

Date: July 23, 2023

To: North Carolina House Oversight and Reform Committee, Rep. Jake Johnson, Rep. Harry Warren

From: Jonathan Andrew (Andy) Jackson

Re: Testimony on the treatment of new party petitions by the North Carolina State Board of Elections

I thank the members of the House Oversight and Reform Committee for the opportunity to present this testimony.

My name is Andy Jackson. I am the Director of the Civitas Center for Public Integrity at the John Locke Foundation in Raleigh, North Carolina. As part of my work at Locke, I advocate for election law and regulation reforms and investigate possible violations of election laws or other misconduct by election officials, campaigns, or political groups. That work aims to make North Carolina's democratic institutions more trustworthy and thereby increase public faith in those institutions.

### **Barriers Thrown up for New Parties that a Major Party Fears**

I was asked to speak to the committee on the actions taken by the North Carolina State Board of Elections regarding the timely filing of petitions by the We the People and Justice for All parties to be officially recognized and appear on the November ballot.

Those actions were entirely predictable based on the board's partisan nature. On June 10th, before the board met to consider the petitions, I published an article on Locke's webpage entitled "Will the State Board of Elections Try Again to Stop Third Parties that Democrats Fear?"<sup>i</sup> A summary of what I wrote then, along with some other information, provides context for what has transpired at the State Board of Elections over the past few weeks.

To be recognized as an official party, new parties must submit petitions with 13,865 valid signatures, and three parties have met that threshold. They are the Constitution Party of North Carolina, which submitted 14,504 valid signatures; the Justice for All Party of North Carolina, with 17,385 valid signatures; and We the People, with 18,639 valid signatures.

I then wrote:

The final step is for the State Board of Elections board to officially recognize the parties in a vote in their upcoming meeting.

While that may seem like a fait accompli, there are a couple of interconnected barriers for the two parties with the most valid signatures: the Democratic Party's hostility to their efforts and the board's recent history of trying to put the kibosh on third parties.<sup>ii</sup>

Towards that end, Democrats have raised "an army of lawyers"<sup>iii</sup> to thwart the rise of third parties they believe might cost President Biden votes in November. Robert Lenhard, a lawyer for the Democratic Party and former White House counsel for President Biden, telegraphed their plan of attack when he said that they would seek to ensure that third parties were not "simply a single candidate wanting to

circumvent existing rules.”<sup>iv</sup> That is despite America’s long tradition of candidate-centered parties, from Theodore Roosevelt’s Bull Moose Party to Ross Perot’s Reform Party.

Those efforts have partially paid off in North Carolina.

The State Board of Elections approved the petition of the conservative Constitution party after a minor delay.

After a further delay, the board voted to certify the petition of the We the People party by a 4-1 bipartisan majority vote, but only after Chairman Alan Hirsch all but requested the Democratic Party to sue the board over its decision, saying that he believed “there has been subterfuge” regarding their petition and that “if someone wants to challenge that in court, they are welcome to do so. I think they have a good case.”<sup>v</sup>

### **Methods Used to Question and Ultimately Stop the Justice for All Party**

Part of the justification for delaying approval of the We the People and Justice for All petitions and the ultimate rejection of We the People’s petition was provided via opposition from Clear Choice Action backed by the Elias Law Group and the North Carolina Democratic Party.

According to a March 14 article in the Washington Post, Clear Choice Action was founded by Pete Kavanaugh, a strategist who served as deputy campaign manager in President Joe Biden’s 2020 presidential campaign. In a statement for that article, Kavanaugh laid out his group’s rationale for trying to stop We the People and Justice for All. He said:

It’s imperative that this election is a clear choice between President Biden and Donald Trump. No third-party or independent candidate has any chance of winning a state in November, never mind reaching 270 electoral votes. They are spoilers, plain and simple. We’re here to work with allies to ensure those candidates are held accountable, and everything is on the table.<sup>vi</sup>

“Everything is on the table.”

Clear Choice Action conducted what it called its own “review” of the petitions and, based on that review, urged the board to conduct further verification procedures.<sup>vii</sup> The board complied and attempted to contact 26 verified signers of the We the People petition and 66 verified signers of the Justice for All petition based on the statements received from Clear Choice Action. Of those, 12 verified Justice for All petition signers claimed they did not sign or did not remember signing it.<sup>viii</sup>

Clearly, you cannot reject a petition based on a small sample from an organization that had declared that “everything is on the table” to keep the parties they targeted off the ballot.

To their credit, board staff then conducted their own review of the Justice for All petition by attempting to contact a random sample of 250 verified signers. They were able to reach 49 people on that list, a response rate of 19.6 percent. Of those, 21 said they did not sign the petition or do not remember signing it. That is 42.9 percent of all verified signers who were successfully contacted.<sup>ix</sup>

It may be tempting to extrapolate from those 21 cases and presume that over 40 percent of all the verified signatures submitted from Justice for All are from people who did not sign the petition. There are two problems with making such a presumption. First, board staffers asked people to remember signing a petition sometimes weeks or months after reportedly signing it. It is easy to understand that someone who signed a petition in a grocery store parking lot in February may not recall signing it when an official calls to ask about it in July. Those who said they remembered signing the petition were then subjected to a series of follow-up questions.

