STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV023631-910
NORTH CAROLINA DEMOCRATIC PARTY, Plaintiff, v. NORTH CAROLINA STATE BOARD OF ELECTIONS *et al.*, Defendants.	**BRIEF IN SUPPORT OF EMERGENCY MOTION FOR PRELIMINARY INJUNCTION OR EXPEDITED HEARING ON THE MERITS** *Relief Requested by August 16, 2024*

Plaintiff North Carolina Democratic Party ("NCDP") serves this brief in support of its Emergency Motion for Preliminary Injunction or Expedited Hearing on the Merits. The NCDP seeks an injunction prohibiting the North Carolina State Board of Elections and its members and executive director in their official capacities (collectively, the "Board") from printing any ballot for the 2024 general election that includes any candidate of the We The People Party of North Carolina ("WTP Party").

INTRODUCTION

North Carolina law establishes different ballot-access requirements for unaffiliated candidates and political parties. Each is governed by a different section of the chapter that includes the State's election statutes, Chapter 163. *See* N.C. Gen. Stat. § 163-122 (unaffiliated candidates); *id.* § 163-96 (new political parties). One difference between the two statutes is the number of signatures required to get on the ballot: unaffiliated candidates seeking statewide office must gather signatures from 1.5% of the voters in the last gubernatorial election, but new parties need only collect from 0.25%. While the signature threshold is lower for a party, the statute imposes "additional burdens" on new political parties "to attain and retain such recognition," including the

duty to "'inform the signers of the general purpose and intent of the new party.'" *Buscemi v. Bell*, 964 F.3d 252, 265 (4th Cir. 2020) (quoting N.C. Gen. Stat. § 163-96(b)).

There is good reason for these distinctions. As the Fourth Circuit and U.S. Supreme Court have recognized, the "attempt to form a new political party and the act of seeking office as an unaffiliated candidate 'are entirely different' endeavors.'" *Id*. (quoting *Storer v. Brown*, 415 U.S. 724, 745 (1974)). To compare the two is "to compare apples and oranges" because a "new political party 'contemplates a statewide, ongoing organization with distinctive political character,' whereas an unaffiliated candidate merely seeks election for one office." *Id.*

The Board's recognition of the WTP Party conflates the two statutory requirements. Robert F. Kennedy Jr. is a self-declared independent candidate for president. In November 2023, Kennedy registered in North Carolina as an unaffiliated presidential candidate and thus had to gather signatures from 83,188 registered voters. But in January 2024, the Kennedy campaign decided that it would be easier to form a new political party—the WTP Party—with the "sole purpose" of placing Kennedy's name on the ballot. Through this maneuver, the Kennedy campaign purported to cut its signature requirement by five-sixths—from 83,188 to 13,865.

On July 16, 2024, Board voted 4-1 to recognize the WTP Party. Board Chair Hirsch found that the WTP Party was a "subterfuge"—a candidate campaign committee masquerading as a political party—but voted "reluctantly" in favor of recognition because "it is such a close call that ultimately a court would have to decide" whether North Carolina law permits that maneuver. Hirsch explained that he was "not sure the Board should be the one that is standing in the way if someone wants to challenge that in court" and opined that the challenger would "have a good case."

The NCDP filed this lawsuit so that a court can decide that important, recurring question. The Board's decision here collapses the distinction between candidates and parties, permitting candidates and their campaign committees such as the Kennedy campaign to circumvent both North Carolina's ballot-access rules and North Carolina's campaign finance rules.

If the Board's decision stands, the implications are clear: future independent candidates will stop complying with the ballot-access and campaign finance requirements the General Assembly enacted for unaffiliated candidates. Future candidates will simply follow the easier path to ballot access—and to significantly more permissive campaign finance rules—by creating a single-candidate, single-election "political party." If the Kennedy Campaign succeeds in its efforts, North Carolina can expect a flood of candidates masquerading as political parties to follow this strategy in 2026 and beyond.

The Board's ruling needs to be corrected—and quickly. North Carolina is the first state in the nation to send out absentee ballots. The deadline for making these ballots available is fast approaching on September 6, 2024. And, according to the Board, ballots need to be printed by "mid-August to ensure any names can be added to the ballot, and ballots proofed, printed, and distributed."

Given the extreme urgency of this matter, the NCDP seeks either a preliminary injunction prohibiting the NCDP from printing any ballot for the 2024 general election that includes any candidate of the WTP Party, or an emergency hearing on the merits, so that the Court may promptly consider the legal question presented here, rule on North Carolina law, and reverse the erroneous decision of the Board. If the Court does not immediately issue an injunction or correct the Board's misunderstanding of the law, it will very soon be too late.

BACKGROUND

A. Kennedy Seeks the Democratic Nomination for President

In April 2023, Kennedy "declare[d] that he would challenge President Biden for the Democratic nomination in a long-shot bid for the White House." Compl. ¶ 38. Kennedy filed a Statement of Candidacy that month with the Federal Election Commission listing his party affiliation as "Democratic Party." Compl. ¶ 39; Robert F Kennedy, FEC Form 2: Statement of Candidacy (Apr. 5, 2023), archived at https://perma.cc/T3BZ-RGT5.

B. Kennedy Registers as an Unaffiliated Candidate for President

In October 2023, Kennedy abandoned his effort to win the Democratic nomination and "declared [him]self an independent candidate for President of the United States of America." Compl. ¶ 40; Robert F. Kennedy, Jr., *Today, I Declared Myself an Independent Candidate for President*, Substack (Oct. 9, 2023), archived at https://perma.cc/L542-VGT4. In a speech across from Independence Hall, Kennedy "declare[d] [his] own independence. Independence from the Democratic Party and independence from all parties." *Id*.

On November 1, 2023, Kennedy registered in North Carolina to run for President as an unaffiliated candidate. *See* Compl. ¶ 41; Robert Kennedy for President – UNA (filed Nov. 1, 2023), https://vt.ncsbe.gov/PetLkup/ (click "Petition" and choose "ROBERT KENNEDY FOR PRESIDENT – UNA" from the dropdown). The Kennedy campaign thus had to gather signatures from 1.5% of the voters in the last gubernatorial election. *See id*.

C. The Kennedy Campaign Seeks to Form the WTP Party to Secure Ballot Access for Kennedy

In January 2024, the Kennedy campaign announced that it was forming the WTP Party as "the most direct path to ballot access." Compl. ¶ 42; Press Release, Team Kennedy, Kennedy Campaign Forms 'We the People' Political Parties in Six States (Jan. 16, 2024), archived at

https://web.archive.org/web/20240116233827/https://www.kennedy24.com/kennedy_campaign_we_the_people_political_parties.

The Kennedy campaign expressed its view that North Carolina "offer[s] independent presidential candidates two methods of achieving ballot access — as an individual candidate or as the nominee of a new party" and explained that it had chosen to create a new party because it "requires fewer signatures." *Id.* The result would be the same either way: "Once a new party achieves ballot access in this way, they can nominate the candidate of their choosing, in this case, Robert F. Kennedy, Jr." *Id.*

On January 10, 2024, Kennedy campaign staff member Ceara Foley registered the WTP Party with the Board as a new party seeking recognition under N.C. Gen. Stat. § 163-96. Compl. ¶ 44. The sole purpose of the WTP Party was to secure ballot access for Kennedy. *Id.*

The WTP Party provided instructions to petitioners explaining that the purpose of the WTP Party was to place Kennedy's name on the North Carolina ballot:

INSTRUCTIONS FOR PETITIONERS

NEW NORTH CAROLINA "WE THE PEOPLE" PARTY PETITION

Purpose: To start a new party "We The People" in North Carolina.
This will allow us to place Robert F. Kennedy, Jr.'s name on the NC ballot for the 2024 Presidential election.
To do so, we need to collect 21,000 signatures by May 1st or 1435 a week collectively across NC.

WTP Party, Instructions for Petitioners at 3 (Compl. Ex. A) (produced by WTP Party to the Board).

The WTP Party also provided sample scripts to use when collecting signatures. The first sample script requests signatures to get Kennedy on the ballot as an independent presidential candidate:

Sample Signature Collecting Scripts:

#1 " Excuse me miss/sir/folks, sorry to bother/interrupt. Are you registered to vote in North Carolina? We are creating a new independent 3rd party called We The People to put Robert F Kennedy Jr on the ballot in November. He is running as an independent for the office of president. Are you familiar with him? We require about 13,700 signatures in NC to get him on the ballot. Would you be willing to sign to allow us a real choice this November?

Id. at 1.

The WTP Party's instructions for petition circulators are just as clear. These instructions urge the circulator to tell the voter that the "sole purpose of this petition" is "to place the name of Robert F. Kennedy Jr. on the 2024 general election ballot":

5. You may NOT misrepresent the purpose of this petition.

The sole purpose of this petition to qualify a new political party in North Carolina – "We The People" Party – to place the name of Robert F. Kennedy Jr. on the 2024 general election ballot as a candidate for the office of President of the United States. You cannot collect a signature by telling a voter the petition is to "Save America" or "Help the Poor."

BE HONEST WITH THE VOTERS.

WTP Party, Circulator Instructions (Compl. Ex. B) (produced by WTP Party to the Board).

At the same time, the Kennedy campaign—the entity paying WTP Party Chair Foley's salary[1]—was announcing on its website that the WTP Party was "the new party that RFK Jr. is using solely for the purpose of satisfying ballot access regulations":

NORTH CAROLINA: ON THE BALLOT

Total Signatures Required	Start Date	End Date	
13,757	Anytime	05/31/2024	STATE PAGE

North Carolina is collecting signatures for party ballot access. **We the People** - the new party that RFK Jr. is using solely for the purpose of satisfying ballot access regulations. **Click here to register** or **volunteer** to help get Bobby on the ballot in North Carolina or get in touch at **northcarolina@teamkennedy.com**

[1] *See* June 26, 2024 Board Meeting Tr. at 114:5-10 (Compl. Ex. D) ("MS. MILLEN: And so, just, if I may ask, when you say you're on staff with the Kennedy campaign, who is, who is paying you?; MS. FOLEY: Team Kennedy").

Team Kennedy, Ballot Access HQ (May 28, 2024) (Compl. Ex. C), archived at https://web.archive.org/web/20240528152655/https:/www.kennedy24.com/ballot-access (click on North Carolina).

D. The Board Recognizes the WTP Party Despite Its "Subterfuge"

The WTP Party submitted 24,509 signatures by the June 1, 2024 deadline for new party recognition. Compl. ¶ 50.

On June 5, 2024, the NCDP submitted a letter to the Board objecting to the WTP Party's petition. Compl. ¶ 51. The NCDP explained that "the Kennedy Campaign is attempting to skirt North Carolina ballot access rules by pretending to form a political party that is in fact no more than a candidate campaign committee—organized by and under the direction of a single candidate 'solely for the purpose of satisfying ballot access regulations'—thereby placing Kennedy on the ballot with just one-sixth of the signatures required by state law for independent candidates like him, and with three additional months to submit those signatures." *Id.*; *see* Letter from NCDP to the Board re WTP Party at 7 (June 5, 2024), archived at https://perma.cc/A8TV-RYK2.

On June 26, 2024, the Board met to consider the sufficiency of three petitions to be recognized as a new political party: from the WTP Party, the Constitution Party of North Carolina, and the Justice For All Party of NC ("JFA Party"). Compl. ¶ 52. The Board voted 3-2 to deny all three petitions while it investigated the circumstances surrounding the three parties' collection efforts. *See, e.g.*, June 26, 2024 Board Meeting Tr. at 156:22–157:5 (Compl. Ex. D) (denying WTP Party recognition "for now").[2]

On July 9, 2024, the Board voted 5-0 to recognize the Constitution Party of North Carolina under N.C. Gen. Stat. § 163-96. Compl. ¶ 53; *see* Press Release, NCSBE, State Board Recognizes

[2] Undersigned counsel engaged a court reporter to create a transcript of the public recording of the June 26, 2024, meeting. *See* https://dl.ncsbe.gov/?prefix=State_Board_Meeting_Docs/2024-06-26/.

Constitution Party as Official NC Political Party (July 9, 2024), archived at https://perma.cc/86JA-GVKM.

Less than a month later, on July 16, 2024, the Board voted 4-1 to recognize the WTP Party and 3-2 to deny recognition to the JFA Party. Compl. ¶ 54.

Board member Millen voted to deny recognition to both the WTP and JFA Parties. Compl. ¶ 55. Millen explained that N.C. Gen. Stat. § 163-96 obligates and empowers the Board to determine whether "the petition is one for the creation of a new political party" and whether the new party's organizers and petition circulators "inform[ed] the signers of the general purpose and intent of the new party." July 16, 2024 Board Meeting Tr. at 16:24–17:8 (Compl. Ex. E).[3] "The purpose and intent of a new party cannot merely be to place a particular candidate on the ballot because that is the subject matter of G. S. 163-122." *Id.* at 17:9–12. The overall statutory structure "makes it clear that a political party is intended to be more than a transitory entity designed to be a vehicle for a single candidate." *Id.* at 17:12–17.

