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, *et al.*,

Defendants, and

BARBARA LYNN AMALFI, *et al.*,

Defendant-Intervenor-Appellants.

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

PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO DEFENDANT-INTERVENOR-APPELLANTS' EMERGENCY MOTION FOR STAY OF INJUNCTION PENDING APPEAL

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, and Regulations

Other Authorities

Introduction

This Motion to Stay should be denied. The persons moving for this stay ("**Challengers**") have filed candidate challenges against Rep. Madison Cawthorn before the North Carolina State Election Board ("**NCSBE**"). These Challengers improperly identify themselves as "Defendant-Intervenor-Appellants." They were not Defendants in the district court. And since their Motion to Intervene was denied, they are also not Intervenors. They can only properly be considered Appellants *if* this Court first finds the district court abused its broad discretion when it denied their intervention. However, Challengers have not even argued that the district court abused its discretion and the district court properly denied their intervention, so, as a non-party, they are not entitled to seek a stay, which is sufficient to deny it.

But there are numerous other reasons why Challengers have not justified their stay request, each of which is also sufficient to deny it. First, the NCSBE did not appeal the district court injunction and, as a result, Challengers must have Article III standing to prosecute this appeal. However, Challengers' only cognizable interest is in filing candidate challenges authorized by North Carolina law, which the district court did not enjoin, but they have no property or liberty interest in the processing by the NCSBE of their candidate challenges, which the

district court did enjoin. Thus, they have no Article III standing.

Third, the district court injunction was correctly decided. The plain language of The Amnesty Act of 1872 removes the political disability of Section Three of the Fourteenth Amendment ("**§ 3**"), upon which Challengers base their candidate challenge, from any Member of Congress, including Cawthorn, except for those who were Members of Congress before and at the beginning of the Civil War and fought for the Confederacy. And the three constitutional challenges brought by Cawthorn to the Challenge Statute also have merit and must be reached and rejected by this Court to grant a stay.

Fourth, the Challengers are not irreparably harmed by the injunction as they have no right under federal law to have their Challenges processed by the NCSBE, which the district court enjoined, and they have access to other avenues, such as Congress itself, to object to Cawthorn's candidacy.

Fifth, Cawthorn will be irreparably harmed if the Stay is issued—North Carolina will be mailing absentee ballots for the upcoming primary election in, at most, 13 days from this filing. Cawthorn would be forced to divert time, energy, and resources away from his campaign to defend against an unlawful Challenge being processed under North Carolina law to prevent him from exercising one of the most fundamental First Amendment rights—the right to run for office. And the

timeframe means that an irreversible decision to remove him from the ballot would be made by the NCSBE in, at most, 13 days, under a procedure where none of Cawthorn's federal law and constitutional defenses would be heard, and there would be no time for an appeal to state courts where those defenses could be heard.

Sixth, the voters of North Carolina should be the ultimate decision-makers on which candidate will best serve their interests in Congress. Instead, Challengers assert that the NCSBE should determine if North Carolinians will have the right to judge Cawthorn's qualifications for themselves. Free and fair elections, and our Democratic process, are seriously undermined by allowing state bureaucrats to determine who is qualified to run on the basis of questionable, subjective, and spurious accusations of "insurrection." This Court should not allow such a usurpation of voters' rights and Congressional authority and should deny the stay.

Facts

The facts relevant to this Motion to Stay are simple. The Challengers are several North Carolina voters who filed candidate challenges with the NCSBE against Cawthorn ("**Cawthorn Challenge**"), under a process authorized by North Carolina law. N.C.G.S. § 163-127.1, *et seq*. ("**Challenge Statute**"). The Cawthorn Challenge was based upon a claim under § 3 that Cawthorn "engaged in

insurrection or rebellion" against the United States and is therefore ineligible to take office in the U.S. House of Representatives. U.S. Const. amend. XIV, § 3. Cawthorn vigorously denies he "engaged in insurrection or rebellion" against the United States, but this litigation was not based in Cawthorn's factual defenses. Instead, this matter was before the district court based upon various challenges to the application of § 3 to Cawthorn under federal law and to the Challenge Statute itself.