Political science research has found that:

The quality of information provided by individuals in response to recall questions can be influenced by several factors, notably, the complexity of the question, the deficiencies of memory, and the inclination to give socially acceptable answers.<sup>x</sup>

Deficiency of memory may influence the ability of verified signers to recall having signed the petition. Research by Washington State University political scientists John Pierce and Nicholas Lovrich found that “signers significantly underreport signing a petition when questioned about it several months after the ballot.”<sup>xi</sup> Since all the persons contacted by elections board staff were from a list of verified petition signers, any memory errors could only go in the direction of underreporting signing.

In addition, a sample size of 49 from a population of 17,385 produces a margin of error of 14 percent.<sup>xii</sup> That is assuming that you are willing to accept a confidence level of 95 percent, meaning that one out of every twenty surveys is outside the margin of error. If that is an unacceptable risk for denying people their political rights, a 99 percent confidence level of the same survey has a margin of error of 18 percent. While the margin of error can go in both directions, it compounds the uncertainty caused by memory deficiency.

In short, while the random sample conducted by State Board of Elections staff is a promising beginning for what could be a future method for verifying the new party petition process, its application here is inadequate.

### **We Have Previously Seen the State Board of Elections Acting Against Parties a Major Party Fears**

In 2022, the Green Party submitted petitions with over 16,000 verified signatures by county boards of elections, well over the 13,865 needed for recognition. But, like We the People and Justice for All in 2024, the Greens faced opposition from the Democratic Party.

Again, it was the Democratic Party and the Elias Law Group that spearheaded the effort to keep a progressive party off the ballot. They claimed that there were “fraudulent signatures” on the petitions and that signers were prepared to testify that they did not sign (in their defense, they did not claim that there were enough fraudulent signatures to put the Green Party below the threshold of valid signatures required for certification). They also accused the Green Party of “obfuscation of its purpose and intent as a party” and pointed out that paid signature gatherers collected some signatures.<sup>xiii</sup>

Signers of the Green Party petitions in 2022 faced similar treatment from a Democratic-affiliated group that signers of Justice for all petitions faced this year. Here is how Matthew Hoh, the Green Party's U.S. Senate candidate, characterized that treatment:

They're calling people five times a day. Actually, one person just told us that his wife yesterday was called four times in three and a half hours by them. There's all kinds of levels on this. There's the harassment; there's the misrepresentation; and then there is the bullying or the shaming.<sup>xiv</sup>

As with Justice for All, the board voted 3-2 along party lines not to certify the Green Party in time to get on the 2022 ballot. They eventually certified the party, but only after the July 1 deadline to place candidates on the ballot. It was only after the Greens successfully sued the State Board of Elections that they could get on the 2022 ballot.<sup>xv</sup>

The No Labels Party also faced a delay in their certification after State Board of Elections Chairman Alan Hirsch stated that No Labels needed to do more to prove that it satisfied another provision of the statute, that "the organizers and petition circulators shall inform the signers of the general purpose and intent of the new party."<sup>xvi</sup> However, unlike the Justice for All and Green petitions, the delay was insufficient to deny them ballot access.

### **What Can We Conclude from All This?**

This raises a question: Would the Constitution Party's petition have survived the level of scrutiny that the State Board of Elections gave the other party petitions that meet the valid signature requirement over the past several years? We will never know because the board did not treat the Constitution, We the People, and Justice for All parties equally.

What we are left with is a board that gave a relatively smooth process to a conservative party getting on the ballot (Constitution), made it more difficult for two relatively moderate parties that could pull votes from both Republicans and Democrats (No Labels and We the People) and acted to keep two progressive parties off the ballot (Green and Justice for All). Conservatives might like to think that is evidence that they are brighter than progressives. However, it is more likely an indication of unequal treatment those parties received from the board.

A large part of that inequality was that the moderate and, especially, progressive parties were the targets of campaigns by one of the major parties and its "army of lawyers" to keep them off the ballot. In the cases of the progressive parties, the State Board of Elections was receptive to those campaigns.

I am not willing to let Republicans off the hook just because the Republican board members have been consistent in their support of certifying all party petitions, including that of the right-leaning Constitution Party. Would that party have faced more headwinds if Republicans had a majority on the board, giving them the power to stop the Constitution Party like the current majority stopped the Justice for All Party? Given the nature of partisan politics and motivated reasoning, I worry they would have.

## **Where Do We Go from Here?**

Several things can be done to improve the process so that party petitioners are treated more equally.

First, if several parties allegedly encounter the same problem of meeting the State Board of Elections' expectations regarding informing petition signers of their purpose and intent, then at some point, we must see if the board is properly communicating those expectations to the parties. The board could also make determinations regarding purpose and intent earlier in the process, perhaps as soon as the party has reached the required number of valid signatures, and use the first meeting in June to make decisions regarding the number of valid signatures.

Second, given that extensive problems in the party petition process have become the new norm at the State Board of Elections, the General Assembly could move the deadline to submit petitions from June 1 to May 1 to give the board more time to finish its work.

