**No. 22-1251**

IN THE

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

MADISON CAWTHORN, an individual,

*Plaintiff-Appellee*,

v.

MR. DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, MS. STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, MR. JEFF CARMON, in his official capacity as a member of the North Carolina State Board of Elections, MR. STACY EGGERS IV, in his official capacity as a member of the North Carolina State Board of Elections, MR. TOMMY TUCKER, in his official capacity as a member of the North Carolina State Board of Elections, MS. KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

*Defendants, and*

BARBARA LYNN AMALFI, LAUREL ASHTON, NATALIE BARNES, CLAUDE BOISSON, MARY DEGREE, CAROL ANN HOARD, JUNE HOBBS, MARIE JACKSON, MICHAEL JACKSON, ANNE ROBINSON, DAVID ROBINSON, CAROL ROSE, and JAMES J. WALSH,

*Defendant-Intervenor-Appellants*.

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

## REPLY IN SUPPORT OF DEFENDANT-INTERVENOR-APPELLANTS' EMERGENCY MOTION FOR STAY OF INJUNCTION PENDING APPEAL

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## I. Introduction

The state law proceedings blocked by the district court raise weighty issues. But the issues in this emergency motion for stay are far narrower: Did the district court err when it enjoined an adversarial state proceeding, based on interpreting an 1872 amnesty for ex-Confederates as somehow forgiving future insurrectionists? And are the litigants in the enjoined state proceedings—whose rights there were squelched by the injunction—proper parties to appeal, when the nominal defendants (members and an employee of the state adjudicative body) failed to appeal and explicitly take *no position* on the matter?

A stay would restore the status quo ante. Challengers could proceed to litigate before the state adjudicative body; Cawthorn would enjoy the full panoply of procedural rights to defend his candidacy in that litigation, including appealing through the highest levels of the North Carolina state court system to the U.S. Supreme Court; and this Court could consider any non-timing-sensitive issues presented by this case on a normal appellate timeline. Conversely, failure to grant the stay will effectively and permanently deprive Challengers of their statutory right to litigate their challenge to Cawthorn's candidacy before the 2022 election.

## II. Challengers are Proper Parties to Present this Issue.

### A. Challengers have standing to appeal the district court's judgment.

Challengers' standing "need not be based on whether they would have had standing to independently bring this suit, but rather may be contingent on whether

they have standing now based on a concrete injury related to the judgment." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011); *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) ("To determine whether an intervenor may appeal from a decision not being appealed by one of the parties in the district court, the test is whether the intervenor's interests have been adversely affected by the judgment."). Challengers' interests have been *profoundly* adversely affected by the judgment.

### B. The North Carolina candidacy challenge process is not a mere "complaint" leading to a "government investigation" but rather a right to sue.

Cawthorn's arguments under both Article III and Rule 24 are infected by pervasive misdescription of the rights afforded to challengers under the North Carolina candidacy challenge statute ("Challenge Statute"). Cawthorn repeatedly misstates Challengers' interest as the mere *filing* of a challenge, and describes the NCSBE as "processing" it; then he misdescribes the NCSBE proceeding as a "government investigation." (Cawthorn Opp. at 1, 8, 19.) These mischaracterizations compare Challengers to tipsters who call into a police line, leading to a possible investigation in which they have neither control nor rights.

But Challengers are not tipsters; they are *litigants*. Their interest is not just in *filing* complaints for the NCSBE to "process" but in *litigating* their challenges, enjoying substantive and procedural rights afforded by state law. The NCSBE has not been enjoined from conducting a "government investigation" but rather from

adjudicating *the action that Challengers seek to litigate before it*. And the injunction's effect on Challengers is to *deprive them of a right conferred by state law*.