The Defendants in this litigation are the Members of the NCSBE and its Executive Director, all named in their official capacities. The district court denied Challengers' motion to intervene and detailed its reasons for doing so—including similarity of interests, adequate representation, and undue delay. Ex. A, Order Denying Motion to Intervene, ECF No. 56. ("**Intervention Order**").

The district court then granted Cawthorn's motion for a preliminary and permanent injunction, holding that the Amnesty Act of 1872 precluded the application of § 3 to Cawthorn. Ex. B, Order Granting Injunction, ECF No. 78. ("**Injunction Order**").

Before the current candidate challenges were filed, the NCSBE had obtained in state court a stay from their duty, under the Challenge Statute, to process any candidate challenge until current ongoing redistricting litigation was

concluded. Ex. , DE 9-3 ("**Challenge Stay**") (stay issued "until a final resolution of the present litigation"). Challengers claim that the "final resolution" to the state court challenge to North Carolina's new congressional maps was accomplished when the U.S. Supreme Court denied an application for stay. Mot. to Stay, n.4. However, this ignores the fact that applicants for the U.S. Supreme Court stay could still petition the Supreme Court for a writ of certiorari, as they have promised, so that the state court stay from processing candidate challenges could continue for months or years and at least until May 24, 2022, when the cert petition is due, based on the outcome of the Supreme Court appeal and any subsequent proceedings. As a result, a stay of the injunction issued by the district court would still afford no relief to the Challengers, as the ballots for the primary election need to be prepared by March 27, 2022, 13 days from now.

Standard of Review

This Court reviews denials of motions to intervene, whether as of right or permissive, as well as preliminary and permanent injunctions, for abuse of discretion. *Stuart v. Huff*, 706 F.3d 345, 34(4th Cir. 2013) (intervention); *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (preliminary); *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017) (finding district court abuses its discretion on a

permanent injunction when it "relies on incorrect legal conclusions or clearly erroneous findings of fact," . . . or otherwise acts "arbitrarily or irrationally" in its ruling). (internal citation omitted). Accordingly, this Court will "review factual findings for clear error and legal conclusions *de novo*." *Id.*

Argument

I. The Stay procedure is not available to a non-party to the action.

Challengers are not entitled to a stay, even if they meet the required factors, since they are not parties to this action in the first place and are not authorized to seek a stay under federal rules. Fed. R. App. P. 8.

The district court denied Challengers' Motion to Intervene, Intervention Order, which Challengers have properly appealed to this Court. However, Challengers are not just appealing the denial of their motion to intervene, but have also filed an appeal of the injunction. The Challengers are correct that an applicant who has been denied intervention may file a protective notice of appeal as to the judgment in order to "secure the ultimate object of such motion." *Mausolf v. Babbitt*, 125 F.3d 661, 666 (8th Cir. 1997).

However, Challengers seek not only to protect their prospective right to appeal, if this Court finds that their intervention should have been granted, but they also seek a stay. A stay can only be issued to protect a validly pending appeal,

but here, whether the appeal is lawfully pending won't be determined until this Court decides to reverse the denial of the intervention. Only at that time does a proposed intervenor's "protective notice of appeal . . . become effective." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3902.1, at 113 (2d ed.1991) (". . . the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective *if* the denial of intervention is reversed." (emphasis added)). The Stay request is currently based on only a protective notice of appeal, not an effective one, which cannot be a lawful basis for a stay.

II. Challengers lack Article III standing to bring an appeal and, therefore, request a Stay.

Challengers do not have Article III standing to prosecute an appeal. "Although intervenors are considered parties entitled to appellate review . . . , an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). The Court recognized that intervenors who were granted intervention as of right may have an "adequate interest" to justify the intervention, but, when the defendant does not appeal, the Court held that the intervenors must have Article

III standing on their own. *Id.* at 69. So here, Challengers must have a legally cognizable interest sufficient to confer Article III standing.

