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 (*SIC*)-APPELLANTS' RENEWED EMERGENCY MOTION FOR STAY OF INJUNCTION PENDING APPEAL

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Introduction

Nothing has changed since "Defendant-Intervenor (*sic*)-Appellants" ("**Challengers**") filed their first Emergency Motion to Stay, and thus should be denied. Challengers again improperly identify themselves as "Defendant-Intervenor-Appellants." They were not Defendants in the district court, their motion to intervene was denied so they are not Intervenors, and 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 do not even argue that the district court abused its broad discretion in denying their motion to intervene, which was properly denied, so, as a non-party, they are not entitled to seek a stay, which is sufficient to deny it.[1]

Further, there are numerous reasons why Challengers have not justified their stay request, each of which is also sufficient to deny it.[2]

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[1]Challengers argue that the "timing exigencies of the May 17, 2022 primary election" make moving for a stay first in the district court impracticable. Challengers Renewed and Supplemental Emergency Motion for Stay of Injunction Pending Appeal, D. 34 at 1 n.1. ("**Second Intervention Motion**") However, it is impossible for the NCSBE to hear the Challengers candidacy challenge before the primary as the ballots have already been made and delivered. Def. Resp. to Renewed Mot. to Intervene, Ex. A at 1.

[2]In order to avoid repetition, this response will refer to and incorporate by reference as appropriate, Plaintiff-Appellee's Response in Opposition to Defendant-Intervenors-Appellants' Emergency Motion to Stay, Doc. 16-1. ("**Cawthorn's First Response**")

Facts

On December 7, 2021, Representative Cawthorn ("**Rep. Cawthorn**"), filed a notice of candidacy for North Carolina's 13th Congressional District. Second Order Denying Intervention, Ex. B at 1-2. A group of registered voters of the 13th Congressional District filed a "challenge" with the North Carolina State Board of Elections ("**NCSBE**") alleging that Rep. Cawthorn does not meet the federal constitutional requirements for a Member of the U.S. House of Representatives ("**January Challenges**"). *Id.* at 2. On the next day, however, January 11, 2022, the Wake County Superior Court in North Carolina issued an indefinite stay on all challenges filed with the Board pending a final resolution regarding the litigation surrounding North Carolina's redistricting. *Id.*

Rep. Cawthorn filed a motion for preliminary injunction on January 31, 2022, seeking declaratory and injunctive relief prohibiting the NCSBE from proceeding to adjudicate the January Challenge under the state statute. *Id.* On February 7, 2022, the January Challengers filed a motion to intervene ("**First Intervention Motion**"), which the court denied finding that the proposed intervenors were adequately represented by the NCSBE. *Id.* On February 21, 2022, the court granted Rep. Cawthorn's motion to advance the trial on the merits and consolidate with the hearing on the motion for preliminary injunction. *Id.*

Underlying the district court proceedings were the redistricting litigation. On February 2, 2022, the Supreme Court of North Carolina heard arguments regarding the redistricting question and on February 4, 2022, ruled that the current districts were unconstitutional. *Id.* On February 23, 2022, the state court issued newly drawn maps for congressional districts. *Id.* The next day, the NCSBE issued a letter to the January Challengers informing them that their challenge was no longer valid as they were no longer "qualified registered voters" in the newly drawn 13th Congressional District. *Id.* at 3.

On February 28, 2022, Rep. Cawthorn withdrew his December notice of candidacy and filed a notice for the newly drawn 11th Congressional District. *Id.* Two days later, on March 2, 2022, two registered voters from the district filled challenges with the NCSBE ("**March Challengers**") arguing on the same basis as the January Challengers, that Rep. Cawthorn was not eligible to run for office. *Id.* Of those two, only one was also a January Challenger who sought to intervene in this case on February 7, 2022. *Id.*

Following a hearing on March 4, 2022, the court orally granted the motion for injunctive relief, issuing a written order on March 10, 2022. *Id.* On March 9, 2022, the January challengers filed a notice of appeal of the order denying the motion to intervene and the court's oral order granting injunctive relief; amending

this notice on March 11, 2022, adding an appeal of the written order. *Id.* at 4. This Court then denied the emergency motion to stay finding that Challengers were private individuals, not parties, to the litigation and thus were not entitled to a stay. Order re Limited Remand, Doc. 33 at 2 (March 17, 2022). In that same order, this Court ordered a limited remand "to permit the appellants to file and the district court to consider a new motion to intervene on an expedited basis." *Id.* The district court was directed that "[i]n considering any such motion, the district court should consider which (if any) proposed intervenors still have a challenge remaining before the state board of elections and whether the state court order staying all qualification-related challenges remains in effect." *Id.* The same day the March Challengers filed their motion to intervene in the district court.