Under the Challenge Statute, a voter may file a challenge before the NCSBE alleging "that the candidate does not meet the constitutional . . . qualifications for the office." N.C. Gen. Stat. §§ 163-127.1(3), -127.2(b). The NCSBE appoints a panel to "hear" the challenge, *id.* § 163-127.3(1); the challenger and candidate, as adverse parties before the neutral adjudicative panel, are afforded pre-hearing discovery, including the right to take each other's deposition and request subpoenas for witnesses or documents, *see id.* §§ 163-127.4(a)(2)-(3); the panel conducts a mini-trial, litigated by the challenger against the candidate, for which the challenger "shall be allowed to issue subpoenas for witnesses or documents, or both, including a subpoena of the candidate" and "present evidence at the hearing," *id.* §§ 163-127.4(c)(1)-(2). Challengers may appeal an adverse ruling "as of right" to the full Board, and may appeal an adverse ruling there "as of right . . . directly to the [state] Court of Appeals." *Id.* § 163-127.6(a).

Challengers have suffered an injury-in-fact—deprivation of a right, conferred by state law, to litigate a candidacy challenge. The injury is fairly traceable to the injunction, which extinguished Challengers' rights and interests and is redressable by a favorable judicial decision. That the NCSBE may be content to accept the injunction does not prevent Challengers from seeking to defend their rights on

appeal. To the contrary, the NCSBE's inaction demonstrates that its interests diverge from Challengers' and that the district court erred in denying intervention. Challengers have standing and may appeal despite NCSBE's refusal to do so. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986) (intervenor with standing has "right to continue a suit in the absence of the party on whose side" intervention was made).

### C. The district court abused its discretion by denying the motion for intervention.

In denying Challengers' motion for intervention, the district court misstated Challengers' significant protectable interest, and—as has become clear before this Court—failed to recognize the divergence between the NCSBE's interest and Challengers'.

Denials of motions to intervene are reviewed for abuse of discretion. *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013). But "application of an incorrect legal standard is an abuse of discretion that must be corrected on appeal." *N.C. State Conf. of NAACP v. Berger*, 999 F.3d 915, 930 (4th Cir.), *cert. granted*, 142 S. Ct. 577 (2021).

#### 1. Challengers have a significant protectable interest in Cawthorn's action.

As noted above, state law affords Challengers the right to litigate their candidacy challenge before the NCSBE and, if necessary, to appeal as of right to the state Court of Appeals. Challengers' interest in that litigation is not to watch the NCSBE "process" it, but to litigate it. Furthermore, their *objective* in that litigation

is not a generalized notion of seeing statutes implemented, but the *specific objective* of obtaining a ruling that Cawthorn is constitutionally disqualified from seeking office.

**2. Denial of Challengers' intervention has squelched their ability to protect their interests.**

Challengers are "so situated that disposing of the action may as a practical matter impair or impede [their] ability to protect [their] interest." Fed. R. Civ. P. 24(a)(2). A ruling that creates a "practical disadvantage" in the intervenor's parallel proceeding satisfies this prong. *Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 121 (4th Cir. 1981). Here, the injunction did not merely create a "practical disadvantage" in the state proceeding; it blocked that proceeding entirely.

Challengers' interest in this challenge cannot be protected as mere amici. *See id.* Parties with amicus status "have no right to seek review by appeal." *Am. Petroleum Inst. v. Cooper*, No. 5:08-CV-396-FL, 2009 WL 10688053, at *3 (E.D.N.C. Feb. 27, 2009).

**3. The NCSBE does not adequately represent Challengers' interests.**

The district court posited that the NCBSE would adequately represent Challengers' interests. But the filings before this Court demonstrate that the NCSBE's interests diverge from Challengers', and it is certainly not adequately representing Challengers' interests here.

An intervenor's burden to show inadequate representation is "minimal"; it only requires that "the representation of his interest 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). This is the default rule. An exception applies when parties share the same "ultimate objective." *Virginia v. Westinghouse*, 542 F.2d 214, 216 (4th Cir. 1976). In such cases, intervenors must show "adversity of interest, collusion, or nonfeasance." *Westinghouse*, 542 F.2d at 216. But Challengers and the NCSBE do not share the same "ultimate objective."