Intervenors' only "right" of any kind is authorization to file a candidate challenge under North Carolina state law. And they still have that "right," since the district court's order enjoins the NCSBE from processing or hearing challenges based upon § 3, but does not prevent Challengers from filing the current or future candidate challenges.

Challengers have no cognizable right or interest under federal law to have their Challenges processed or to succeed (i.e., no property or liberty interest). *See* Part III.B.1. Challengers may have a right to have their challenges processed under state law, but this does not rise to a cognizable interest under federal law. Thus, the Challengers do not have Article III standing and the Stay should be denied.

III. Challengers have not met the factors necessary for granting the Stay.

The moving party is required to show it is entitled to a stay pending appeal, based upon the: (1) moving party's likelihood of prevailing on the appeal's merits; (2) likelihood of moving party's irreparable harm absent stay; (3) the prospect that others will be harmed if court grants stay; and (4) the public interest in granting stay. *DV Diamond Club of Flint, LLC v. Small Bus. Admin.*, 960 F.3d 743, 745-46 (6th Cir. 2020).

A. The Challengers have not, and cannot, make a strong showing that they will prevail on the merits.

Challengers have appealed two issues, the district court's denial of their motion to intervene. Ex. A, and the district court's granting of Cawthorn's motion for a preliminary and permanent injunction. Ex. B. The Challengers need "to make a strong showing that he is likely to prevail on the merits," which is then balanced with the other factors. *See Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119 (4th Cir. 1977).

1. The district court did not abuse its discretion when it denied Challengers' intervention.

This Court must first determine whether the district court properly denied Challengers' motion to intervene. If the district court did, the Stay must be denied.

The deferential abuse of discretion review stems from "the district court's superior vantage point for evaluating the parties' litigation conduct and whether an existing party adequately represents a proposed intervenor's interests." *N. Carolina State Conference of NAACP v. Berger*, 999 F.3d 915, 927 (4th Cir. 2021), *cert granted sub nom. Berger v. N. Carolina State Conf. of the NAACP*, No. 21-248, 2021 WL 5498793 (U.S. Nov. 24, 2021).

Challengers argue that "[s]ince the district court grounded its own jurisdiction (standing and ripeness) on proposed-intervenor Ashton's filing before

a neutral adjudicative body, but then refused to let her participate in the proceedings, it would be manifestly unfair for this Court to prevent her from appealing the preliminary injunction that squelched her state administrative Challenge." Mot. to Stay, 6. This argument is without legal merit.

Challengers do not assert here that their interests were different than the NCSBE's interests, nor do they assert that the Attorney General's office did not adequately represent their interests. The Challengers don't even argue the district court abused its discretion when it denied their motion to intervene, let alone provide any law that would support such an assertion if they made it. In fact, nowhere in their motion to stay is this Court's standard of review on the question of intervention even mentioned. Stating a result is "manifestly unfair" does not come close to showing the district court abused its discretion.

And the district court did not abuse its discretion when it denied Challengers' Motion to Intervene, both as of right and permissively, because it determined Challengers did not overcome a heightened presumption of adequate representation by the NCSBE. Intervention Order, 5. The district court also found the Challengers "add[ed] little to nothing to the court's consideration" and that their intervention was "not only [ ] unnecessary, but also would delay this matter." *Id.* at 6.

a. The district court did not abuse its discretion when it denied Challengers' intervention as of right.

Under Rule 24(a)(2), a court must permit intervention as a matter of right if the movant can demonstrate (1) an interest in the subject matter of the action; (2) the protection of his interests would be impaired because of the action; and (3) that interest is not adequately represented by existing parties to the litigation. *Stuart*, 706 F.3d at 349. A failure to meet any one of these elements will preclude intervention as of right. *Berger*, 999 F.3d at 927.

In denying the Challengers' motion to intervene the district court found that they could not overcome a heightened presumption of adequate representation. Intervention Order, 4. Adequate representation has long been presumed when "the party seeking intervention has the same ultimate objective as a party to the suit." *Berger*, 999 F.3d at 930. Further, "a heightened presumption of adequacy applies when would-be intervenors share the same ultimate objectives as a government defendant." Intervention Order, 3. In order to rebut this heightened presumption of adequacy, Challengers must make a showing of "adversity of interest, collusion, or nonfeasance." *Berger*, 999 F.3d at 930.