Millen cited "six established facts that demonstrate that with respect to both the Justice for All Party and the We the People Party, the purpose and intent here is to place an individual candidate on the ballot"—Cornel West for the JFA Party and Kennedy for the WTP Party—"and not to create a new political party." *Id.* at 17:24–18:5. Four of those facts are of particular relevance here.

First, both Kennedy and West "initially indicated that they were going to proceed with their candidacy using the independent candidate method outlined in G.S. 163-122." *Id.* at 18:5–11.

[3] As with the June 26, 2024 meeting, undersigned counsel engaged a court reporter to create a transcript of the public recording of the July 16, 2024 meeting. *See* ttps://dl.ncsbe.gov/?prefix=State_Board_Meeting_Docs/2024-07-16/.

Second, the scripts used by Kennedy's "petition circulators indicated that the sole purpose of the party was to secure a place on the ballot for Kennedy as an 'independent candidate.'" *Id*. at 19:3–7.

Third, "both candidates, Kennedy and West, by their actions have demonstrated that their purpose is to get on various ballots by any means necessary with no regard to the particulars of a political party." *Id*. at 21:1–5. Millen then listed some of the "alternative methods these candidates are using in other states [to get on the ballot] because they speak to the issue of the purpose of the North Carolina putative parties," showing that they are really "an unaffiliated candidacy which should fall under the 163-122 statute." *Id*. at 23:18–24:1.

> Mr. Kennedy will be on the ballot in Colorado on the Libertarian line. In California he will be on the line of the American Independent Party of California which of course was the George Wallace Party. In Michigan, he's the nominee of the Natural Law Party which is part of an international movement of parties aligned with transcendental meditation. In South Carolina Mr. Kennedy is running on the ballot line of the Alliance Party of South Carolina. In Florida, Mr. Kennedy is running on the Reform Party line, the old Ross Perot Party. In Delaware, Mr. Kennedy is the nominee of the Independent Party of Delaware. In Texas, Mr. Kennedy is apparently running as an independent and his team has collected 245,000 signatures to get on the ballot. In Nevada, Mr. Kennedy is also running as an unaffiliated or independent candidate but his candidacy is under fire in that state partly because of the inconsistent fact that he's running on all of these small party labels in other states. This litany leads to the obvious question of how a candidate can be unaffiliated in some states, aligned with preexisting third parties in several states, and starting a new party in other states. Only in states without a preexisting party whose ballot line he believes he can obtain by this method does the We the People Party come into existence and that is the situation for Hawaii, Mississippi, and potentially North Carolina where the so-called party serves as nothing but a special purpose vehicle for Mr. Kennedy's independent candidacy.

Id. at 21:6–22:19.

Fourth, "only after [the Board] started raising issues about whether these were authentic political parties, did each of these parties come forward with other candidates for office: a mayor here, a NC House candidate there. But that attempted, post-hoc rationalization is itself evidence of the pre-textual nature of these so-called parties." *Id*. at 24:1–10.

Board Chair Hirsch agreed with Millen that the WTP Party had engaged in subterfuge but said that he would vote to recognize the WTP Party anyway:

> I agree with Ms. Millen. I think this is a subterfuge. But having said that, just looking at the words of the statute with purpose and intent, I think it's a very, very close call. And I am going to reluctantly vote to recognize We the People. Even though I believe there has been subterfuge. Fundamentally because I think that it is such a close call that ultimately a court would have to decide it. Therefore I'm not sure the Board should be the one that is standing in the way if someone wants to challenge that in court. They are welcome to do so. I think they have a good case but, again, I think it's a very close call.

Id. at 28:18–29:11.

Board members Lewis and Eggers found nothing improper with the Kennedy campaign's approach. Lewis expressed his view that the General Assembly provided independent candidates with two options—run as unaffiliated or create a new party—and "enacted a public policy which favors candidates' access to the ballot via a party as opposed to unaffiliated because they've made it more difficult to access the ballot as an unaffiliated candidate." *Id*. at 25:11–16. Eggers concurred "because the legislature has expressed a preference that candidates run as party affiliates and not independents." *Id*. at 27:5–9.

The fifth Board member, Carmon, declined to share his views, stating that he did not think the Board "should belabor the point." *Id*. at 29:16.

The Board then voted 4-1 to recognize the WTP Party, with Millen casting the dissenting vote. *Id*. at 30:12–22.

Immediately following the July 16, 2024, meeting, the Board issued a press release announcing that it had recognized the WTP Party. Compl. ¶ 65. The Board stated that the WTP Party "will have candidates on ballots in November, which it chose during its June 2024 nominating convention," including "Robert F. Kennedy Jr. and Nicole Shanahan for president and vice president of the United States, Jeff Scott of Charlotte for N.C. Senate District 40, and Mark

Ortiz of Kannapolis for Rowan County Commissioner, according to a letter from We The People, North Carolina." *Id.*; *see* Press Release, NCSBE, State Board Recognizes We The People as Official NC Political Party (July 16, 2024), archived at https://perma.cc/86JA-GVKM.

As for the JFA Party, the Board announced that "[m]embers opposed to the party's recognition cited evidence of fraud in the signature gathering process, as well as the refusal of independent signature gatherers to comply with a subpoena for information from the Board." *Id.*[4]

STANDARD OF REVIEW

A preliminary injunction should issue "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Holmes v. Moore*, 270 N.C. App. 7, 15, 840 S.E.2d 244, 254 (2020) (quoting *Kennedy v. Kennedy*, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333 (2003)).

This Court has the discretion to expedite a hearing on the merits under its inherent power "to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Wilson v. Pershing*, LLC, 253 N.C. App. 643, 648, 801 S.E.2d 150, 155 (2017) (quoting *Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960)); *see also Value*

[4] On July 22, 2024, three "voters and petition signers who supported JFA's effort to become a ballot-qualified party in 2024" sued the Board in the Eastern District of North Carolina. Compl. ¶ 2, *Ortiz II v. N. Carolina State Bd. of Elections*, No. 5:24-cv-420-BO (E.D.N.C. filed July 22, 2024), ECF No. 1. These three plaintiffs are requesting that an order be entered "as soon as possible, but no later than August 19, 2024 that: (1) directs NCSBE to certify JFA as a new party entitled to place its candidates on North Carolina's November 5, 2024 general election ballot pursuant to N.C. GEN. STAT. § 163-96(a)(2); (2) enjoins NCSBE from enforcing the July 1, 2024 deadline prescribed by N.C. GEN. STAT. § 163-98 against Plaintiffs; and (3) directs NCSBE to take any and all other action necessary to ensure the inclusion of JFA's candidates, including Dr. West, on North Carolina's November 5, 2024 general election ballot." *Id.* at 17–18 (footnote omitted). A hearing was held on July 30, 2024 and the Court entered a minute order reporting that a "written order' would "follow." ECF No. 49.

Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 385 N.C. 250, 280, 891 S.E.2d 100, 122 (2023) ("North Carolina trial courts are vested with broad authority to manage cases in their dockets").

ARGUMENT

I. This Court Has Authority to Review the Board's Decision.

Chapter 163 of the General Statutes provides that the Wake County Superior Court is the forum for "judicial review" of any Board decision:

> Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the State Board of Elections rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file his petition in the Superior Court of Wake County.

N.C. Gen. Stat. § 163-22(*l*); *see McFayden v. New Hanover County*, 273 N.C. App. 124, 129, 848 S.E.2d 217, 221 (2020) (Board decisions are "exclusively" subject to judicial review in this Court).

For that right to "judicial review" to have any meaning in an election law case like this one, the Court must decide in an expedited fashion the core legal question presented here: whether North Carolina law permits an independent candidate such as Kennedy to establish a political party under § 163-96 for the "sole purpose" of placing a candidate's name on the ballot, rather than complying with the requirements for an unaffiliated candidate in N.C. Gen. Stat. § 163-122.

The NCDP thus asks this Court to issue a preliminary injunction prohibiting the Board from printing any ballot for the 2024 general election that includes any candidate of the WTP Party during the pendency of this proceeding. Alternatively, the Court could conduct an expedited hearing on the merits, so that it may promptly consider the legal question presented here, rule on North Carolina law, and reverse the erroneous decision of the Board. In either case, it is important that a decision issue promptly so that ballots may be printed in time to comply with North Carolina law regarding issuing of absentee ballots.

II. The Court Should Issue a Preliminary Injunction Prohibiting the Board from Printing Ballots with Candidates for the WTP Party.

A preliminary injunction is warranted here to correct the legal error reflected in the Board's ruling before it is too late. As shown below, the NCDP is likely to succeed on the merits, and a preliminary injunction is necessary to protect the NCDP's rights.

A. The NCDP Is Likely to Succeed on the Merits Because the Board's Decision to Recognize the WTP Party Violated North Carolina Law.

This dispute turns on a proper reading of the statutory framework for ballot access in Chapter 163. The Court's "task in statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Dudley*, 270 N.C. App. 771, 773, 842 S.E.2d 163, 164 (2020). "The intent of the legislature may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Id.*

i. The Board Misapplied the Statutory Framework for Ballot Access.

North Carolina law provides that the presidential ballot in this state will include the candidates "nominated by any political party ***recognized*** in this State under G.S. 163-96" and any "candidate for President of the United States who has qualified to have his or her name printed on the general election ballot as an unaffiliated candidate under G.S. 163-122." N.C. Gen. Stat. § 163-209(a) (emphasis added).

These two paths to the ballot—as the nominee of a recognized political party under § 163-96 and as an unaffiliated candidate under § 163-122—involve different statutory requirements.

1. Section 163-96 Governs Petitions for a New Political Party.

Section 163-96 provides that a political party "within the meaning of the election laws" is a group of voters who, in the last election, either (a) won 2% of the presidential or gubernatorial

vote in North Carolina, N.C. Gen. Stat. § 163-96(a)(1); or (b) nominated a presidential candidate in 70% of the states, *id*. § 163-96(a)(3).

Section 163-96 also defines a process for forming new political parties. To be recognized as a new party, a group of voters must file with the Board "petitions for the formulation of a new political party which are signed by registered and qualified voters in this State equal in number to one-quarter of one percent (0.25%) of the total number of voters who voted in the most recent general election for Governor," including "at least 200 registered voters from each of three congressional districts in North Carolina." N.C. Gen. Stat. § 163-96(a)(2). In 2024, this 0.25% requirement amounted to 13,865 petition signatures. Compl. ¶ 24.

The petitions themselves must include the name of the new party and information about its chairperson. N.C. Gen. Stat. § 163-96(b). "In addition to the form of the petition, the organizers and petition circulators shall inform the signers of the general purpose and intent of the new party." *Id*.

After review by the county boards of elections, *see id*. § 163-96(c), the organizers submit the petitions to the Board, which "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*. § 163-96(a)(2). The Board's website explains that "part of its consideration will be whether the organizers and petition circulators met [the] statutory requirement" to "inform the signers of the petition of the general purpose and intent of the new party." NCSBE, Petition for Recognition as Political Party (last visited July 30, 2024), https://www.ncsbe.gov/candidates/petitions/petition-recognition-political-party, archived at https://perma.cc/9ZLK-QGSR. Organizers are thus invited to "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." *Id.*

If the Board recognizes a new political party, then in "the first general election following the date on which a new political party qualifies under the provisions of N.C.G.S. 163-96, it shall be entitled to have the names of its candidates for national, State, congressional, and local offices printed on the official ballots." N.C. Gen. Stat. § 163-98. This "new political party" may "select its candidates by party convention," without the need to conduct a primary. *Id.*

2. Section 163-122 Governs Unaffiliated Candidates.

Unaffiliated candidates are subject to different requirements. Like new parties, unaffiliated candidates have to gather petitions signed by eligible North Carolina voters by a deadline. But unlike new parties, unaffiliated candidates do not have to disclose their general purpose and intent when collecting signatures. *Compare* N.C. Gen. Stat. § 163-122(c) (unaffiliated candidates), with *id.* § 163-96(b) (new political parties). Unaffiliated candidates can thus "collect signatures from a larger pool of voters." Brief of Defendant-Appellee (NCSBE) at 39, 2020 WL 416066, at *39, *Buscemi v. Bell*, 964 F.3d 252 (4th Cir. 2020) (No. 19-2355) (quoting N.C. Gen. Stat. § 163-96(b)). At the same time, unaffiliated candidates in a statewide race must collect signatures from a greater proportion of voters—1.5% (83,188) rather than 0.25% (13,865)—and submit them to the Board earlier—by March 5, 2024. N.C. Gen. Stat. § 163-122(a)(1).

3. The Board Erred by Conflating Unaffiliated Candidates with New Political Parties.

The General Assembly established a two-tiered system for ballot access—one that applies different requirements to new parties and unaffiliated candidates—because the "attempt to form a new political party and the act of seeking office as an unaffiliated candidate 'are entirely different' endeavors." *Buscemi*, 964 F.3d at 265 (quoting *Storer*, 415 U.S. at 745).

For new political parties, the General Assembly required the organizers and circulators to "inform the signers of the general purpose and intent of the new party." N.C. Gen. Stat. § 163-96(b). This requirement serves the "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." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). And that interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election" applies to both parties and candidates. *Id.* The General Assembly thus has the power "to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support." *Am. Party of Texas v. White*, 415 U.S. 767, 782 (1974).

