—any prejudice to NCGP was self-inflicted. Even though NCSBE later recognized NCGP, it can hardly be faulted for not doing so on June 30 given the scope of the fraud at issue and the refusal of NCGP and its agents to cooperate. NCGP has effectively

sandbagged NCSBE by submitting fraudulent petition signatures, declining to cooperate with NCSBE investigators until days before the deadline, and then seeking relief from a deadline it does not actually allege to be unconstitutional.

The amended complaint only briefly discusses the July 1 deadline as a matter of fact, A020–22 ¶¶ 24, 29, 31-34; A029–31 ¶¶ 64, 69, and while it asks for an injunction barring NCSBE from enforcing the "July 1 filing deadline under § 163-98," A037 ¶ 93(B), it *nowhere* alleges that the deadline itself violated NCGP's constitutional rights or imposed any unreasonable burden, and neither of NCGP's claims even references § 163-98. A036. Nor were these points raised clearly in NCGP's preliminary injunction motion—which is in any event not a proper vehicle to amend Plaintiffs' claims *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998). NCGP argued generally that the "Challenged Provisions" were not narrowly tailored, but it nowhere suggested—as the court subsequently found—that North Carolina law is not narrowly tailored because it gives NCSBE roughly a month to prepare ballots after the July 1 deadline. NCGP's proposed order similarly *nowhere* proposed that the district court find, as it subsequently did, that application of the July 1 deadline violated NCGP's constitutional rights, even where the Board was reasonable in waiting to certify NCGP until it completed more of its investigation. *See* A202–03.

Despite this lack of pleading or argumentation, the court found the July 1 deadline "imposes a severe burden on the Green Party's right to have candidates appear on the November general election ballot," A240, and that it "is not narrowly tailored" as applied here. A241. The court's order therefore violates the broader jurisdictional rule that any "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

Finally, NCSBE's willingness to set aside the deadline through a proposed consent order is irrelevant. While parties may "settle their litigation with consent decrees, they cannot agree to 'disregard valid state laws.'" *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 268 (8th Cir. 2011) (quoting *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995)). The Court may therefore enter the consent judgment only if doing so "is *necessary* to rectify a *violation of federal law*." *Id.* (quoting *Perkins*, 643 F.3d at 216). The only violation of federal law found by the court was never pled by NCGP, and cannot serve as a basis for the court's injunction.

B. The district court erred in concluding the July 1 deadline, as applied here, is unconstitutional.

Even if NCGP had alleged that the July 1 deadline violates its rights as applied, it failed to show any likelihood of success on the merits of such a claim. The district court found that the deadline operated as a severe burden on NCGP's First Amendment rights. A240. That conclusion is impossible to square with *Pisano v.*

Strach, which held that a related deadline—the May 17 deadline in § 163-96(c) for first submitting new-party signatures to county boards—imposed only a modest burden. *See* 743 F.3d 927, 935-36 (4th Cir. 2014). This Court explained that deadline provided "ample time and opportunity to collect the reasonable number of required signatures" under § 163-96(a)(2). *Id.* at 936. Indeed, this Court noted that many sister circuits have likewise "found that such schemes do not impose severe burdens." *Id.* at 935 (collecting cases); *see also Wood v. Meadows*, 207 F.3d 708, 714 (4th Cir. 2000). The July 1 deadline likewise provides "ample time and opportunity" for compliance. NCGP's inability to achieve certification by July 1 was self-inflicted due to "irregularities identified during review of [NCGP's] petitions," the "blatantly obvious" fraud found as a result, and the party's own delay in cooperating with NCSBE's investigation.

In view of these problems with NCGP's petitions, the district court *never* found, or even suggested, the Board acted unreasonably in delaying recognition of NCGP at its June 30 meeting. NCGP's inability to present untainted petition sheets does not somehow render the July 1 deadline burdensome. As the Sixth Circuit explained in the context of a similar Ohio deadline, the "filing deadline for independent candidates is not so early that a diligent candidate cannot meet the requirement." *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005); *see also Swanson v. Worley*, 490 F.3d 894, 909 (11th Cir. 2007). The same is true here.

Despite this extensive case law finding run-of-the-mill filing deadlines like § 163-98 to impose only modest burdens, the court found a severe burden here. It offered little reasoning to support that conclusion, pointing only to the fact that NCGP could not comply with the deadline given that NCSBE only certified them on August 1. A240. But NCGP's non-compliance does not mean that the law imposes a severe burden. "If the burden imposed by a challenged law were measured by the consequence of noncompliance, then every voting prerequisite would impose the same burden." *Democratic Party of Va. v. Brink*, No. 3:21-CV-756-HEH, 2022 WL 1159701, at *11 (E.D. Va. Apr. 19, 2022) (quoting *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1188 (9th Cir. 2021)). Indeed, the Supreme Court has "rejected the idea" that "*failure* to follow a regulation could be said to disenfranchise [a] voter." *Id.* (citing *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973)). In *Rosario*, the Court rejected a challenge to a law requiring voters to enroll in a party at least 30 days before the general election. It rejected the plaintiffs' characterization of the law as disenfranchising because "the statute merely imposed a time deadline on their enrollment." 410 U.S. at 757. The same is true here.