The district court found that Challengers could not persuasively rebut this presumption. Intervention Order, 4. "[T]he movants and Defendants share the

same ultimate objective in *this* case." *Id.* Further, any "argument[] to the contrary conflate[s] their challenge to [Cawthorn's] qualifications before the State Board of Elections with this litigation." *Id.* "Finally, [Challengers] make no showing of 'adversity of interest, collusion, or malfeasance." *Id.* at 5. Rather, the district court found that, after reviewing the Challengers' proposed response to Cawthorn's preliminary injunction motion, submitted with their Motion to Intervene, and the response filled by the NCSBE, that their arguments were substantially the same. *Id.* (finding Challengers also argued lack of jurisdiction based on the ripeness and abstention doctrines, that Plaintiff failed to demonstrate likelihood of success on the merits of his constitutional claims, that "the Qualifications Clause does not conflict with the challenge statute, and that the 1872 Amnesty Act applied at one time and not to future 'insurrectionists.'"). The district court did not abuse its discretion.

b. The district court did not abuse its discretion when it denied Challengers' permissive intervention.

The deference accorded in review of a district court's denial of permissive intervention is at its zenith. *Berger*, 999 F.3d at 938 ("[A] challenge to the court's discretionary decision to deny leave to (permissibly) intervene must demonstrate a *clear* abuse of discretion in denying the motion." (citation omitted)). A court does

not abuse its discretion where it finds, as here, that intervention would result in unnecessary complications and delay. *Id.* at 939; *Stuart*, 706 F.3d at 355.

Furthermore, the district court held that the Challengers' and the NCSBE's interests were the same, and that their response added "little to nothing to the courts' consideration." Intervention Order, 6. From that, the district court found that "[Challengers] proposed intervention to permit the court's consideration of their response not only is unnecessary, but also would delay this matter since the briefing on the motion by the parties is now complete." *Id.* As a result, the district court did not abuse its discretion when it denied permissive intervention. Consequently, this Court should deny their Stay, since they have no appeal to prosecute.

2. The district court injunction is proper.

The district court based its decision to grant an injunction based on only one federal law claim made by Cawthorn: that, under the 1872 Act, § 3 could not be lawfully applied to Cawthorn. The district court did so because, "[w]here, as here, a straight interpretation of the statutory text answers the question presented, this court will not reach the constitutional questions when it is not necessary to do so." Inj. Order, 19. If this Court rejects the district court's decision on the statutory text, the additional constitutional claims made by Cawthorn must also be

considered and rejected by this Court to determine that Challengers' appeal has sufficient merit and meets this factor. *See N. Carolina Right To Life, Inc. v. Leake*, 344 F.3d 418, 435 (4th Cir. 2003), *cert. granted, judgment vacated*, 541 U.S. 1007 (2004).

a. The court correctly held that § 3 doesn't apply.

i. The 1872 Act removed all § 3 disability.

The candidate disqualification attempt by Challengers is based on § 3 that bars *officeholders* (not *candidates*) who "[i] having previously taken an oath . . . to support the Constitution . . . , [ii] shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may . . . remove such [§ 3] disability." Since disability under § 3 includes the disability of persons who "shall have engaged in" insurrection, it applies prospectively. And when the 1872 Act provided that "such disability" under § 3 "shall be removed," it also removed any prospective disability for all persons. Inj. Order, 21-22. ("The 1872 Act,[1] [which,] by its plain language, removed '*all political disabilities* imposed by [§ 3] *from all persons whomsoever*,'" "which includes current members of Congress like the Plaintiff." (emphasis by court)).