Regardless of the support for a given candidate, North Carolina has a distinct "interest in ensuring that the new party itself, as opposed to a particular candidate for office, has a modicum of support before adding the party to a general ballot." *Nader 2000 Primary Comm., Inc. v. Bartlett*, No. 5:00-cv-00348-BR, slip op. at 23 (E.D.N.C. Aug. 9, 2000) (attached as Addendum), ECF No. 16. The "voters and the state are entitled to some assurance that [a] particular party designation has some meaning in terms of a statewide, ongoing organization with distinctive political character." *Id.* (quoting *Libertarian Party of Fla. v. State of Fla.*, 710 F.2d 790, 795 (11th Cir. 1983)).

The Board's decision here undermines that distinct interest in regulating political parties by permitting unaffiliated candidates to skip the requirements applicable to them under N.C. Gen. Stat. § 163-122 and instead register as a political party under § 163-96(b). That decision was legally erroneous for at least three reasons.

First, the Board failed to apply the "specific–general canon of construction." *Gibson v. Lopez*, 273 N.C. App. 514, 519 n.5, 849 S.E.2d 302, 305 n.5 (2020). That canon provides that

"when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling." *Piedmont Pub. Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177–78 (1993). Here, the Board violated that canon by concluding that § 163-122 and its requirements for ballot access—which are addressed to more specific subject matter and would otherwise apply to an unaffiliated candidate like Kennedy—do not apply if a candidate merely adopts the *form* of a political party under the more general statute in § 163-96.

Second, the Board's decision is also contrary to the "the canon of statutory construction that a statute may not be interpreted 'in a manner which would render any of its words superfluous.'" *State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) (quoting *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994)). Our Supreme "Court has repeatedly held that 'a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant.'" *Id*. (quoting *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981)). The Board's decision effectively reads the requirements of § 163-122 out of Chapter 163. None of the distinctions between § 163-96 and § 163-122 will matter if unaffiliated candidates can rebrand as parties. The two-tiered structure the legislature created for ballot access for political parties (per § 163-96) and unaffiliated candidates (per § 163-122) will fold. No future independent candidates will comply with the signature requirements for ballot access in N.C. Gen. § 163-22, or with the March primary deadline to submit a petition. They will simply follow the easier path to ballot access by creating a single-candidate, single-election "political party." Indeed, Board Chair Hirsch testified before the North Carolina House Oversight & Reform Select Committee on July 23, 2024, that the Board's decision here collapses the two-tiered process:

> So that is something I think that the General Assembly should consider whether they really want to have this two-tiered process. Because after this experience, I don't think anybody is going to try to be an unaffiliated candidate any more at the statewide level.

House Oversight and Reform Committee, NC State Board of Elections Hearing, Transcript at 18 (July 23, 2024), available at https://webservices.ncleg.gov/ViewDocSiteFile/8861.

Third, the Board abdicated its statutory responsibility to distinguish between candidates and political parties. Section 163-96 applies to petitions for a new "political party," not unaffiliated candidates seeking a backdoor to ballot access. The "natural, approved and recognized meaning" of political party, *Matter of Oak Meadows Comm'y Ass'n*, 899 S.E.2d 404, 408 (N.C. Ct. App. 2024), is "[a]n organization of voters formed to influence the government's conduct and policies by nominating and electing candidates to public office," Black's Law Dictionary (12th ed. 2024). It is a "statewide, ongoing organization with distinctive political character." *Storer*, 415 U.S. at 745.

Section 163-96 itself confirms this meaning. The very requirement that a political party seeking recognition "inform the signers" of the "general purpose and intent" of the party *presumes* that the group is an entity with distinctive and ongoing political character that will seek to fulfill a purpose and intent through the candidates it nominates to office.

This much is clear: a political party is not the same as a candidate. Indeed, to compare them is to compare "apples and oranges" because the "attempt to form a new political party and the act of seeking office as an unaffiliated candidate 'are entirely different' endeavors." *Buscemi*, 964 F.3d at 265 (quoting *Storer*, 415 U.S. at 745). An unaffiliated candidate is "an individual seeking ballot access for himself whereas the new party is a group of individuals seeking recognition in order to nominate candidates for office." *Buscemi v. Bell*, No. 7:19-cv-164-BO,

2019 WL 13211246, at *4 (E.D.N.C. Nov. 22, 2019). "The groups are simply not similarly situated." *Id.*

It is no answer to argue that a political party could be a "group of voters" that has come around a single candidate for a single election, but without a "distinctive political character" and without an "ongoing organization." North Carolina law also distinguishes between a "political party" and a "candidate campaign committee," which is merely a political committee "organized by and under the direction of a candidate." N.C. Gen. Stat. § 163-278.38Z;[5] *see also* N.C. Gen. Stat. § 163-278.6(74) (in the definition of a political committee, distinguishing between a "political party" and a committee "controlled by a candidate" or that "[h]as the major purpose to support or oppose the nomination or election of one or more clearly identified candidates.").

Therefore, the Board erred by concluding that a "political party" capable of recognition under § 163-96 includes a group formed by a candidate campaign solely to put an individual on the ballot, for a single office, for a single election cycle.

ii. The Board's Interpretation Will Undermine North Carolina's Campaign Finance Structure.

The Board's decision to collapse the distinction between a candidate campaign and a political party also threatens to undermine the campaign-finance rules established by the General Assembly, violating yet another canon of statutory construction. "When multiple statutes address a single subject matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent." *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257

[5] While the definition may be found in Part 1A of Article 22A, governing "Disclosure Requirements for Media Advertisements," the term is not limited to Part 1A of Chapter 163. Multiple provisions in Chapter 163 outside Part 1A incorporate the term "candidate campaign committee" and its definition by reference. *See, e.g.*, N.C. Gen. Stat. §§ 163-278.6(20); 163-278.13C; 163-278.16B (referring to a "candidate campaign committee" as defined in N.C. Gen. Stat. 163-278.38Z).

(2020)(citation omitted). "Statutes *in pari materia* must be harmonized, to give effect, if possible, to all provisions without destroying the meaning of the statutes involved." *Id.* (cleaned up).

The campaign finance rules that apply to a "candidate" are quite different from those that apply to a political party. For **campaign contributions**, the rule for any "candidate" or "other political committee" is that it may not accept contributions in excess of $6,400. N.C. Gen. Stat. § 163-278.13(a). In contrast, because they are intended to support many candidates over time, there are no limits for contributions to a political party. *See* N.C. Gen. Stat.§ 163-278.13(h).

The rules are different for **campaign expenditures** as well. Section 163-278.13B(a) restricts the use of contributions for a "candidate" or a "candidate campaign committee" to nine enumerated purposes, but these restrictions do not apply to a political party. As the Board Campaign Finance Manual states, "there are very few restrictions on how a party committee may spend its money." NCSBE, Campaign Finance Manual at 83 (Rev. 02.22), archived at https://perma.cc/D4T3-JZHC.

The Board's reading, however, effectively eliminates this distinction between a campaign committee and a political party as well. If the Kennedy campaign, or others like it, can gain access to the ballot as a political party for purposes of § 163-93, then there is no reason they would not be treated as a political party for purposes of campaign finance restrictions—freeing them to accept unlimited campaign contributions and lifting some restrictions on their expenditures. This adverse consequence directly undermines any conclusion that the legislature *intended* to permit unaffiliated candidates to form their own political parties.

iii. The Consequences of the Board's Decision Will Be Widespread.

If the Board's decision stands, North Carolina can expect a flood of candidates masquerading as political parties to follow this strategy in 2026 and beyond. Indeed, less than a month after the Kennedy campaign announced its plans to circumvent North Carolina's ballot

access requirements by starting a new political party, independent candidate Cornel West and his campaign followed suit by seeking to form the "Justice for All Party" in North Carolina and other states where "it is easier to gain access to the ballot [as] a party as opposed to an independent." @CornelWest, X (Jan. 31, 2024 12:43 PM, https://x.com/CornelWest/status/1752749471622979858 (Video at 0:18: "We're calling for the Justice for All Party to be used to gain access to the ballot in those states where it's easier to gain access to the ballot [as a] party as opposed to an independent. I'll be an independent in other states."), archived at https://perma.cc/U84Y-VJT3.

Not only will candidates use this new ruling to circumvent the requirements for ballot access, but any candidate seeking to avoid the contribution and expenditure limits the General Assembly has imposed on individual candidates could simply form a political party in their own image and escape those requirements. For example, any candidate for office will find it powerfully attractive to create a new political party that can accept unlimited campaign contributions (not just checks for $6,400 at a time) to a party that exists only to get that single candidate elected.

Accordingly, the reading the State Board adopted—which enabled the WTP Party's "subterfuge"—is inconsistent with North Carolina law and the intent of the General Assembly in enacting Chapter 163 and should be reversed.

Another case might present a closer question. But this one is easy. That is because the Kennedy campaign—at least until the NCDP objected to party recognition on June 5, 2024—was remarkably open about the nature of the WTP Party. That may be because the Kennedy campaign assumed—incorrectly—that North Carolina created a loophole that gives "independent candidates two methods of achieving ballot access," Compl. ¶ 43, and so brazenly stated what it was trying

to do. But as discussed above, the Kennedy Campaign's reading of the ballot access rules is a distortion of North Carolina law.

There are at least five reasons, some of which were also recounted by Board Member Millen, that establish that the "purpose and intent" of the WTP Party is to put a single, independent candidate on the ballot with a lower number of signatures and different deadline for ballot access.

First, Kennedy initially registered to run as an unaffiliated candidate in North Carolina on November 1, 2023—seeking to comply with § 163-122.[6] That registration was consistent with Kennedy's October 2023 announcement of his run as an "independent candidate for the President of the United States," and declaration of "independence from all parties."[7] Registration under § 163-122 required Kennedy to obtain 83,188 signatures from North Carolinians by noon on the date of the North Carolina primary: March 5, 2024. The Kennedy campaign failed to do that, instead deciding to pivot to create a new party in North Carolina.

Second, when the Kennedy campaign decided to change tactics, they were candid about the purpose of the WTP Party. The Kennedy campaign announced that it was forming the WTP Party in January 2024 as "the most direct path to ballot access."[8] The Kennedy campaign expressed its view that North Carolina "offer[s] independent presidential candidates two methods of achieving ballot access — as an individual candidate or as the nominee of a new party" and explained that it had chosen to create a new party because it "requires fewer signatures." *Id.* The

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[6] *See* Robert Kennedy for President – UNA, N.C. State Board of Elections (filed Nov. 1, 2023), https://vt.ncsbe.gov/PetLkup/ (click "Petition" and choose "ROBERT KENNEDY FOR PRESIDENT – UNA" from the dropdown).

[7] Compl. ¶ 9; Robert F. Kennedy, Jr., Today, I Declared Myself an Independent Candidate for President, Substack (Oct. 9, 2023), https://robertfkennedyjr.substack.com/p/kennedy-independent-presidentialcandidate, archived at https://perma.cc/L542-VGT4.

[8] Compl. ¶ 42; Press Release, Team Kennedy, Kennedy Campaign Forms 'We the People' Political Parties in Six States (Jan. 16, 2024), archived at https://web.archive.org/web/20240116233827/https://www.kennedy24.com/kennedy_campaign_we_the_people_political_parties

result would be the same either way: "Once a new party achieves ballot access in this way, they can nominate the candidate of their choosing, in this case, Robert F. Kennedy, Jr." *Id.*

Third, when it came time to tell voters about the purpose of the party, the WTP Party provided instructions to petitioners that frankly explained the "sole purpose" of the WTP Party was to place Kennedy's name of the North Carolina ballot and provided sample scripts, one of which requested signatures to get Kennedy on the ballot as an "independent" presidential candidate. Multiple examples are provided in the factual background above, including this one.

> 5. You may NOT misrepresent the purpose of this petition.
>
> The sole purpose of this petition to qualify a new political party in North Carolina – "We The People" Party – to place the name of Robert F. Kennedy Jr. on the 2024 general election ballot as a candidate for the office of President of the United States. You cannot collect a signature by telling a voter the petition is to "Save America" or "Help the Poor."
>
> BE HONEST WITH THE VOTERS.

Compl. Ex. B; *see also* Compl. Exs. A & C.

Fourth, upon creating a new party in North Carolina, Kennedy did not abandon his independent run for President. Indeed, Kennedy formed a "We The People" party only in the handful of other states (including Hawaii and Mississippi) where he could take advantage of a lower signature requirement by creating a special-purpose political party. Instead, Kennedy is still running a campaign across the U.S. as the "first independent president since George Washington." *See* kennedy24.com/ballot-access (last visited July 30, 2024). And in many states he is borrowing the ballot line of multiple other small parties, including the American Independent Party of California in California, the Natural Law Party in Michigan, and the Alliance Party of South Carolina in South Carolina. *Id.* In other words, as Board Member Millen concluded, Kennedy has demonstrated that his purpose "is to get on various ballots by any means necessary with no regard to the particulars of a political party." Compl., Ex. E, Tr. at 21:1–22:19. The NCDP does not

oppose Mr. Kennedy's right to petition to be included on the ballot as what he truthfully is—an unaffiliated candidate for president—but he must follow the requirements of § 163-122 to do so.