Third, any time you pay people to gather signatures, register voters, or get people out to vote, you increase the likelihood of fraud. That is especially true if you pay people on a per-unit basis. Of the 26 states with initiative and referendum processes, nine ban paying per-payment-per-signature.<sup>xvii</sup> The General Assembly should consider per-unit payment bans.

Fourth, the current process leaves small parties vulnerable to interference by the two major parties whenever the latter is willing to hire "an army of lawyers" to stop them. While I have noted problems with the random sample of Justice for All petition signers this month, it is a method that offers some promise of giving election officials data on signers independent of that provided by major party attorneys. Ideally, the process would be systematic so that all parties are treated equally, done earlier to mitigate deficiencies in memory, and with a larger sample to increase statistical validity. Such a process should also account for "false negatives," people who signed petitions but do not remember doing so.

We should be careful about that last recommendation. While having three parties meet the valid signature requirement in one year is unusual, there is no guarantee that it will not become more common. If such a random sample review process is required by law, the State Board of Elections should be given the resources to conduct those reviews.

The events of the past several years have taught us that the party certification process is, if not broken, susceptible to manipulation by groups that believe that "everything is on the table" when it comes to preventing minor parties from gaining access to the ballot. The State Board of Elections and the General Assembly should take action to ensure that the ability of new parties to get on the ballot is not unduly influenced by how strongly one of the major parties wants to keep them off the ballot.

Thank you.

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<sup>ii</sup> Ibid.

<sup>iii</sup> Rebecca Davis, O'Brien, "Democrats Prepare Aggressive Counter to Third-Party Threats," The New York Times, March 20, 2024, <https://www.nytimes.com/2024/03/20/us/politics/democrats-third-party-candidates.html>.

<sup>iv</sup> Ibid.

<sup>v</sup> Recording of the July 16, 2024 meeting of the North Carolina State Board of Elections, [https://s3.amazonaws.com/dl.ncsbe.gov/State\\_Board\\_Meeting\\_Docs/2024-07-16/State%20Board%20of%20Elections%20Meeting-20240716.mp4](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/State%20Board%20of%20Elections%20Meeting-20240716.mp4).

<sup>vi</sup> Michael Scherer, "Biden allies form new group to coordinate attacks on third-party candidates," The Washington Post, March 14, 2024, <https://www.washingtonpost.com/politics/2024/03/14/biden-third-party-super-pac/>.

<sup>vii</sup> Letter to the North Carolina State Board of Elections, "Re: Failures of Counties to Verify Signatures on New Party Petitions," Elias La Group, June 7, 2024, [https://s3.amazonaws.com/dl.ncsbe.gov/State\\_Board\\_Meeting\\_Docs/2024-07-16/New%20Party%20Petitions/Objections/NC%20Letter%20Re%20County%20Failure%20to%20Signature%20Check.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/New%20Party%20Petitions/Objections/NC%20Letter%20Re%20County%20Failure%20to%20Signature%20Check.pdf).

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<sup>ix</sup> "Summary of Calls to JFA Signers at Random," North Carolina State Board of Elections, accessed July 16, 2024, [https://s3.amazonaws.com/dl.ncsbe.gov/State\\_Board\\_Meeting\\_Docs/2024-07-16/New%20Party%20Petitions/SBE%20Inquiry/Summary%20Calls%20to%20JFA%20Signers%20at%20Random.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-07-16/New%20Party%20Petitions/SBE%20Inquiry/Summary%20Calls%20to%20JFA%20Signers%20at%20Random.pdf).

<sup>x</sup> Patrick Fournier, et al. "Validation of time-of-voting-decision recall," The Public Opinion Quarterly 65.1 (2001): 95-107, <file:///C:/Users/AndyJackson/Downloads/2001-ValidationofTime-of-Voting-DecisionRecall.pdf>.

<sup>xi</sup> Katharina E. Hofer, "Partisan Campaigning and Initiative Petition Signing in Direct Democracies," Swiss Journal of Economics and Statistics 153 (2017): 261-291, <https://link.springer.com/content/pdf/10.1007/BF03399509.pdf>.

<sup>xii</sup> "Margin of error calculator, formula, and examples," Survey Monkey, accessed July 16, 2024, <https://www.surveymonkey.com/mp/margin-of-error-calculator/>.

<sup>xiii</sup> Michael Vincent Abucewicz, Letter to the North Carolina State Board of Elections, "Re: Green Party's Failure to Comply with Party Qualification Requirements Under State Law," cc: Elias Law Group LLP, 1

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<sup>xv</sup> Rusty Jacobs, “NC Green Party claims vindication after US judge orders state to make room for party on ballot,” WUNC, August 8, 2022, <https://www.wunc.org/politics/2022-08-08/nc-green-party-claims-vindication-after-federal-judge-orders-nc-to-make-room-for-greens-on-ballot>.

<sup>xvi</sup> Andy Jackson, “No Labels Party Recognition Delay Fits Pattern of Partisanship,” The John Locke Foundation, August 3, 2023, <https://www.johnlocke.org/no-labels-party-recognition-delay-fits-pattern-of-partisan-hackery/>.

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