Challengers say the 1872 Act only has retrospective effect, because it

[1] *See* Inj. Order, 20 (full cites for 1872 and 1898 Acts).

removed "disabilities *already* imposed," since "the 1872 Act uses 'imposed' in the past tense." Mot. to Stay, 11 (emphasis in original). But they err grammatically. "Imposed," as used in the 1872 Act's "the disability imposed by [§ 3]," is used as a past *participle*[2]— *not* a "past tense" *verb*, which acts as an adjective to show *which* "disabilities" are referenced. And those are disabilities imposed *by* § 3, not *based on* § 3, so the reference is to the *sort* of *legal* disability § 3 imposes, which is both retroactive and prospective, not the particular applications of § 3 to an individual. *Accord Impose* www.merriam-webster.com/dictionary/impose ("to establish or apply by authority"). Accordingly, "imposed" doesn't justify Challengers' use of "disabilities *already* imposed" to claim only retrospective application. Thus, when the 1872 Act says that particular legal disability created by § 3 is "hereby removed from all persons whomsoever," it meant "all" to apply prospectively too. *Accord* Inj. Order, 22 (language that would have indicated temporal limitation).

The only exception (Congress knew *how* to make exceptions) to 1872 Act's

[2] Participles are "a form of a verb that in some languages, such as English, can function independently as an adjective," as here, The Free Dictionary, Participle, https://www.thefreedictionary.com/participle.html, and are "verbals" (not verbs but based on verbs) that come in "past" ("imposed") and "present" ("imposing") versions. Purdue Online Writing Lab, Participles, https://owl.purdue.edu/owl/general_writing/mechanics/gerunds_participles_and_infinitives/participles.html.

removal of § 3 legal disability were some office-holders and military personnel. The 1898 Act removed their disability: "the disability imposed by [§ 3] heretofore incurred is hereby removed." "[H]eretofore" indicates retrospective application (Congress knew *how*) and "incurred" indicates application to particular persons—both unlike the 1872 Act. As before "disability imposed by [§ 3]" is a participle phrase indicating *which* legal disability is at issue. If "imposed by," in both the 1872 and the 1898 Acts, had meant only prior application to particular persons, as Challengers claim, then there would have been no need for "heretofore incurred," in the 1898 Act, to make it only retroactive, violating construction canons.

Challengers recite legislative history. Mot. to Stay, 11-12. But since the 1872 Act is "clear and unambiguous," "consideration of legislative history [i]s unnecessary and improper," though the Board's arguments thereon are "unpersuasive." Inj. Order, 20 n.8 (citations omitted).

Challengers claim Congress interpreted the 1872 Act retrospectively, citing the House's refusal to seat Berger. Mot. to Stay, 12-14. Berger's exclusion, after criticizing American involvement in World War I, predated modern First Amendment doctrine. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 130 (2021). The House considered only the 1898 Act, not the 1872 Act, as the State Defendants conceded in oral

argument. Inj. Order, 22. So when the House said that the 1898 Act's "heretofore" language removed previously incurred disabilities only, that was true of the 1898 Act. The 1872 Act, however, which the House did not consider, did not have this language and, in light of § 3's retroactive and prospective effect and the 1872 Act's definition of "disability," acted prospectively. The district court correctly rejected the Berger argument. Inj. Order, 22-23.

Challengers say "[t]he 1872 Act must be construed to avoid unconstitutionality." Mot. to Stay, 14. First, they say the district court's interpretation of the 1872 Act amounts to repealing § 3. *Id.* But the plain language of § 3 gave Congress plenary power to remove any and all § 3 disabilities, and Intervenors identify no provision limiting the breadth of that power. Second, Challengers liken the district court's interpretation to prospective pardons. *Id.* at 15. Cawthorn hasn't been criminally convicted, so § 3 can't be viewed as a prospective pardon, and § 3 refers to political, not criminal, consequences of "insurrection." The plain language of the 1872 Act removes this political consequence from any Representative other than those who served during the 36th and 37th Congresses. Cawthorn is a Member of the 117th Session of Congress, so the 1872 Act removed the ability to apply § 3 to him. Since § 3 doesn't apply to him (or any Member holding office after the 37th Congress), the application of § 3 to him is prohibited

by federal law.

ii. Were § 3 disability extant, it wouldn't presently apply.