Fifth, the Kennedy campaign operates as if the WTP Party were a subsidiary of the Campaign. The salary for Ceara Foley, the North Carolina State Chair of We the People, is paid by "Team Kennedy." *See* Compl. Ex. D at 114:5-10. When submitting their list of officers to the Board, the WTP Party's Chair, Secretary and Treasurer all listed email addresses with either the teamkennedy.com or kennedync.org domain names.[9] The WTP Party appears to have no financial existence outside of spending by the Kennedy campaign and had no website prior to May 17, 2024, the deadline for the WTP Party to submit petition signatures to the counties.[10] Public reporting reflects that neither the national nor state party has registered or filed any campaign finance disclosure reports with the Federal Election Commission. When it claimed that it had collected the necessary signatures to access the ballot in North Carolina, the Kennedy campaign—not the Party—issued a press release that "[i]ndependent Presidential Candidate Robert F. Kennedy, Jr. . . . ha[d] collected the necessary signatures to put 'Bobby on the Ballot' in North Carolina."[11]

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[9] We The People, Executive Committee/List of Officers (Received by Board on May 28, 2024), available at https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/New%20Party%20Petitions/We%20The%20People%20supporting%20materials.pdf (last visited July 31, 2024).

[10] Before the Board, the WTP Party also relied on its website—wethepeoplenc.com—to show that signatories understood the putative purpose of the petitions. Compl. Ex. D at 147:13-14. But that website *did not exist* before the WTP Party submitted its petition signatures to the county boards on May 17, 2024. The domain was registered 7 days later, on May 25. *See* https://lookup.icann.org/en/lookup (search wethepeoplenc.org). The only references regarding We The People on the internet prior to May 17, 2024 were on Kennedy24.com, which described We The People as a way to "reduce[] the number of valid signatures" the Kennedy Campaign would "need to get on the ballot nationwide. Team Kennedy, About 'We The People' Party (last visited May 30, 2024), https://www.kennedy24.com/ballot_access_about_we_the_people_party.

[11] Press Release, Team Kennedy, Kennedy Collects Signatures Needed to Gain Ballot Access in Swing State North Carolina (Apr. 1, 2024), https://www.kennedy24.com/kennedy_ballot_access_north_carolina.

B. The NCDP is Likely to Suffer Irreparable Harm if The Decision of The Board is Not Promptly Reversed.

Printing ballots with the names of candidates nominated by a party recognized in violation of North Carolina law will cause immediate and irreparable injury, loss, or damage to the NCDP and its members. The NCDP has an interest in competing fairly against other political parties and unaffiliated candidates in North Carolina. Compl. ¶ 7. In addition the unlawful inclusion of the WTP Party on the ballot will require the NCDP to divert and expend additional resources to oppose WTP candidates who could not qualify for the ballot absent circumvention of North Carolina law—funds and resources that it would otherwise deploy elsewhere. *Id.*

North Carolina is the first in the nation to send out absentee ballots. Our state requires that absentee ballots be provided to voters 60 days before the election—by September 6, 2024—unless an exception applies. N.C. Gen. Stat. § 163-227.10(a). This year, the Board is "generally tell[ing] political parties [to finalize their nominees by] mid-August to ensure any names can be added to the ballot, and ballots proofed, printed and distributed." Kimberly Cataudella Tutuska, *When does the presidential nominee need to be selected to get on NC ballots?*, News & Observer (July 22, 2024) (quoting Board public information director Patrick Gannon), https://www.newsobserver.com/news/politics-government/article290308599.html.

Therefore, if a preliminary injunction does not issue before mid-August (the NCDP has requested relief by August 16, 2024), it may be too late to redress the harm to the NCDP and its members. A preliminary injunction at the outset of the litigation is warranted where the "primary ultimate remedy sought is an injunction," where "denial of a preliminary injunction would serve effectively to foreclose adequate relief," and where "the decision to grant or deny a preliminary injunction in effect results in a determination on the merits." *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759-60; *see also N.C. Baptist Hosp.*, 195 N.C. App. at 724, 673 S.E.2d at 796.

III. In the Alternative, the Court Should Conduct an Emergency Hearing, Clarify North Carolina Law, Reverse the Decision of the Board, and Remand for Further Proceedings.

In the alternative to a preliminary injunction, the Court should issue a prompt ruling on the legal question at the heart of this dispute. As Chair Hirsch suggested, the legal question presented here is one that "a court" should "decide." In accordance with its jurisdiction to review the decisions of the Board in accordance with N.C. Gen. Stat. § 163-22(*l*), the Court could reverse the decision of the Board, instruct the Board on the law, and remand to the Board with instructions to remove the WTP Party and its candidates, or for further proceedings in accordance with this Court's directions. *Cf. Tolliver v. Employment Sec. Comm'n of North Carolina*, 83 N.C. App. 240, 349 S.E.2d 650 (1986) (Orr, J.) (holding Wake County had properly reversed agency decision and remanded for rehearing where decision was affected by error of law); N.C. Gen. Stat. § 150B-51(b) (a court reviewing a final agency decision may affirm the decision, reverse or modify it if the substantial rights of the petitions may have been prejudiced, by among other grounds, an "error of law," or "remand the case for further proceedings).[12]

CONCLUSION

The NCDR requests that the Court issue a preliminary injunction prohibiting the Board from printing any ballot for the 2024 general election that includes any candidate of the WTP Party or, in the alternative, that the Court conduct an emergency hearing on the merits of the parties' dispute.

[12] While § 163-22(*l*), and not the North Carolina Administrative Procedure Act, provides the basis for this Court's review, the procedures for agency review are instructive here.

Dated: August 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served upon the parties to this action by mailing copies thereof by first class, postage prepaid mail and electronic mail to counsel of record at the following addresses:

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This the 1st day of August, 2024.

Raymond M. Bennett

ADDENDUM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:00-CV-348-BR3

NADER 2000 PRIMARY COMMITTEE, INC., RALPH NADER, THE GREEN PARTY OF NORTH CAROLINA, DOUGLAS STUBER, AND MARK DUNLEA,

Plaintiffs,

v.

GARY O. BARTLETT, in his official capacity as Executive Secretary-Director of the North Carolina State Board of Elections, and the NORTH CAROLINA BOARD OF ELECTIONS,

Defendants.

ORDER

This matter comes before the court on plaintiffs' motion for a preliminary injunction. This motion has been fully briefed by the parties, and a hearing was held on the motion on 31 July 2000 in Raleigh, North Carolina. The matter is now ripe for disposition.

I. BACKGROUND

In this action, Ralph Nader, the Nader 2000 Primary Committee, Inc. (the Committee), the Green Party of North Carolina (the Party), and two registered voters, one from North Carolina and one from New York, seek to have Nader placed on the ballot in North Carolina as the nominee of the Green Party for the 7 November 2000 presidential election.

On 21 February 2000, Ralph Nader announced his intention to run for President of the Untied States in the November 2000 election. Although he is not a member of the Green Party, and remains an independent, (Reply, Tab 1), Nader secured the nomination of the Green Party on

25 June 2000. (Reply at 2.) Since his decision to run for President, Nader's campaign, in conjunction with the Green Party, has been orchestrating a nationwide effort to obtain ballot access in the 50 states. As of 26 June 2000, Nader was on the ballot in 20 states and in the District of Columbia. (Reply, Tab 1.)

A candidate may qualify for ballot status in North Carolina in one of three ways set forth in N.C. Gen. Stat. §§ 163-96 and 163-122. First, a party is recognized as a "political party" when it polled, in the last general election for its "candidate for Governor, or for presidential electors, at least ten percent (10%) of the entire vote cast in the State" for those offices. N.C. Gen Stat. § 163-96(a)(1). The Green Party has never been on the ballot in North Carolina and therefore cannot qualify under the foregoing provision.

A potential candidate may also qualify for the ballot as an "unaffiliated candidate" for an upcoming election by submitting to the North Carolina State Board of Elections ("the State Board") a petition containing the signatures of two percent (2%) of the total number of registered voters in the State.[1] See N.C. Gen. Stat. § 163-122(a)(1). For the upcoming election, a candidate must submit 98,606 verified signatures to qualify under § 163-122(a)(1).[2] Under §163-122, a potential candidate must submit to the State Board a qualifying petition on or before 30 June 2000 for purposes of the 7 November 2000 election. However, before submitting the signatures to the State Board, the signatures must first be reviewed by each of the 100 county

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[1] As of 7 April 2000, there were 4,930,319 registered voters in North Carolina. (Bartlett Aff. ¶ 2.)

[2] The court notes that § 163-122(a)(1)-(4) specifically refer to qualifications for a "statewide office," a "district office," a "county office" or "partisan municipal office." Although the statutory provision does not specifically refer to the office of the President of the United States or reference national offices, the court assumes the legislature intended to cover such races by its use of the term "statewide offices" because such positions are voted for on a statewide basis. Moreover, North Carolina does not have a separate ballot access provision governing Presidential and Vice-Presidential candidates.

boards, each of which has 15 days to verify the signatures submitted. Thus, the effective date by which a candidate would have had to produce the required number of signatures to qualify as an independent Presidential candidate was 15 June 2000. Ross Perot appeared on North Carolina's ballot as an unaffiliated candidate by qualifying under § 163-122 in 1992.

Finally, a potential candidate may achieve access to the ballot by appearing as the representative of a qualified new party. To qualify as a new political party for the ballot in North Carolina, representatives of the new party are required to submit to the State Board a petition containing the signatures of two percent (2%) of the number of registered voters in the State who voted in the most recent general election for Governor. See N.C. Gen. Stat. § 163-96(a)(2). For the upcoming election, a party must submit 51,324 signatures. (Bartlett Aff. ¶ 5.) The petition must contain the signatures of at least 200 registered voters from each of four Congressional districts in North Carolina. (Id.) Section 163-96 provides that the petitions used to qualify a new party must contain on the heading of each page in bold print or capital letters, the following language:

> The undersigned registered voters in _____ County hereby petition for the formation of a new political party to be named _____ and whose state chairman is _____ residing at _____ and who can be reached by telephone at _____. The signers of this petition intend to organize a new political party to participate in the next succeeding general election.

Although the deadline for submission of the signed petitions to the State Board is 1 June 2000, the effective deadline is 17 May 2000 because a candidate must first submit his or her signatures to the county boards to accommodate the 15-day signature review period. There is no restrictive time limit within which signatures must be collected. Groups interested in qualifying a new party may begin collecting signatures immediately after the most recent election for Governor.

After qualifying, a new party may nominate candidates in a nominating convention for

any office on the ballot, and, in the first general election following the date on which the new party qualifies, the new party is entitled to have the names of its candidates for State, congressional, and national offices printed on the official ballot. See N.C. Gen. Stat. § 163-98. The new party must hold its convention and certify the names of its candidates for State, Congressional, and national offices to the State Board no later than July 1 preceding the election.[3] The Libertarian and Reform Parties have qualified for access to the ballot under § 163-96(a)(2) for the 2000 election year.

Although not a method for qualifying to be named on the pre-prepared ballot, N.C. Gen. Stat.§ 163-123 provides a means by which a person may be qualified as a write-in candidate. By submitting a petition with 500 verified signatures on the 90th day before the general election, in this year, 9 August 2000, a candidate may obtain the right to be a write-in candidate during the general election. As with the other methods of qualifying, the signatures must be submitted to the county boards 15 days prior to August 9. (Bartlett Aff. ¶ 11.)

Plaintiffs assert that they sought to place Nader on the ballot by qualifying the Green Party pursuant to N.C. Gen. Stat. § 163-96(a)(2) as a new political party because that statute

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[3] Under § 163-106(b), candidates of recognized political parties who are running for local, state and congressional offices must file and pay a filing fee between the first Monday in January and the first Monday in February. This year's primary elections were held on 2 May 2000 this year, and most nominees were determined by the third day after the primary. The second primary required in some races was held on 30 May 2000. Nominees of the recognized political parties were therefore certified, at the latest, by the first few days of June. There is no statutory requirement, however, that the recognized political parties notify the State Board of their nominees for President and Vice-President by a certain date. Those names traditionally become known by mid-August because the major parties tend to hold their conventions in July and early August.

New parties, by contrast, were required to certify their nominees, including those nominees for national offices, by 1 July 2000. The Green Party held its national convention in late June, and Nader accepted the Party's nomination for the office of President on 25 June 2000. Accordingly, had the Green Party qualified under § 163-96, it would have been able to comply with the requirement in § 163-98 that it certify its nominees by 1 July 2000. However, the State Green Party would not be able to control the scheduling of the national convention and, if the convention had been held after 1 July 2000, as both the Republican and Democratic conventions were scheduled to be held, application of § 163-98 would have proven problematic.

required significantly fewer signatures. However, as of May 2000, the Green Party had not collected the 51,324 valid signatures required for ballot access. On 2 May 2000, the Nader Committee requested that the State Board extend the statutorily imposed deadline from 1 June 2000 to 31 August 2000. The State Board denied that request on 18 May 2000 on the ground that it lacked authority to waive a statutorily imposed deadline. (Bartlett Aff. ¶ 13.) On 1 June 2000, the Green Party submitted 1,956 verified signatures to the State Board. (Bartlett Aff. ¶ 14.)