**4. The district court erroneously applied the inapplicable exception, rather than the general rule, which Challengers easily satisfy.**

The district court held that "movants and Defendants share the same ultimate objective in *this* case: to obtain a court order rejecting the Plaintiff's claims and upholding the constitutionality of the challenged statute." *Cawthorn v. Circosta*, No. 5:22-cv-50, ECF No. 56, *4 (E.D.N.C. Feb. 21, 2022). The NCSBE's failure to appeal and its current posture demonstrates this reasoning's fallacy: the NCSBE's ultimate objective here is not *obtaining* an order upholding the challenged statute's constitutionality, but *avoiding* an order declaring it unconstitutional. In contrast, Challengers' ultimate objective here is avoiding an injunction that deprives them of their statutory rights—an objective in which the NCSBE has disavowed any interest. The ruling below demonstrates this divergence: it satisfies the NCSBE's objective of avoiding a determination that the challenged statute is unconstitutional, but completely thwarts Challengers' interest in pursuing their statutory rights.

Insofar as the NCSBE's interests included "upholding the constitutionality of the challenged statute," that interest was dissolved by the injunction. The district court refrained from ruling on Cawthorn's constitutional challenges to the statute, instead basing its order on a *statutory* interpretation of the 1872 Amnesty Act. *Cawthorn*, No. 5:22-cv-50, ECF No. 78, *19-20 (E.D.N.C. Mar. 10, 2022) ("[T]his court will not reach the constitutional question when it is not necessary to do so.").[1] This ruling avoided any impact on the NCSBE's interest in "upholding the constitutionality of the challenged statute." This easily foreseeable outcome removed the NCSBE's interest in further defending its statute. Indeed, from the NCSBE's perspective, not appealing the ruling arguably allows the NCSBE to "uphold[] the constitutionality of the challenged statute" *better* than appealing it; declining to appeal prevents Cawthorn's claims that the statute is unconstitutional from being addressed.

Challengers' interests are not limited to preserving the statute's constitutionality. The district court's initial ruling granting Cawthorn a preliminary injunction—which preserved the NCSBE's interest in defending the statute's constitutionality—*completed foreclosed* Challengers' ability to pursue their state

[1] For brevity, Challengers do not here repeat their responses to Cawthorn's constitutional claims, which Challengers addressed below. *See Cawthorn,* No. 22-cv-50 (E.D.N.C. filed Feb. 7, 2022), ECF No. 27-1 (Challengers' Opp.), at 11-23. Challengers further note that Congress enacted Section Three implementing legislation for North Carolina. The 1868 Omnibus Act, which readmitted North Carolina (along with five other former Confederate states) to the Union, *specifically required* North Carolina to apply Section Three. 40 Cong. Ch. 70, 15 Stat. 73 (1868). This provision has not been repealed.

litigation. After Challengers moved for a stay in this Court, the district court issued its final ruling, a *permanent* injunction, extinguishing Challengers' opportunity to renew their intervention motion—which would have further demonstrated how their interests diverged from the NCSBE's.

Further, the filings before *this* Court conclusively demonstrate that the district court abused its discretion in assuming the identity of the parties' interests. The NCSBE has effectively admitted that, in addition to upholding the Challenge Statute's constitutionality, it also serves *other* interests, which diverge substantially from Challengers' interests and render the NCSBE incapable of adequately representing Challengers' interests. The NCSBE "take[s] no position on [Challengers'] emergency motion or their appeals" (NCSBE Amicus Br. at 9), and details its primary interest in implementing its own election timeline, including matters such as time for "staff to input code into the election administrative system, proof the ballots, have ballots printed by vendors, and have those ballots delivered to the county boards." (*Id.* at 7-8.)

The NCSBE's interests are entirely appropriate. But they diverge sharply from Challengers' interests, which include being able to *litigate their challenge before the NCSBE*. In fact, in further briefing, the NCSBE may cite these interests to adopt a position directly *adverse* to Challengers, arguing that Challengers' requested relief should be denied because of the NCSBE's practical considerations. Even if the NCSBE *still* retains its interest in upholding the Challenge Statute's

constitutionality—a question on which the NCSBE takes no position—and even if it someday appeals the injunction (issued on grounds that do not involve the statute's constitutionality), the NCSBE's interest would be satisfied by an *eventual* ruling to that effect, after many months. But Challengers' interest is to *litigate their challenge* and, if successful, *obtain a ruling that Cawthorn is disqualified from the 2022 ballot*. A ruling after the 2022 election is of little value to Challengers.