In an order on March 30, 2022, the district court denied the motion to intervene again. Second Order Denying Intervention, Ex. B at 4. In that order, the district court found that in regards to the first question, "the January challengers, including Laurel Ashton, lost any standing that they may have had to intervene in this case on February 24, 2022, when they were notified that their challenges were no longer valid." *Id.* Further, the March Challengers "did not seek to intervene in this case until instructed to do so." *Id.*

The May Primary is also proceeding. Before the district court issued its

Second Order Denying Intervention, the NCSBE had already mailed out ballots for the May 17, 2022 primary. Defs.' Resp. to Renewed Mot. to Intervene, Ex. A at 1. Further, the NCSBE is still considering whether to appeal the district court's order, which they have until April 11, 2022 to do. *Id.*

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 & Franternal 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 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 citations omitted). Accordingly, this Court will "review factual findings for clear error and legal conclusions *de novo*." *Id.*

Argument

I. Nothing has changed since this Court denied Challengers' first motion to stay so this stay should also be denied.

Nothing has changed since this Court issued its order denying the

Challengers' motion to stay. Challengers still are a non-party to the action. They were not named defendants in the action, their motion to intervene was denied (twice), and they can only be appellants *if* this Court finds that the district court abused its broad discretion in denying the motion to intervene.

Further, the relief that the Challengers seek in requesting a stay, so that the NCSBE can hear their challenge before the May primary, is impossible at this point. The NCSBE has already mailed out ballots for the May primary with Cawthorn's name on it. Defs. Resp. to Renewed Mot. to Intervene, Ex. A at 1. In order for any candidacy challenge to take effect before the May primary, all steps in the Challenge process would need to be completed at least 7 days in advance of the deadline–i.e., by March 21, 2022, or March 25, 2022. Defs. Resp. to 1st Em. Motion to Stay, Doc. 19-6, at 8. Since we are well past that date, it is impossible for Challengers candidacy challenge to take effect before the May primary. As such "if th[e] candidate challenge resulted in a disqualification, but was not completed by the dates above, it would be implemented after the May 17 primary election ahead of any subsequent election." *Id.* at 9.

Nothing has changed since this Court issued its denial of the first motion for stay. Rep. Cawthorn's arguments from his First Response, Doc. 16-1, are still valid and incorporated herein, but summarized for this Court's convenience.

First, the stay procedure is not available to a non-party to the action. 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. *See* Cawthorn's First Response at 6-7.

Second, Challengers do not have Article III standing to prosecute an appeal. 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). 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. *See id*. at 7-8.

Finally, Challengers have not the factors necessary for granting a 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). Challengers fail on all four factors. Namely, (1) the district court did not abuse its discretion when it denied Challengers' both intervention as of right and permissive intervention; (2) the district court's injunction was properly decided; (3) the Challengers' interests would not be irreparably harmed by a stay whereas Cawthorn's interests would be; and (4) the public interest favors an injunction of enforcement of an unlawful or unconstitutional statute. *See* Cawthorn's First Response 8-24.

II. The District Court did not abuse its discretion in denying Challengers' Motion to Intervene on remand.

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

The Court must first determine whether the district court properly denied Challenger's motion to intervene on remand. If the district court did, the Stay must be denied.

A district court's determination that a motion to intervene is untimely is

reviewed for abuse of discretion. *Scott v. Bond*, 734 Fed. App'x 188, 191 (4th Cir. 2018) (citing *Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 365-66 (1973)); *see also Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989). "District courts are accorded broad discretion in deciding the timeliness of a motion to intervene after assessing all the relevant circumstances." *Id.* It is only an abuse of discretion if the district courts decision was "guided by incorrect legal standards or rested upon a clearly erroneous factual finding." *Id.* (citing *Brown v. Nucor Corp.,* 576 F.3d 149, 161 (4th Cir. 2009)).

When assessing the timeliness of a motion to intervene, courts consider "(1) how far the case has progressed, (2) the prejudice to other parties caused by any tardiness in filling the motion, and (3) the reason for any tardiness." *Id.* (citing *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014)). "The most important consideration in reviewing a motion to intervene is whether the existing parties will suffer prejudice if the motion is granted." *Id.*

Here, the district court discussed all three of these factors, giving substantial discussion to the prejudice to the parties. *See* Second Order Denying Intervention at 5-6.