Even assuming *arguendo* § 3 disability survives, its application to Cawthorn could not be determined until he presents himself to take the oath of office upon reelection. First, it applies to *taking office*, not *candidacy*. For example, being underage for age-restricted offices doesn't bar candidacy, if his upcoming birthday qualifies him to take the oath of office. So assuming disputed facts, § 3 would only disqualify Cawthorn from "be[ing] a . . . Representative," not a *candidate* for Representative. Until he presents himself to take the oath of office, any § 3 disability does not attach to him.

Second, § 3 authorizes Congress to "remove such disability" at any time, including immediately preceding Cawthorn taking his oath of office after his reelection. Thus, until then, it remains unknown if any disability that attaches to him has already been removed by Congress.

In sum, the NCSBE planned to apply § 3 to determine Cawthorn's *candidate* qualifications, but "this claimed power has been rendered ineffective by the 1872 Act," so "[s]ubjecting [him] to such a procedure would violate federal law." Inj. Order, 23.

b. Cawthorn's constitutional claims, which have not been reached and are preserved, have merit and preclude issuance of a Stay.

In addition to the claim reached by the trial court, that applying § 3 to Cawthorn is prohibited by the 1872 Act (Count IV), Cawthorn also made three constitutional claims in Counts I, II and III of his Complaint and in support of his request for an injunction. The district court didn't reach those Counts, but they must be considered and rejected by this Court to issue a stay.

First, the Challenge Statute is unconstitutional, because its "reasonable suspicion" standard violates the First Amendment by triggering a government investigation (Count I). *See* N.C.G.S. §§ 163-127.3; 127.4; *see also* Ex. D, DE 9, Mem. in Supp. of Prelim. Inj., 14-16 ("**PI Mem.**"); Ex. E, DE 51, Reply in Supp. of Prelim. Inj., 6-8 ("**PI Reply**"). Running for political office is quintessential First Amendment activity, *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981), and a government investigation into the exercise of a First Amendment right infringes on that right. Reasonable suspicion cannot support infringement upon a fundamental First Amendment right. *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013) (holding that it violates the First Amendment to arrest someone who is peacefully protesting, based on mere suspicion and without probable cause).

Second, the burden-shifting provision of the Challenge Statute is

unconstitutional under the Due Process Clause of the Fourteenth Amendment, because it requires Cawthorn to bear the burden of proof that he is not disqualified from office under § 3 and because it requires Cawthorn to prove a negative, that he did not "engage in insurrection or rebellion" against the United States. (Count II). *See* N.C.G.S. § 163-127.5(a); *see also* PI Mem, 16-19; PI Reply, 8. When government processes infringe on free speech, "the operation and effect" of those processes "must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied," and this requires "the State (to) bear the burden of persuasion to show that (the defendant) engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 520, 529 (1958) (internal citations omitted). The Challenge Statute's burden-shifting provision does not survive that analysis.

Third, the statute is also unconstitutional under Article 1, § 5 of the U.S. Constitution because Congress is the exclusive judge of the qualifications of its Members. (Count III). The U.S. Supreme Court held that a recount doesn't usurp the Senate's authority, because it doesn't "frustrate the Senate's ability to make an independent final judgment (of a Member's qualifications)." *Roudebush v. Hartke*. 405 U.S. 15 (1972).

Here, the Challenge Statute permits the State of North Carolina to make its

own judgment of whether a candidate is qualified to be a Member of the Congress and, if not, remove him from the ballot, thereby precluding his reelection. N.C.G.S. §§ 163-127.1, 127.2(b). Removal from the ballot means that Cawthorn cannot be relected and cannot present himself to Congress to take the oath of office, thereby usurping Congress' constitutional authority to judge Cawthorn's qualification themselves. Therefore, it violates Article 1, § 5 of the U.S. Constitution.

All of these constitutional claims have merit and each justifies the district court injunction.