On 16 May 2000, plaintiffs filed suit alleging that the 1 June 2000 filing deadline in conjunction with the number of signatures required and the mandatory petition language set forth in § 163-96 rendered that statute unconstitutional as applied to them. Plaintiffs now seek a preliminary injunction enjoining the enforcement of N.C. Gen. Stat. § 163-96 and directing the State Board to place Ralph Nader on the North Carolina ballot as the Green Party's nominee for President.[4]

II. PRELIMINARY INJUNCTION STANDARD

The standard for the issuance of a preliminary injunction is well established and requires an examination of the following: 1) the likelihood of irreparable harm to the plaintiff if the injunction is not entered; 2) the likelihood of harm to the defendant if the injunction is entered; 3) the likelihood plaintiff will succeed on the merits; and 4) the public interest. Blackwelder Furniture Co. v. Seilig Mfg. Co. Inc., 550 F.2d 189, 193 (4th Cir. 1977). Although all four factors are to be considered, the irreparable harm to plaintiff and the potential harm to the defendant are the two most important factors and are referred to as the "balance of the harms."

[4] Plaintiffs have not requested in their complaint that this court require North Carolina to put Wynona LaDuke, Nader's Vice-Presidential running mate, on the North Carolina ballot.

See Direx Israel, Ltd v. Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir. 1991). The balancing of the harms between the plaintiff and the defendant must be conducted first, as that balance "fixes the degree of proof required for establishing the likelihood of success by the plaintiff." Id. at 817.

If the court finds that the balance of the harms "tips decidedly" in favor of plaintiff, the injunction should be granted if plaintiff raises a "grave or serious question" as to its success on the merits. See James A. Merritt & Sons v. Marsh, 791 F.2d 328, 330 (4th Cir. 1986). Stated another way, the injunction should be granted if "'the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.'" Direx, 952 F.2d at 812-813 (quoting Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991)). If the balance of harms is more evenly balanced, then plaintiff must show a likelihood of success on the merits in order to obtain the injunction. Blackwelder, 550 F.2d at 195.

The court will proceed with an analysis of this case within the framework established by the preliminary injunction standard, first addressing the alleged harms to the plaintiffs and defendants, and balancing those harms to determine the appropriate burden to be carried by plaintiffs to justify the preliminary injunction they seek. Secondly, the court will address the merits of plaintiffs' action challenging the constitutionality of § 163-96(a)(2) and §163-96(b). In this lawsuit, plaintiffs have specifically challenged the constitutionality of § 163-96, the new party statute, based on its high signature requirement, its early filing deadline, and its required petition language. The court notes, at the outset, that plaintiffs have chosen to seek a position for Nader as the Green Party's candidate for President on the North Carolina ballot pursuant to § 163-96. Accordingly, § 163-96 is the only ballot access provision before this court. While

plaintiffs have made many compelling arguments regarding the difficulties Ralph Nader has faced in obtaining ballot access throughout the 50 states since he declared his candidacy in February 2000, the court is constrained, for purposes of this action, to analyze those arguments in the context of the constitutionality of § 163-96, the ballot access provision governing the qualification of new parties in North Carolina.[5] In the merits section of this Order, the court will address first the constitutionality of § 163-96(a)(2), which sets forth the signature requirement and filing deadline, and secondly, the constitutionality of § 163-96(b), which sets forth the required petition language.

A. Balance of the Harms

1. Harm to Plaintiffs Nader, Committee, and Green Party if Injunction is Denied

Plaintiffs claim that, if this court fails to enjoin North Carolina's enforcement of § 163-96, North Carolina voters who support Ralph Nader, like plaintiff Stuber, will be denied the opportunity to vote for the candidate of their choice, (Pl.s' Mem. at 11-12); that Nader will be denied the opportunity to have his name on the ballot and to compete for votes in a nation-wide election; and that the Green Party will be denied the opportunity to have its nominee for President of the United States placed on North Carolina's ballot. Moreover, the Green Party contends that being excluded from the ballot in North Carolina not only limits its opportunity to have Nader elected by diluting the support he receives in other states, but also affects the Party's

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[5] While plaintiffs explain that Nader and the Campaign elected to try to qualify for ballot access under § 163-96 because that statute's requirements were "slightly less onerous" than those contained in § 163-122, the provision governing access by independent candidates, plaintiffs have not challenged the constitutionality of § 163-122 in this lawsuit, nor have they alleged, in their complaint, that the combined effect of § 163-122 and § 163-96 creates an unconstitutional ballot access scheme as it pertains to Presidential and Vice-Presidential candidates. See, e.g., Populist Party v. Herschler, 746 F.2d 656, 659 (10th Cir. 1984)(Populist Party and its candidates challenged both the Wyoming statutes relating to placing an independent candidate for President on the 1984 general election ballot and also the statutes relating to the formation of a new political party when Secretary of State refused to put Bob Richards, Populist candidate for President on the general election ballot).

ability to receive federal matching funds for current and future presidential campaigns under the Federal Election Campaign Act ("FECA"). If the Green Party's nominee receives at least 5% of the nationwide vote on 7 November 2000, the Party will be eligible to receive federal funds under 26 U.S.C. § 9004(a)(3). (Pl.s' Mem. at 12.) If the Green Party is excluded from the ballot in North Carolina, the Party contends that it will receive a lower percentage of the nationwide vote and interfere with its ability to obtain matching funds. And finally, plaintiffs assert that voters outside North Carolina who support and plan to vote for Ralph Nader, such as plaintiff Dunlea, will have their votes effectively diluted by the inability of North Carolinians to place votes for Nader. The plaintiffs contend that, because this case involves an alleged violation of their First Amendment right of freedom of association, the potential harm is *per se* irreparable, citing Elrod v. Burns, 427 U.S. 347, 373 (1976)("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Plaintiffs note that, short of being included on the ballot, no other remedy can redress the harm that would be inflicted by this court's failure to grant their motion.

Defendants argue that the Green Party has not been qualified for the ballot as a result of its own dilatory action and/or intentional strategic decision-making. Specifically, defendants state that the "party has created the predicament it faces by waiting until the last minute to undertake an effort to qualify for the North Carolina ballot." (Def.s' Mem. at 13.) Defendants are correct that, under § 163-96, the Green Party has had almost four years to collect the requisite number of signatures. Unlike the statutory schemes in some other states, see Libertarian Party of Oklahoma v. Oklahoma State Elections Board, 593 F. Supp. 118, 121 (W.D. Okla. 1984), North Carolina's statute does not place any limitations on the time periods within which signatures may be gathered for new party petitions. Importantly, the Green Party has been

in existence for many years; the party dates itself to 1984. Currently, there are approximately 78 members of the Green Party holding elected office in 19 states and in the District of Columbia. (Hartsell Aff., Att. 2.) With respect to its North Carolina presence, plaintiffs claim a 14-year veteran of the Chapel Hill Town Council as "the longest serving Green Party elected representative in the United States." (Compl. ¶ 5.)[6] Indeed, Ralph Nader ran for President as the Green Party candidate in 1996. (Reply, Tab 1.) On a budget of $5,000, he garnered approximately 700,000 votes nationwide. The existence of the Association of State Green Parties is also worthy of note. That association has, as one of its stated goals, building a national political force in order to cooperate on substantive issues such as ballot access and electoral campaigns. (Hartsell Aff., Att. 3.) Despite the fact that the Green Party has a significant history and presence nationwide, though not a substantial presence in North Carolina, and the fact that Nader ran for President as a Green Party candidate in 1996, the Party chose not to initiate the ballot access petition procedures to qualify itself as a new party in North Carolina until Nader announced his candidacy in February of this year. Accordingly, the fact that the Party had only three months to comply with the signature requirements imposed by § 163-96, then, is the result of its own decision-making process.

Furthermore, the manner in which the Party attempted to comply with North Carolina's ballot access laws was the result of careful and strategic campaign decision-making. Numerous affidavits submitted by plaintiffs show that the Campaign essentially chose not to make a serious effort to comply with the requirements because the cost of complying within three months (March, April and May) was allegedly prohibitive. Todd Mann, the Field Director for Ralph

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[6] Council member Joyce Brown has not, however, been listed on the ballot as a member of the Green Party.

Nader's Presidential Campaign, states the point most candidly:

> Although it is arguable that we would have had a chance of meeting the deadline if we had poured money into North Carolina and relied on paid petitioners, it would not have been a reasonable decision for the overall campaign. Not only do we strongly prefer to use volunteers as a matter of principle, we would have had to spend more than $100,000, perhaps $200,000, on paid circulators to stand a chance of getting on the ballot in North Carolina. That is simply too much for the national campaign to bear, particularly when we still would have been a long shot.

(Mann Aff. ¶ 23.)[7] Mann continues, "[g]iven the realities of the timing of presidential campaigns, the early petition deadlines, and high signature requirement transform the petition process from a measure of support to a measure of wealth." (Id. at ¶ 24.)

Again, the court notes the fact that the statute at issue addresses a new party's access to the ballot, not merely a Presidential candidate's access to the ballot. Because the Green Party chose not to attempt to comply with the new party statute in North Carolina until it decided to run a Presidential candidate in this state, the Green Party faced additional challenges involving both time and money. As noted above, the Party's decision to seek access in February 2000 left it with only three months out of the otherwise available three and three-quarter years to obtain signatures. The attempt to collect the signatures in three months in a Presidential election year imposed significant additional costs. For example, Sean Haugh, a co-coordinator of the most recent petition drive for the Libertarian Party of North Carolina, provided testimony that it is

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[7] See also Nader Campaign Manager Amato's Aff. ¶ 21 (noting that the Nader campaign has allocated some funds to the North Carolina effort, but those funds were insufficient to allow compliance with the May 17 deadline and that the "campaign was reluctant to put in even more of its scarce resources because, unless we are able to remove the burdens which would require us to spend more than $100,00 to "purchase" signatures, we could not even hope to make the deadline."); and Stuber Aff. ¶¶ 17-18 ("The Nader campaign has not allocated more of its limited resources to the North Carolina ballot access effort because the early deadline and high signature requirement make it almost impossible to succeed . . . . The Nader campaign cannot afford what amounts to a $100,000 filing fee to appear on the North Carolina ballot; this cost is simply prohibitive for a grassroots candidate and political party trying to run a national campaign.")

significantly less expensive to conduct a petition drive in non-election years. In non-election years resources and volunteers are less scarce and paid petition collectors are less costly. (Haugh Aff. ¶ 11.) In its latest drive, the Libertarian Party began collecting signatures in November 1996 and finished in late May 1997. The party spent about $40,000 on paid petitioners. (Haugh Aff. ¶ 5.) Plaintiffs' own evidence demonstrates, therefore, that the challenges faced by Nader's campaign are inherent in Nader's undertaking; they are not part of the fabric of North Carolina's new party statute.

Perhaps the best measure of the actual effort expended by the Nader campaign to comply with North Carolina's new party statute is the fact that the campaign, after actually expending some amount of money and effort collecting signatures, submitted approximately 1,900 signatures to the State Board on 1 June 2000, far short of the 51,324 signatures required by the statute. As is obvious from plaintiffs' own submissions, the Green Party has exerted very limited efforts to comply with the new party statute and has shown only the most minute fraction of the modicum of support required by North Carolina.

The court has examined the efforts made by the Campaign and the Party to comply with the statute that plaintiffs have challenged in an effort to inform its assessment of the harms alleged by plaintiff in support of the preliminary injunction they seek. The court finds that harms sustained by plaintiffs as a result of their own conduct and decision-making should not be attributed to this court's failure to enter a preliminary injunction on their behalf. The court simply cannot countenance a situation in which the Green Party or any other party deliberately chooses not to commit the resources necessary to comply with North Carolina's law, or even to make a good faith attempt to do so, and instead chooses to litigate to achieve its desired end, a place on the ballot.

The court acknowledges that plaintiffs have alleged harms to voters as well as to Nader, the Campaign and the Party. While plaintiffs have characterized the harms to the voters as harms discrete from those that will be suffered by the party itself, the Supreme Court has noted that "the rights of voters and the rights of candidates do not lend themselves to neat separation." Bullock v. Carter, 405 U.S. 134,143 (1972). The plaintiff voters have asserted that, if Nader is not placed on the ballot as the Green Party nominee for President of the United States, they will be denied the right to vote for him. While it is tempting to analyze the voters' interest in this case as one distinctly separate from that asserted by the candidate, the Campaign, and the Party, the court declines to do so. The voters are self-described Nader supporters. They are the constituents of the Green Party. They are the individuals who would accomplish the satisfaction of North Carolina's statute if such satisfaction had been undertaken. Their right to vote for Nader is intricately intertwined with the Green Party's statutory ability to place him on the ballot and cannot be analyzed separately.