Firstly, the district court noted that "the case progressed to a final order on challenges by two of the proposed intervenors and to notices of appeal filed by

one of the proposed intervenors." *Id.* In regards to prejudice, the court first noted that the challengers "contend that the question presented by their motion is solely to determine the extent to which they may maintain further proceedings in the Court of Appeals." *Id.* at 6. However, "[Rep. Cawthorn] has not litigated the merits of his claims with the movants at the district level and may be required to respond to 'new' arguments, unanticipated theories and possible re-litigation of issues already decided." *Id.* "Subjecting [Rep. Cawthorn] to an appeal brought by strangers to the case would unduly prejudice him by causing further unforeseen delay." *Id.*

The court further found that challengers provided no reason for the tardiness. *Id.* The "[March Challengers] achieved standing in the case on March 2, 2022, and the court expedited the merits hearing to March 4, 20222." *Id.* at 6-7. "However, the court perceives no impediment to [March Challengers] ability to file a motion to intervene between March 2 and March 10, 2022." *Id.* at 7. The January and March Challengers were represented by the same counsel, have a claimed substantial interest in this high-profile case, and were clearly aware of and watching this case, demonstrated by the notices of appeal filed March 9 and March 11, 2022. *Id.*

Challengers do not even attempt to rebut the district court's findings. In

fact, they do not argue that it was an abuse of discretion, but rather plainly erroneous. Challengers 2nd Em. Mot. to Stay at 8. Challengers erroneously seem to combine the January Challengers' Motion and the March Challengers' Motion. (e.g., the "first motion to intervene was filed *before* the NCSBE made any substantive filing at all.") *Id.*

Challengers now attempt to state a reason for their delay by arguing that nothing changed "about the[] [intervention] factors until after [January Challengers] filed [their] appeal and motion for emergency stay in this Court." *Id.* However, the district court specifically addressed this argument. "[March Challengers] may argue that they did not seek intervention in this court before the appeal because nothing substantial had changed in the period between the court's order denying the initial motion to intervene and the court's final order." "[T]he [challengers'] position expressed in the present motion belies this argument," since the March Challengers contend that the shared interest with defendants was "dissolved by this court's order." Second Order Denying Intervention at 7.

Further, Challengers cannot show that the district court's determination of prejudice to Rep. Cawthorn was an abuse of discretion. They attempt to say that the court already found that the Challengers arguments were substantially similar to the NCSBE and as such the district court should not have found that Rep.

Cawthorn may be required to respond to new arguments and unanticipated theories. Challengers 2nd Em. Mot. to Stay at 9. However, the court rested these findings on Challengers own arguments. "As discussed below, the [Challengers] argue their interests 'diverged' from the Defendants' interests upon this court's March 4, 2022 order." Second Order Denying Intervention at 6 n. 1.

Finally, not noted by the district court below is that the March Challengers not only did not seek to intervene at all in the district court before this Court's remand, they filed a notice of appeal, which precluded filing any intervention at all in the district court. Though still untimely, an intervention for purposes of appeal of the district court's injunction could have been filed, but was precluded by their own notice of appeal. Only this Court's remand gave the March Challengers this second bite at the apple, which they now took advantage of on March 17th. If the March Challengers' motion to intervene would have been untimely if filed after the March 2 to March 10 timeframe, as the district court held, surely it was untimely when filed after filing a notice of appeal on March 17.

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

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

The deference accorded in review of a district court's denial of permissive intervention is at its zenith. *N. Carolina State Conference of NAACP v. Berger*, 999 F.3d 915, 938 (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). "Where intervention is of right, the timeliness requirement of Rule 24 should not be as strictly enforced as in a case where intervention is only permissive." *Scardelleti v. Debarr*, 265 F.ed 195, 203 (4th Cir. 2001).

Here the court found that the motion to intervene as of right was untimely. Since permissive intervention is construed even more strictly in regards to timeliness, the court properly denied permissive intervention.

Conclusion

For the foregoing reasons, Rep. Cawthorn respectfully requests this Court deny the Challengers' 2nd Emergency Motion for a Stay of Injunction Pending Appeal.

April 5, 2022

Respectfully submitted,

/s/ James Bopp, Jr.
James Bopp, Jr., Ind. Bar No. 2838-84
Melena S. Siebert, Ind. Bar No. 35061-15
THE BOPP LAW FIRM, PC
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
jboppjr@aol.com
msiebert@bopplaw.com
Attorneys for Plaintiff-Appellee

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 2,907 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 April 5, 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. Counsel for all parties and proposed-intervenors received notice of this filing through the CM/ECF system.

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