The NCSBE's delay in deciding whether to appeal reveals the divergent interests. If the panel is not appointed until after ballots are printed, additional questions will be raised about the feasibility of the challenge process *in this case*. *Trbovich* only requires a showing "that representation of [the movant's] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." 404 U.S. 528, 538 n. 10 (1972). Putative intervenors may have distinct interests even where the parties' objectives are "closely aligned." *Defs. of Wildlife v. N.C. Dep't of Transp.*, 281 F.R.D. 264, 269 (E.D.N.C. 2012). Here, the judge's order satisfied both Cawthorn (who currently is free from a challenge based on Section Three) and the NCSBE (which "won" the issue of constitutionality and no longer has to expend resources defending the statute), but stymied Challengers' interests entirely.

**5. Even under the higher standard of Stuart and Berger, the denial was an abuse of discretion.**

The tight timeline created by the impending election creates an "adversity of interest" not found in other cases. *Cf. Berger*, 999 F.3d at 931-32 (only issue was validity of state law, and primary defendants' additional interest did not detract from shared interests); *Stuart*, 706 F.3d at 352 (movants "concede[d] that they share the same ultimate objective as the existing defendants").

Here, the NCSBE's interest is to avoid a declaration that the Challenge Statute is unconstitutional. The statute was unaffected by the ruling below, so simply not appealing fulfills that interest. But Challengers' interest is bringing *this* candidate challenge, in *this* election cycle. The NCSBE is agnostic on this litigation's timeline and "does not intend to seek expedited relief" (NCSBE Amicus Br. at 3), whereas the timeline poses existential risks to Challengers' challenge. To be sure, the NCSBE has statutory authority to rule on disqualification after ballots have been printed. (NCSBE Amicus Br. at 9.) Even if proceedings have not concluded before ballots are printed, or even after the primary, state law provides mechanisms for addressing candidate disqualification. *See, e.g.,* N.C. Gen. Stat. § 163-114(a). But as a practical matter, disqualification later in the process raises serious complications. Thus, while the NCSBE's points do not bar relief, they do confirm how the NCSBE's interests diverge from Challengers', which is on a fast-moving timeline that renders what might be mere "strategic decisions" in other cases fundamental issues here.

## III. The Public Interest Favors Staying the Injunction.

The public interest is served by allowing full and fair adjudication of Cawthorn's eligibility, ideally *before* the primary, so that Republican primary voters may choose a candidate from non-disqualified alternatives. Cawthorn says "the voters of North Carolina should be the ultimate decision-makers on which candidate will best serve their interests in Congress." (Cawthorn Opp. at 3.) But that is the question that Congress wrestled with in 1866. Section Three's opponents took the position that Cawthorn does here: the voters of Mississippi should be the ultimate decision-makers on whether Jefferson Davis would best serve their interests in Congress. They lost that debate, and the Disqualification Clause is now part of our Constitution. Just as the Civil War affected all Americans, so did the January 6 insurrection. It took place hundreds of miles away from the district Cawthorn seeks to represent, killed people who never set foot there, and very nearly resulted in execution of the Vice President and Speaker of the House while overturning the *national* election for President. Cawthorn may prefer an alternate world where insurrectionist Members of Congress answer to no one outside their districts' borders, but that is not what the Constitution says.

## IV. Conclusion

This Court should grant the emergency motion for stay.

This the 15th day of March, 2022.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains fewer than 2,600 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(d)(2) and Fed. R. App. P. 27(a)(2)(B).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

March 15, 2022

/s/ Pressly M. Millen
Pressly M. Millen

**CERTIFICATE OF SERVICE**

I certify that today, March 15, 2022, I caused the foregoing document to be electronically filed with the Court for the U.S. Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

*/s/ Pressly M. Millen*
Pressly M. Millen