For example, in Anderson v. Celebrezze, 460 U.S. 780 (1983), the Supreme Court began its inquiry "by noting that [its] primary concern [was] not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused." Anderson, 460 U.S. at 806. In that case, however, the Anderson supporters at issue had gathered the signatures of 14,500 registered voters, filed the required documents, and submitted filing fees to meet the substantive requirements for having Anderson's name placed on the ballot in the upcoming election. Id. at 782. They had simply failed to meet Ohio's March filing deadline for independent candidates. The Anderson Court held that Ohio's March filing deadline for independent candidates for the office of President of the United States could not be justified by the State's asserted interest in

furthering voter education, in guaranteeing equal treatment for partisan and independent candidates, or in protecting political stability. The Supreme Court's concluding language directly linked its analysis of the voters' rights in that case to the voters' expression of their support for Anderson and his views, support that was exemplified by the voters' fulfillment of the state's substantive filing requirements for independent candidacies. Here, neither the Green Party of North Carolina, nor any group of avowed Nader supporters has attempted seriously to comply with North Carolina's substantive requirements for placing a new party on the ballot. Indeed in their Reply brief, plaintiffs contend that it is "clearly unreasonable to expect Nader and the Green Party, which are seeking ballot access in 50 states, to devote their limited resources to a State in which the official petitioning deadline has already passed." (Reply at 8.) Anderson's supporters, on the other hand, did not even begin to collect the requisite signatures until the official filing deadline had passed, and they still managed to comply with the substantive requirements, demonstrating the required support for Anderson in Ohio. As such, the voters' alleged inability to vote for Nader as the Green Party candidate for president is tied to their own dilatory action or strategic decision-making as is the case with the Party itself.

Moreover, the court is not persuaded that its failure to enter an injunction in this matter would actually preclude Nader from receiving votes from North Carolinians or that it would preclude North Carolina voters from casting votes for Nader. North Carolina's ballot access scheme allows write-in votes as described above. While the court in no way suggests that a write-in option is an adequate substitute for having one's party's nominee placed on the ballot, see Lubin v. Parish, 415 U.S. 709, 719 n.5 (1974) and Anderson, 406 U.S. at 799 n.26, the option

must nevertheless be considered when assessing the alleged harm as characterized by plaintiffs.[8] Plaintiffs have given the court no indication that they have attempted to satisfy the requirements for obtaining status as a write-in candidate for purposes of the 2000 election, but neither have they suggested that such an option would have been foreclosed. Because North Carolina law provides a write-in alternative, and because the burden imposed by the write-in scheme is positively *de minimus*, satisfaction of the write-in requirements would have alleviated some of the harms plaintiff claims would flow from this court's failure to enter a preliminary injunction in this matter.

2. Harm to Defendants if Injunction is Allowed

Defendants argue that, if this court grants plaintiffs' motion for a preliminary injunction, the state would be harmed because North Carolina would be forced to place Ralph Nader on the ballot as the Green Party's nominee for President when the Green Party has not met any standard demonstrating that the Party has a significant modicum of support in North Carolina.[9] Noting the particular harm that would ensue from the court's requirement that they place the Green Party on the ballot "without any evidence or basis for determining that the Green Party has wider support than any other potential third party that might want to appear on the ballot in

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[8] The court notes that the Arizona Green Party, when it was unable to gain access to the ballot for Nader in 1996, achieved write-in status by following that state's applicable procedures, allowing plaintiffs in that action to vote for Nader in the 1996 general election. See Campbell v. Hull, 73 F.Supp.2d 1081, 1084 (D. Ariz. 1999). Likewise, the Libertarian Party of North Carolina has made use of this State's write-in provision. After qualifying as a new party in 1976, 1980 and 1984, the party failed to qualify in 1988. That year, the Libertarian Party's candidate for President did qualify as a write-in candidate and received 1,263 votes out of the 2,134,370 votes cast for President. The Libertarian Party qualified as a new party once again for purposes of the 1992 election. See McLaughlin v. North Carolina Board of Elections, 65 F.3d 1215, 1219 (4th Cir. 1995), cert. denied, 517 U.S. 1104 (1996).

[9] While the court recognizes Nader's popularity in the country, Nader's popularity as established by various opinion polls is not a proxy for popular support for the Green Party, of which Nader is not even a member, within North Carolina. It is a showing of support for the Party itself that § 163-96 requires.

November," (Def.s' Mem. at 19), defendants also assert that such an injunction would leave the State with no basis for determining when a new party seeking to run a Presidential candidate should be permitted access to the ballot. (Def.s' Mem. at 13.) Granting the injunction would "thwart the state's interest in protecting the integrity of its ballot." (Id. at 19.) Defendants further argue that, by prohibiting them from relying on the reasonable restrictions on ballot access imposed by § 163-96, the court would render the state susceptible to exactly the sort of voter confusion, ballot overcrowding, or presence of frivolous candidates from which the Supreme Court has said states are entitled to protect their voters.

As defendants note, plaintiffs have relied on Anderson to argue that states' interests regarding ballot access are less strong in national elections than in state and local elections. There is no doubt that Anderson supports that proposition. However, the statute at issue in Anderson pertained to the ballot access requirements for independent candidates, not new parties. While a state's interests in regulating the ballot as it pertains to an independent candidate for president may be less than the state's interests in regulating the ballot as it pertains to candidates for state offices or other offices for which only North Carolinians cast votes, such as the House and Senate, it is not clear that a state's interests in regulating a party's access to the ballot differ depending on the type of candidate the party seeks to run. This is particularly so in light of the fact that North Carolina's statute allows parties almost a full four years to comply with the various requirements imposed by the statute. Moreover, qualification under § 163-96 allows a party to place a candidate on the ballot for any position it chooses.

3. Balance of the Harms

In light of the fact that plaintiffs participated in and largely caused the harms to which they allege they will be subjected if § 163-96(a)(2) is not enjoined, and the fact that the Nader

supporters involved in and represented by this action had the option of pursing write-in candidate status for Nader to ensure that they would have the opportunity to cast votes for him regardless of his presence on the ballot, the court concludes that the balance of the harms does not tip decidedly in plaintiffs' favor. However, the court will assume, for the purposes of this preliminary injunction motion that the balance of the harms does tip in their favor, thereby subjecting plaintiffs to a less burdensome showing on the merits, because the court cannot conclude, in any event, that plaintiffs have raised questions going to the merits of this action, i.e., the constitutionality of § 163-96, that are so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.

B. Merits Analysis

1. The Constitutionality of Section 163-96(a)(2).

a. Applicable Standard of Review

The Fourth Circuit has explained that,

> [a]s a rule, state laws that restrict a political party's access to the ballot always implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments. That is because "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech," . . . and because "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."

McLaughlin v. North Carolina Board of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995)(citing Anderson, 460 U.S. at 789 and Williams v. Rhodes, 393 U.S. 23, 31 (1968)), cert. denied, 517 U.S. 1104 (1996).

In McLaughlin, the Fourth Circuit analyzed Anderson and a subsequent Supreme Court case, Burdick v. Takushi, 504 U.S. 428, 434 (1992), to determine the applicable standard of

review in a ballot access case. First, the court reiterated the balancing test set forth in Anderson and reaffirmed in Burdick as follows:

> [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

McLaughlin, 65 F.3d at 1220 (citing Burdick, 504 U.S. at 434). Secondly, however, the McLaughlin court explained that the Burdick court had affirmed a single modification of the Anderson approach, holding that "election laws which place 'severe' burdens upon constitutional rights are subject to strict scrutiny: the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. (internal quotation omitted).

> In short, election laws are usually, but not always, subject to ad hoc balancing. When facing any constitutional challenge to a state's election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that "order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). "The results of this evaluation will not be automatic; . . . there is 'no substitute for the hard judgments that must be made.' " Anderson, 460 U.S. at 789-90, 103 S.Ct. at 1570 (quoting Storer, 415 U.S. at 730, 94 S.Ct. at 1279).

Id. at 1221. See also Wood v. Meadows, 207 F.3d 708, 714-715 (4th Cir. 2000); Green v. Mortham, 155 F.3d 1332, 1336-1337 (11th Cir. 1998)(discussing evolution of standard applied in Supreme Court's ballot access cases and proceeding to apply Anderson test in manner instructed by Burdick, first assessing whether Florida's restrictions were reasonable, nondiscriminatory restrictions requiring review under Anderson's balancing test or severe restrictions necessitating strict scrutiny analysis), cert. denied, 525 U.S. 1148 (1999); LaRouche v. Fowler, 152 F.3d 974,

993 (D.C. Cir. 1998)(discussing two-pronged approach described in Burdick); Independent American Party of Arizona v. Hull, 100 F.3d 962, 1996 WL 640472, **4 (9th Cir. Nov. 5, 1996)(same); and League of Women Voters v. Diamond, 965 F. Supp. 96 (D. Me. 1997)(interpreting Anderson and Burdick to require severe restrictions to be subject to strict scrutiny while reasonable, nondiscriminatory restrictions be subject to the less rigorous Anderson balancing test).[10] The Fourth Circuit has explained that, with respect to the analysis required by the strict scrutiny applied to severely burdensome ballot access schemes, "a court must consider not only the 'legitimacy and strength' of the interests assertedly justifying those burdens, but also 'the extent to which [the state's] interests make it necessary to burden the plaintiff's rights." Wood, 207 F.3d at 716.

As the League of Women Voters court noted, the "Supreme Court has not determined a standard for use in deciding when a state's restrictive election law moves from being reasonable to severe." 965 F. Supp. at 100. See also Independent American Party of Arizona, 100 F.3d 962, 1996 WL 640472 at *4 (same). While this may be true, the Fourth Circuit has fortunately spoken to the severity of the burden at issue in this case. Asked to determine the

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[10] In League of Women Voters, the district court likened the less rigorous Anderson balancing test to rational basis review. The Fourth Circuit explicitly disagreed with such a characterization in McLaughlin. While some

> courts have discerned or suggested that election laws that impose less substantial burdens need pass only rational basis review[,] [s]ee, e.g., Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir.1992) [and] McLain v. Meier, 637 F.2d 1159, 1167 & 1168 n. 16 (8th Cir.1980)[,] [w]e do not read the Supreme Court's opinions that way. We believe that a regulation which imposes only moderate burdens could well fail the Anderson balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational. See, e.g., Burdick, 504 U.S. at 439-40, . . . (determining, first, that challenged election provision imposed "slight" burden and then applying balancing test to conclude that the "legitimate interests asserted by the State are sufficient to outweigh the limited burden"). On the other hand, if a regulation imposes no burdens, it would not fail the balancing test even though it also served no discernible state interest.

McLaughlin, 65 F.3d at 1221, n.6.

constitutionality of North Carolina's provisions restricting political party access to the ballot, specifically N.C. Gen. Stat. § 163-97's provision that a party ceases to exist for ballot access purposes unless it polls 10% of the vote in the gubernatorial election, the Fourth Circuit wrote that

> *the burden that North Carolina's ballot access restrictions impose on protected interests is undoubtedly severe--that is, as history reveals, those regulations make it extremely difficult for any "third party" to participate in electoral politics. . . .* It remains only to determine, then, whether the North Carolina rules that govern a party's ability to place its candidates on the general election ballot are the least restrictive means to achieve the "important state interest in requiring some preliminary 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).

McLaughlin, 65 F.3d at 1221-1222 (footnote omitted and emphasis added).[11] See also Anderson, 460 U.S. at 793-794 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and -- of particular importance -- against those voters whose political preferences lie outside the existing political parties.")

The McLaughlin court did not provide an extended discussion in support of its conclusion that North Carolina's ballot access restrictions impose a severe burden on protected interests. A brief review of North Carolina's ballot access scheme as a whole, however, does lend support to the McLaughlin's court's conclusion regarding the ballot access provisions governing the qualification of new parties. Indeed, the Fourth Circuit reiterated in Wood that

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[11] Concluding that the ballot access provisions for new party access in North Carolina imposed a severe burden on protected interests, the court explicitly noted that "strict scrutiny can apply to laws which mak[e] it difficult, but not impossible, for a new political party to obtain a position on the ballot'" McLaughlin, 65 F.3d at 1221, n.7 (internal quotation omitted).

"[w]hen determining whether a given state's filing deadline unconstitutionally burdens candidates' and voters' rights, a court must examine that state's ballot access scheme in its entirety." 207 F.3d at 711. As explained above, an individual in Nader's position who wants his name placed on the ballot as a presidential candidate has only two options if he is not a member of a party that received more than 10% of the vote in the preceding general election. Such a potential candidate would have to submit petitions with signatures totaling 2% of the registered voters in North Carolina by June 15 (98,606 signatures) or submit petitions with signatures totaling 2% of the number of people who voted in the most recent gubernatorial election in North Carolina by May 17 (51,324 signatures). See N.C. Gen. Stat. §§ 163-122 and 163-96(a)(2).[12] Unlike some other states that have separate provisions dealing with candidates for President and Vice-President of the United States, North Carolina does not have such a separate provision. See Wood, 207 F.3d at 709 (referencing separate statute governing candidates for President and Vice President of the United States); and Rainbow Coalition of Oklahoma v. Oklahoma State Election Board, 844 F.2d 740, 746 n.9 (10th Cir. 1988)(noting that, unlike new party statute challenged in that action, Oklahoma's separate statute governing ballot access for minority candidates for President had a July 15 deadline and required a petition signed by 3% of the total votes cast in the last election for President).[13] Of course, to achieve plaintiffs' stated

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[12] Plaintiffs have not challenged the constitutionality of §163-122. While the court may, and indeed must, consider North Carolina's ballot access scheme as a whole when determining the constitutionality of the burden imposed by the challenged provisions of North Carolina's ballot access laws, see McLaughlin, 65 F.3d at 1223 (ballot access provisions must be assessed as a complex whole), the court may not pass judgment on the constitutionality of a statutory provision that is not properly before it. Accordingly, the court will make no ruling, nor will it opine, on the constitutional validity of § 163-122 in the context of this action.