It does not change matters that NCSBE did not vote to certify NCGP until August 1. As explained, the district court never found the Board acted improperly in waiting to certify until that time, nor could it have. It acknowledged that "[g]iven evidence of alleged fraud," the Board was required to "open[] an investigation into

the sufficiency of the Green Party's petitions." A240. And the court simply ignored undisputed evidence showing that NCGP's delayed certification was a problem of its own making. For example, NCGP ignored NCSBE's initial request to discuss outdated signature sheets it submitted. A165 ¶¶ 6-7. When NCSBE's investigators first reached out to NCGP to discuss the fake signatures in its petitions on May 10, the party refused to meet with investigators until June 22, mere days before the Board met to consider the sufficiency of NCGP's petitions. A176–79 ¶¶ 4-7, 12-19. NCSBE did not receive contact information for circulators known to have engaged in fraud until the same time. A179 ¶ 19. The July 1 deadline was hardly unreasonable in such circumstances. The district court's conclusion that, *post hoc*, the deadline imposes a severe burden simply ignores that NCGP failed to act as "a diligent independent or minor party candidate" in "meet[ing] the filing deadline." *Swanson*, 490 F.3d at 909.

North Carolina's interest in orderly election administration more than justifies the modest burden imposed by the July 1 deadline. The district court acknowledged the state's *compelling* interest here, A240–41, and this Court has explained that "states have an interest 'in ensuring orderly, fair, and efficient procedures for the election of public officials.'" *Pisano*, 743 F.3d at 937 (quoting *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 759 (4th Cir. 2010)). "This interest necessarily requires the imposition of some cutoff period "to verify the validity of

signatures on the petitions, to print the ballots, and, if necessary, to litigate any challenges." *Id.* (citing *Am. Party of Tex. v. White*, 415 U.S. 767, 787, n.18 (1974)); *see also Lawrence*, 430 F.3d at 375 (similar).

Despite recognizing this compelling interest, the district court found the deadline "is likely not narrowly drawn" because of the gap in time between the deadline and when NCSBE finalizes ballots. But the district court also failed to cite any authority for its conclusion that North Carolina must set its filing deadline as close as practicable to the ballot printing date. That conclusion flies in the face of this Court's earlier determination that Virginia's June ballot access deadline—presumably even further ahead of the ballot printing deadline—passed muster, *see Wood*, 207 F.3d at 711, along with numerous decisions upholding even earlier filing deadlines. *E.g.*, *Lawrence*, 430 F.3d at 373 (March deadline); *Swanson*, 490 F.3d at 906 (June); *Rainbow Coal. of Okla. v. Okla. State Election Bd.*, 844 F.2d 740, 747 (10th Cir. 1988) (May). The district court had no basis to erase North Carolina's eminently reasonable July 1 statutory deadline for ballot access.

II. Because of the approaching ballot printing deadline, Appellants will be irreparably harmed absent a stay from this Court.

NCSBE has indicated it must finalize ballots for the November election on August 12. A089. As it stands, the agency has been ordered to place NCGP's candidates on the ballot, notwithstanding their failure to comply with § 163-98, their previous non-compliance with the Board's ongoing investigation into the blatant

fraud in NCGP's petitions, and ongoing state court litigation addressing whether NCSBE should have certified NCGP under state law.

Granting NCGP ballot access will irreparably harm Appellants by forcing them to compete with a party that did not comply with the statutory deadline for naming candidates and that is not eligible for ballot access, requiring Appellants to expend party resources they would otherwise use for other purposes.[6] Courts have recognized that political parties are harmed when forced to compete against "an allegedly ineligible rival on the ballot" because "doing so hurts the candidate's or party's own chances of prevailing in the election." *Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008) (collecting cases).

Given the state's need to finalize its ballots, this harm cannot be ameliorated by a favorable ruling for Intervenors at a later date, which would likely come well after the State distributes ballots to overseas voters. Even if Appellants "are ultimately successful on the merits, there is no guarantee that this case will be resolved quickly enough to ensure that any relief the Court orders could be implemented in time for this fall's general election, particularly in light of the required timeline for preparing ballots." *Pavek v. Simon*, 467 F. Supp. 3d 718, 754 (D. Minn. 2020); *see also Giroux v. LaRose*, No. 1:22-CV-309, 2022 WL 2128017,

[6] The district court recognized that these harms likely rose to the level of an Article III injury-in-fact. A233.

at *15 (S.D. Ohio June 14, 2022) (noting it would be "exceptionally difficult—basically impossible" to provide relief after ballots are printed); *Barr v. Galvin*, 584 F. Supp. 2d 316, 321 (D. Mass. 2008) (similar).

III. The balance of the equities and public interest weigh in favor of a stay.

The state has a compelling interest in regulating its elections in an orderly manner, and the July 1 deadline reasonably serves that interest. In contrast, NCGP has never pled that the deadline is unconstitutional, even as applied here. Even if they levied such a claim, they could not do so with clean hands: the party repeatedly ignored NSCBE's requests to discuss fake signatures in the petitions and only furnished relevant information days ahead of the deadline, despite being contacted close to two months in advance. *Cap. One Fin. Corp. v. Sykes*, No. 3:20CV763, 2021 WL 2903241, at *15 (E.D. Va. July 9, 2021) (weighing equities against party whose own acts imposed hardship) (citing *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002)).

Similarly, the public interest is harmed whenever a court enjoins the operation of laws enacted by the people's representatives. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *5 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring). That is particularly true here in view of NCGP's failure to even plead that the law set aside is unconstitutional. Given that lack of challenge, "the public

interest is well served by compliance with a valid State statute." *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1036 (4th Cir. 1980).

CONCLUSION

For the foregoing reasons, Appellants respectfully ask that this Court stay the preliminary injunction below.

DATED: August 9, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), 32(a)(5), and 32(g)(1), I certify that this motion has 5,182 words and was prepared using Times New Roman, 14-point font.

/s/ Narendra K. Ghosh

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of August, 2022, I caused this *Emergency Motion for Stay Pending Appeal* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel of record.

I also hereby certify that on this 9th day of August, 2022, I caused this *Emergency Motion for Stay Pending Appeal* to be emailed to counsel for Plaintiff-Appellees and Defendants, addressed as follows:

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