B. The Challengers' interests are not irreparably harmed by the injunction.

1. The Challengers have no right under federal law to have their Challenges processed.

Challengers have no federal due process right under the Fourteenth Amendment to have their challenges heard by the NCSBE. In order to be constitutionally entitled to have their candidate challenges heard by the NCSBE, they would need to demonstrate they have been deprived of a "cognizable liberty or property interest." *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 314 (4th Cir. 2012). Neither interest is at stake here because any interest given to them by state law is only their authorization to file a candidate challenge, which they have

already done and which has not been enjoined.

2. Challengers can raise their concerns about Cawthorn's qualifications to Congress.

Under Article 1, Section 5, Clause 1 of the U.S. Constitution, Congress has the power to judge the election of its own members, including members' qualifications. The district court injunction does not enjoin Challengers' ability to petition Congress to review his qualifications if Cawthorn is reelected. Nor does it prevent Congress from acting under § 3, by amending the 1872 Act to remove its prospective effect before Cawthorn takes the oath of office.

Challengers have a right to petition Congress to influence their decisions. U.S. Const. amend. I. Thus, even if Challengers are somehow harmed by the NCSBE not proceeding with their candidate challenge, they are not irreparably harmed because they can petition Congress, upon Cawthorn's reelection, to disqualify Cawthorn from taking the oath of office.

C. Cawthorn's interests are irreparably harmed absent an injunction.

The district court concluded that Cawthorn would be irreparably harmed, if the NCSBE proceeded with a candidate challenge based on § 3, and that he had no adequate remedy at law. Injunction Order, 23. The district court reasoned that "Plaintiff has and would have been required to prepare a defense to this widely

publicized—and unlawful—quasi-judicial proceeding in which he was accused of insurrection against the United States by political opponents while at the same time attempting to campaign for office in the U.S. House of Representatives." *Id.*

But Cawthorn's irreparable injury goes far beyond what the district court found. Cawthorn's First Amendment right to run for office would be significantly harmed if he was forced to assume "such burdens pursuant to a provision from which he is explicitly protected by federal law." *Id.* at 25. This significant harm rises to "irreparable" considering the primary election is scheduled for May 17, 2022. Pursuant to N.C. G.S. § 163-227.10(a), the state must begin mailing absentee ballots 50 days prior to the primary Election Day, which is March 27, 2022. Before then, the NCSBE will need time to print the absentee ballots. That leaves at most 13 days from this filing for this Court to rule on the Motion to Stay, and, if necessary, for the NCSBE to appoint a panel, for the panel to hear and to make a decision, for the NCSBE to hear any appeal of the panel's decision, and for appeals of the NCSBE's decision to be heard by any and all appropriate judicial bodies—an impossibility.

If the Motion to Stay is granted, Cawthorn will be irreparably harmed both as a legal and practical matter.

D. The public interest favors an injunction.

Upholding constitutional rights and federal law serves the public interest. *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). In contrast, the public interest is harmed when unlawful or unconstitutional statutes are enforced and used against those seeking to lawfully exercise their constitutional rights.

But most importantly, the public interest is served in choosing the People's representatives by democratic processes, not by state bureaucrats, which Challengers propose here. The undemocratic scheme contained in the North Carolina Challenge provision supplants voters for state bureaucrats who will determine who can represent the People. This is fundamentally anti-democratic and contrary to the public interest.

Conclusion

For the foregoing reasons, Cawthorn respectfully requests this Court deny the Challengers' Emergency Motion for a Stay of Injunction Pending Appeal.

March 14, 2022

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing document complies with the typeface requirements and the type-volume limitations of Federal Rules of Appellate Procedure 27(d)(1)(E) and 27(d)(2)(A) because this motion contains 5,170 words (calculated using the word count function of the word processing program used to draft the foregoing), excluding the parts of the motion exempted by Federal Rules of Appellate Procedure 27(d)(2) and 27(a)(2)(B) and used Times New Roman, 14 point font.

/s/ James Bopp, Jr.
James Bopp, Jr.

Certificate of Service

I certify that on March 14, 2022, I caused the foregoing document and all attachments thereto to be electronically filed with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. In addition, the following were served and provided notice by first-class mail and email:

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