[13] In Rainbow Coalition, a pre-Burdick case applying the Anderson balancing test, the Tenth Circuit upheld an Oklahoma statute requiring a party seeking recognized status to obtain signatures equaling at least 5% of the number of votes cast in the last general election (a number which ranged between 45,497 and 62,784 depending on whether the previous election was gubernatorial or presidential) and to file them no later than May 31 of an even-

goal of having Nader's name placed on the North Carolina ballot as the Presidential nominee for the Green Party, plaintiffs could proceed only under § 163-96 because a successful petition under §163-122 would have allowed Nader to appear on the ballot only as an unaffiliated candidate. Given the limited alternatives available to a candidate in Nader's position seeking ballot access, and the explicit and pertinent guidance provided by the McLaughlin court, this court is constrained to apply strict scrutiny, rather than the less rigorous Anderson balancing test, in its review of plaintiffs' challenge to the constitutionality of N.C. Gen. Stat. § 163-96(a)(2). Plaintiffs have objected specifically to the number of signatures required in conjunction with the effective filing date of 17 May 2000 imposed by § 163-96(a)(2) to allow a new party to gain access to the ballot. The court must determine whether § 163-96(a)(2) is narrowly drawn to advance a state interest of compelling importance.

b. The Compelling Nature of State's Interest

First the court will address the issue of the nature of the State's interest. The State has asserted, not only its interest, but its "duty to ensure that the electoral process produces order rather than chaos." Libertarian Party of Illinois v. Rednour, 108 F.3d 768, 774 (7th Cir. 1997), cert. denied, 522 U.S. 858 (1997). Specifically, the State has alleged an indisputable interest in preventing a grocery list of candidates, minimizing voter confusion, discouraging frivolous candidates and promoting fair, honest and orderly elections. (Def.s' Mem. at 19.) See New Alliance Party v. North Carolina State Board of Elections, 697 F. Supp. 904, 907 (E.D.N.C. 1988)("[i]t is certainly true . . . that the interest of a state in preserving the integrity of the

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numbered year. Such parties were allowed one year to circulate their petitions.

The Oklahoma statute upheld by the Tenth Circuit was very similar to North Carolina's statute, but North Carolina requires 2% rather than 5% of the votes cast in the last election and allows new parties 3 3/4 years to circulate their petitions.

electoral process and regulating the number of candidates to avoid voter confusion is compelling"). As the Supreme Court has explained,

> [w]e have never required a State to 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. . . . To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 194-195 (1986).

The Supreme Court has also long recognized that "[t]here is surely 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). See also Munro, 479 U.S. at 194 ("Jenness and American Party [of Texas v. White, 415 U.S. 767, 782 n.14 (1974)] establish with unmistakable clarity that States have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot....' Anderson v. Celebrezze, 460 U.S. 780, 788-789, n. 9 (1983). We reaffirm that principle today."); and Ahmad v. Raynor, 862 F.2d 313, 1988 WL 118613, **1 (4th Cir. Oct. 27, 1988)("states have a legitimate, and indeed a compelling interest, in requiring a candidate to show a significant 'modicum of support' before permitting his or her name on the official ballot"), cert. denied, 490 U.S. 1109 (1989).

Particularly with respect to new parties, the State has asserted an interest in ensuring that the new party itself, as opposed to a particular candidate for office, has a modicum of support before adding the party to a general ballot. The Supreme Court has explained that "[a] new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office." Storer, 415 U.S. at 745. As the Eleventh Circuit has opined, "[w]hen candidates list a party affiliation . . . the voters and the state are entitled to some assurance that particular party designation has some meaning in terms of a 'statewide, ongoing organization with distinctive political character.'" Libertarian Party v. Florida, 710 F.2d 790, 795 (11th Cir. 1983), cert. denied, 469 U.S. 831 (1984). See also Rednour, 108 F.3d at 774.

Plaintiffs have argued that the State's interests are significantly different in the context of a Presidential campaign. Notably, however, the State is not enforcing § 163-96 in an attempt to regulate this year's Presidential election. Rather, the State seeks to regulate the access of new parties to its ballot. The interest in keeping new parties off of the ballot that do not exhibit a modicum of support in this state does not differ in a presidential election year. Indeed, it is arguable that the interest in keeping a new party without the required state support off of the ballot is greater in a presidential election year in North Carolina where the Presidential election years coincide with the election of all major state government officials. Such a circumstance heightens the possibility of voter confusion. Plaintiffs are correct that the Anderson Court explained that

> in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice-President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential

> election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

Anderson, 460 U.S. at 794-795. As noted, however, the statute challenged in this case does not purport to regulate access for presidential candidates. Instead, it regulates access of new parties, like the Green Party, to the ballot. An order enjoining the State from enforcing § 163-96 would permit the Green Party to place any candidate it so desires on the ballot in North Carolina. Even if this court enjoined § 163-96 only as applied to Ralph Nader for purposes of this election year, such an injunction would not permit the placement of Nader on the ballot as an independent candidate as was the case in Anderson, but rather the placement of Nader on the ballot as the Green Party's nominee for President. The fact that the candidate at issue here is a Presidential candidate cannot be relied upon to negate or lessen the State's interest in requiring a party, as opposed to an independent candidate, to show a modicum of support in this State before being placed on the ballot given the fact that the statute these plaintiffs have chosen to challenge is the statute pertaining to new party access. This is particularly so in light of the fact that the new party statute has built-in safeguards, such as the three and three-quarter-year period in which to obtain signatures -- a feature which is eminently useful to a new party but perhaps less useful to an independent candidate who decides to run relatively late in the game. As noted earlier, plaintiffs had the option of proceeding under the independent candidate statute, and/or challenging the constitutionality of that statute. The court concludes that the State has undoubtedly stated a compelling interest in requiring a new party to show a modicum of support within North Carolina before being permitted on the ballot.

c. Whether Section 163-96(a)(2) is Narrowly Drawn

Whether § 163-96(a)(2) is narrowly drawn, i.e., the least restrictive means, to satisfy the State's compelling interest presents a separate issue. In McLaughlin, the Fourth Circuit implicitly held that the provisions of North Carolina's ballot access scheme requiring a party to obtain signatures from 2% of the voters in the previous gubernatorial election passed constitutional muster under American Party of Texas v. White, 415 U.S. 767 (1974)(upholding a two-tiered system that did not provide a separate avenue for small parties to run candidates for local elections). McLaughlin, 65 F.3d at 1225. The McLaughlin court specifically noted that North Carolina's new party statute prevented a party from nominating candidates for local offices within North Carolina without demonstrating statewide support even where those local candidates had significant local support. Id. Nevertheless, the court rejected the Libertarians' challenge to North Carolina's election laws restricting access to the ballot and agreed with the district court "that the ballot access rules do not unconstitutionally burden rights guaranteed by the First and Fourteenth Amendments." Id. at 1226.

Specifically, with respect to the statute requiring a party to obtain 10% of the vote to retain its party status, see N.C. Gen. Stat. § 163-97, the court wrote,

> *While all states condition ballot access on a showing of some "preliminary modicum of support," it is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the state's avowed and compelling interests.*

McLaughlin, 65 F.3d at 1222 (emphasis added). With respect to signature requirements imposed on candidates of new parties, Ahmad v. Raynor, 862 F.2d 313, 1988 WL 118613 (4th Cir. Oct. 27, 1988) (involving Libertarian Party of Maryland and its candidate for Unites States Senate), is also worthy of note. In Ahmad, the Fourth Circuit upheld the constitutionality of a Maryland

ballot access law requiring a "non-primary" party, i.e., a political organization which has presented the state a petition asking official recognition and signed by at least ten thousand of Maryland's registered voters, to submit a petition signed by at least 3% of registered eligible voters in order to have a particular candidate representing that party on the general election ballot. While it is easier, under Maryland's ballot access scheme to gain recognition as a non-primary party, Maryland requires a greater percentage of registered voters to support the candidacy of a party nominee than North Carolina requires to allow a new party unrestricted access to the ballot.

This court agrees with the McLaughlin court that it is beyond judicial competence to identify a specific percentage of signatures required for a new party petition that would constitute the least restrictive means to advance the State's compelling interests. The court notes, however, that requiring 2% of actual voters from the previous gubernatorial election to sign a new party petition is safely within the realm of signature requirements approved by the Supreme Court as well as the Fourth Circuit. See Jenness v. Fortson, 403 U.S. 431 (1971)(upholding constitutionality of ballot access law requiring independent candidates to collect signatures of 5% of voters eligible to vote in last election, even when combined with June filing deadline and 180 day time period for collection). In any event, given the nature of the challenge to § 163-96's constitutionality, the court cannot determine whether the statute is narrowly drawn without considering the signature requirement in the context of the other characteristics of the new party access scheme, including the filing deadline, the type of voter permitted to sign the required petitions, and the time period permitted for the collection of signatures.

While the McLaughlin court explicitly addressed the issue of signatures required for new party petitions, that court did not address the filing deadline imposed by § 163-96 or the effect of

that filing deadline in conjunction with the signature requirement. To properly analyze the filing deadline in § 163-96, therefore, the court finds it necessary to rely on other cases that have addressed filing requirements, the evidence submitted by the State with respect to its administrative needs, and an analysis of the filing deadline in conjunction with the time allotted to procure the required signatures.

The Supreme Court has held February and March filing deadlines unconstitutional in Williams v. Rhodes (new parties)[14] and Anderson v. Celebrezze (independent candidates), respectively. The Eleventh Circuit invalidated an April 6 filing deadline for new parties in New Alliance Party v. Hand, 933 F.2d 1568, 1574 (11th Cir. 1991).[15] The Tenth Circuit, on the other hand, upheld a May 31 filing deadline for petitions for non-Presidential candidates in conjunction with a 5% signature requirement, noting, however, that Oklahoma provided a separate statute with a deadline of July 31 for Presidential candidates. Rainbow Coalition v. Oklahoma State Election Board, 844 F.2d 740 (10th Cir. 1988). In Wood, the Fourth Circuit, applying Anderson, upheld the constitutionality of a Virginia law requiring independent candidates for offices other than President and Vice-President to submit petitions signed by ½ of 1% of Virginia's registered voters by the second Tuesday in June. 207 F.3d at 717. Candidates were not permitted to begin collecting signatures until January 1 of the year in which the election was to be held. Id. at 709. In Jenness v. Fortson, 403 U.S. 431 (1971), the Supreme Court held

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[14] The February 7 deadline invalidated in Williams was accompanied by a requirement that a party obtain signatures of 15% of the number of voters in the previous election. At the time, Ohio laws made no provision for ballot position for independent candidates as distinguished from political parties.

[15] As in Anderson, the plaintiffs in Hand began collecting the required signatures after the filing deadline had passed and substantively complied with the statutory requirements at issue. The Eleventh Circuit wrote that "the early deadline in question placed a burden on the plaintiffs, given that they were unable to meet the deadline imposed but were able to meet the signature requirements at a later date." Hand, 933 F.2d at 1574 (applying strict scrutiny).

that Georgia's filing deadline of the second Wednesday in June for independent candidates was not unreasonably early and therefore not unconstitutional, even when combined with a signature requirement of 5% of voters eligible to vote in the most recent election and a time period within which to gather the requisite signatures of 180 days. 403 U.S. at 438. The Jenness Court noted that Georgia's scheme placed no limitation whatsoever on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that vote counted. Id. at 434. In U.S. Taxpayers Party of Florida v. Smith, 871 F. Supp. 426, 432 (N.D. Fla. 1993), aff'd, 51 F.3d 241 (11th Cir. 1995), the court applied Anderson[16] to uphold a July 15 Presidential filing deadline which it considered in conjunction with a requirement that the candidate obtain 60,312 signatures or 1% of Florida's registered voters. The court explicitly found that a "July 15 deadline, unlike the March 20 deadline in Celebrezze, does not place a 'significant state-imposed restriction on a nationwide electoral process.'" Id. at 434.

The foregoing review of cases shows that the formal June 1 deadline and effective May 17 deadline applicable to new party petitions in North Carolina for the 2000 election fall somewhere in the as yet unaddressed middle of potential deadlines imposed by states across the

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[16] In its discussion of Florida's July 15 filing deadline, the U.S. Taxpayers court wrote that

> it must be understood that any choice of filing deadlines is 'necessarily arbitrary.' . . . Once a filing deadline is established, 'it would probably be impossible to defend it as either compelled or least drastic.' . . . Any filing deadline, like any percentage or other numerical requirement, could be challenged ad infinitum, the challenging party contending that allowing candidates to file a few days later would not leave the state's interest unprotected. . . . Recognizing these possibilities, the Eleventh Circuit has devised a formula to avoid this type of litigious impasse: '[A] court must determine whether the challenged laws "freeze" the status quo by effectively barring all candidates other than those of the major parties, ... and provide a realistic means of ballot access. . . . The focal point of this inquiry is whether a "reasonably diligent . . . candidate [can] be expected to satisfy the signature requirements." . . . . Thus, this test is whether the legislative requirement is a rational way to meet this compelling interest test. The least drastic means test becomes one of reasonableness, i.e., whether the statute unreasonably encroaches on ballot access."

U.S. Taxpayers, 871 F. Supp. at 432 (citing Libertarian Party of Florida v. Florida, 710 F.2d 790, 793 (11th Cir. 1983) which relied upon Anderson).

country. Because there are so many variables in ballot access schemes, none of the foregoing cases can be considered directly on point. While none of the cases suggests that a May 17 deadline is *per se* unconstitutional, the May 17 deadline is nevertheless earlier than the other deadlines that have been upheld. The court notes, however, that the later deadlines that have been upheld have often been upheld despite their appearance in ballot access schemes with more restrictive features than North Carolina's. See, e.g., Jenness v. Fortson, 403 U.S. 431 (1971)(while filing deadline was in mid-June, statute required signatures of 5% of voters *eligible* to vote in last election, as opposed to 2% of those who *actually* voted in the last election, and prescribed 180 day time period for collection rather than permitting three and three-quarter year time period).

Additionally, the court notes that both the Libertarian Party and the Reform Party have qualified as new parties for purposes of the November 2000 election. The Libertarian Party qualified in July 1997 after conducting a petition drive that began in November 1996. Indeed, the Libertarian Party has qualified six out of the seven times it has attempted to do so. (Haugh Aff. ¶ 6.) The Reform Party qualified on 1 June 2000. Gary Bartlett has supplied a chart compiling information pertaining to the various occasions on which certain new parties have qualified for access to the ballot pursuant to North Carolina's new party statute. At least ten new parties have gained access to the ballot by complying with North Carolina's requirements in the past 25 years. As the Supreme Court wrote in American Party of Texas, after commenting on the fact that two political parties had qualified for ballot access under the Act challenged in that litigation,

> [i]t is not, therefore, immediately obvious that the Article on its face or as it operates in practice, imposes insurmountable obstacles to fledgling political party efforts to generate support among the electorate and to evidence that support

within the time allowed.

415 U.S. at 784.[17] Like the American Party Court, this court cannot conclude, given the evidence regarding other parties that have qualified for the ballot under the new party statute in North Carolina, that the statute freezes the status quo, limiting the political field to representatives of the two major parties. The statute does not effectively bar all candidates other than those of the major parties, and it does appear to provide a realistic means of ballot access for new parties. In short, a reasonably diligent party could be expected to satisfy the signature requirements if that party were inclined to devote the necessary time and financial resources to do so.

The State has attempted to give an overview of the tasks required to prepare ballots for an election. This year's election will occur on 7 November 2000 and, by statute, absentee voting must begin on 18 September 2000, 50 days before the general election. (Bartlett Aff. ¶ 15.) The ballots to be used throughout North Carolina must therefore be prepared by 18 September 2000. After ballots are initially prepared, the State Board has to approve the ballots submitted by each of North Carolina's 100 counties. Following approval, the State estimates that at least six weeks will be required for the printing of ballots, partially because this is a Presidential election year. (Bartlett Aff. 15.) Before the ballots are approved, but after the new parties are deemed qualified by the State Board, all new parties are required to hold their conventions and/or submit their nominees for certification. The State Board cannot begin any of the preparation for the general

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[17] Also, in providing guidance to a lower court considering the constitutionality of a California ballot access provision regarding independent candidates, the Supreme Court instructed the lower court to consider whether "a reasonably diligent candidate [could] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." Storer, 415 U.S. at 742. In North Carolina, new parties have qualified for the ballot with some regularity. (See generally, Bartlett Aff.)

election herein described until new parties are qualified. While the new parties are required to submit their signatures to county boards of elections by May 17, the State Board cannot begin its administrative work until 1 June 2000, the date on which the county boards complete their certification processes. The 1 June 2000 date allows the State three months and 18 days to complete its administrative preparation for the general election before the date absentee voting begins in North Carolina on 18 September 2000.[18] Given the list of tasks that must be completed, three months and 18 days is not an unreasonably long period of time in which to accomplish them.

As noted above, it would be impossible to assess the constitutionality of the filing deadline standing alone, divorced from the context in which it has been imposed. North Carolina's effective May 17 filing deadline applicable to new parties, while earlier than deadlines in a majority of other states, simply cannot be analyzed properly without reference to the approximately three and three-quarter- year time period permitted for the collection and submission of signatures preceding that deadline. Ballot access schemes throughout the country feature many variable characteristics, including: the number of signatures required; the percentage of registered or voting voters that such a number represents; the deadlines for filing the requisite petitions; the amount of time permitted to obtain the necessary signatures; the type of voter permitted to sign the petitions; the consequences to the voter who does sign the petitions; and the restrictions placed upon the ability of new parties to place candidates on the

[18] Although the State Board denied plaintiffs' request for an extension of the deadline from June 1 to August 31 because the Board concluded it was not authorized to extend a statutorily imposed deadline, it is clear from defendants' recitation of the facts pertaining to ballot preparation that such an extension would have made it impossible for the State to prepare absentee ballots as required by statute.

general election ballot.[19] Throughout their briefs, plaintiffs have repeatedly made the point that North Carolina's is one of the most restrictive ballot access schemes in the country. Generally, plaintiffs have cited the early filing deadline in conjunction with the raw number of signatures required for new party qualification in support of that assertion. As noted, however, the court must consider many other variables, foremost among them in this context, the percentage of voters that the raw number of signatures represents, the type of voters eligible to sign the new party's petition, and the time period allowed for the collection of the required signatures. Requiring only 2% of the actual voters of a state is certainly and safely within the realm of acceptable requirements under Supreme Court precedent, and the liberality of the three and three-quarter-year collection period speaks for itself. Similarly, the fact that any registered voter can sign a new party petition, or numerous new party petitions for that matter, lessens the burden on new parties considerably. In any event, as the Eleventh Circuit has explained in response to a similar argument advanced by the Libertarian Party of Florida, a state's ballot access requirements cannot be stricken as unconstitutionally burdensome merely because a majority of states protect similar interests by imposing lesser requirements. "A court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature." Libertarian Party of Florida, 710 F.2d at 793-794 (citing Storer, 415 U.S. at 729-730). Having considered all of the various features of North Carolina's ballot access scheme as it pertains to the qualification of new parties, this court cannot

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[19] For example, under Maryland's ballot access laws as discussed in Ahmad, *supra*, a new party is recognized as a "non-primary party" by obtaining the signatures of only 10,000 registered voters. To place a candidate on the general election ballot, however, the party must submit a supporting petition signed by at least 3% of registered eligible voters. By contrast, in North Carolina, once a new party is qualified, it is entitled to put candidates for national, state and local offices on the general election ballot under § 163-98.

conclude that plaintiffs have raised a serious or grave question as to the constitutionality of § 163-96(a)(2). Accordingly, under the standard applicable to preliminary injunctions explained in Blackwelder and Direx, the court cannot conclude that such an injunction is warranted in this case.

2. The Constitutionality of Section 163-96(b)

Section 163-96(b) requires new parties to include in their petitions the following language: "The signers of this petition intend to organize a new political party to participate in the next succeeding general election." Plaintiffs contend that this language is unconstitutional because it erroneously implies that those who wish to support the creation of a new political party in North Carolina will be expected to themselves "organize" the new political party. (Pl.s' Mem. at 23.) Plaintiffs have submitted affidavits testifying to the discomfort that some individuals have expressed about the language when asked to sign petitions by members of the Green Party. Plaintiffs claim that the experiences recounted by the Green Party petition circulators "amply demonstrates that the erroneous information contained in the mandated ballot language has affected the signature-gathering process." (Id. at 25.)

The McLaughlin court addressed the very petition language at issue in this case and analyzed its constitutionality under the Anderson balancing test. McLaughlin, 65 F.3d at 1226. To declare a state's mandatory ballot petition language unconstitutional, the court concluded that the "factfinder must be persuaded that protected expressive, political, and associational rights have in fact been invaded, or the court must be able to conclude as a matter of law that such is the inevitable consequence." McLaughlin, 65 F.3d at 1227. "In the absence of any evidence that the challenged language [had] made it any more difficult for the Libertarians to secure petition signatures than their task would have been had their petitions omitted the objectionable

references," id., and unable to conclude as a matter of law that the challenged language was likely to deter a person otherwise interested in supporting a petitioning party from contributing her signature, id., the court affirmed the district court's refusal to declare § 163-96(b) unconstitutional.

Plaintiffs in this case have submitted the affidavit of a Green Party petition gatherer and plaintiff, Douglas Stuber, in which he testifies that the ballot language was a significant impediment to his collection of signatures. He states that in the collection of almost 2,000 signatures, "almost 15% of the people [he] ask[ed] to sign decline[d] based on the wording of the petition. Potential signers . . . asked [him] to explain whether this language meant they were actually joining the Green Party or whether it would require them to vote for the Green Party candidate. . . . The potential signers . . . were scared away by the demanding obligations suggested by the language required by state law." (Stuber Aff. ¶ 27.) Stuber also states that it took him longer to acquire signatures because he had to take the time to explain the language. (Id.) Plaintiffs also rely on the testimony of Sean Haugh, a collector of signatures for the Libertarian Party, who states that, in his experience, a significant number of non-signers have been influenced by the misleading language of the petition. (Haugh Decl. ¶ 16.) The court notes that, despite the alleged burden discussed by Haugh, the Libertarian Party has been successful in obtaining ballot access using the petitions including the language at issue in six out of seven attempts.

Applying the Anderson balancing test to the ballot language issue in McLaughlin, the Fourth Circuit found that the "particular language that North Carolina prescribes on ballot access petitions does not advance any important state interests . . . ." McLaughlin, 65 F.3d at 1227. The court concluded, however, that § 163-96(b) fails the Anderson test "only if it also does in

fact burden protected rights." Id. While plaintiffs have submitted the testimony of one Green Party petitioner, plaintiffs have not submitted any evidence from individuals who refused to sign based on the misleading language. The court cannot conclude, based only on the affidavits of Stuber (Green Party) and Haugh (Libertarian Party), that the Fourth Circuit's assessment of the petition language is erroneous. The McLaughlin court wrote:

> While we agree that the language "could possibly" be interpreted the way the Libertarians claim, we are equally certain that it need not be so interpreted. A reasonable voter could well construe the language as a whole to mean only that the signers intend jointly -- and not necessarily severally -- to organize a political party that is "new" in the narrowly relevant sense of not being presently qualified "to participate in the next succeeding general election." . . . At bottom, we believe that we may not declare a state's mandatory ballot petition language unconstitutional merely because it could conceivably mislead some individuals and could have been crafted more adroitly.

65 F.3d at 1227. The testimony provided by Stuber and Haugh does not persuade the court that protected, expressive, political, and associational rights have in fact been invaded. Nor is the court able to conclude as a matter of law that such is the inevitable consequence of the language required by § 163-96(b). Moreover, the court notes for the record that the fact that the Green Party submitted only 1900 verified signatures indicates to the court that, whatever effect the ballot language may have had on the Party's signature gathering efforts, the ballot language was not the factor that prohibited the Party from complying with North Carolina's new party statute. Again, the plaintiffs' strategic choice not to commit the money or resources to the North Carolina ballot access drive must carry the majority of that burden.

C. The Public Interest

The last prong in the Blackwelder analysis is whether a preliminary injunction would be in the public interest. As the Fourth Circuit has noted,

> [t]he public interest factor does not appear always to be considered at length in

> preliminary injunction analyses. See, e.g., Jones v. Board of Governors of Univ. of N.C., 704 F.2d 713, 717 (4th Cir.1983) (summarily noting the public interest). As one district court stated: "[i]n this case, as in many, it is difficult to ascertain where the public interest rests.... Both sets of parties assert basic rights fundamental to our nation.... In short, the court cannot easily align the parties so as to place one on the side of the public interest."

Rum Creek Coal Sales, 926 F.2d at 366-367. Given the interests put forth by the State in support of the ballot access restrictions pertaining to new parties, the court finds that enforcement of § 163-96 would likely be in the public's interest. While allowing citizens of North Carolina the opportunity to vote for Ralph Nader for President would arguably be in the public interest as well, the court cannot conclude that it would be in the public interest to require the State to place Nader on the ballot as a Green Party candidate when plaintiffs have not shown even a minimal level of support for the Green Party within North Carolina. Because this analysis of the public interest does not differ markedly from the analysis of the interests of the parties, the court concludes that the public interest factor does not alter the conclusion to be drawn from the other preliminary injunction factors.

III. CONCLUSION

For the foregoing reasons, the court DENIES plaintiffs' request for a preliminary injunction enjoining the State's enforcement of N.C. Gen. Stat. §163-96 and requiring North Carolina to place Ralph Nader on its ballot as the Presidential nominee of the Green Party.

This 9 August 2000.

W. Earl Britt
Senior United States District Court Judge

N.C./gob/J.C.D.