

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,

Amici Curiae 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

**AMICI CURIAE DEFENDANTS' RESPONSE TO
DEFENDANT-INTERVENOR-APPELLANTS'
EMERGENCY MOTION
FOR STAY OF INJUNCTION PENDING APPEAL**

Dated: March 14, 2022

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NOW COME Defendants, members of the North Carolina State Board and its Executive Director in their official capacities (“State Board” or “Defendants”), pursuant to Appellate Rule 27, in response to Defendant-Intervenor-Appellants’ emergency motion for stay of injunction pending appeal. Defendants are filing this brief as amici due to being inadvertently left off as parties to this action when it was initially docketed with this Court.

Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

State Board’s Position and Interest as Amici Curiae

Defendants take no position on Defendant-Intervenor-Appellants’ emergency motion or their appeal at this time. However, Defendants wish to make the Court aware of certain procedural requirements that may call into question whether the candidate challenge process, including any appeals, can be completed prior to the deadline by which ballots must be finalized for the May 17 primary election.

Moreover, the State Board is reviewing the written order to determine whether it will file an appeal. Should the State Board notice an appeal, it does not intend to seek expedited relief in this matter.

Defendants are members and the Executive Director of the North Carolina State Board of Elections, an agency of the State of North Carolina. N.C.G.S. § 20-1, 163-28. The State Board oversees the conduct of elections in North Carolina, including the candidate challenge statutes at issue in this action. Appellate Rule 29(a)(2) authorizes State Agencies to file this amici curiae brief. Fed. R. App. P. 29(a)(2). As such, the State Board has a strong interest in this matter and how it is resolved by this Court.

Background

On December 7, 2021, Plaintiff-Appellee filed a notice of candidacy with the North Carolina State Board of Elections to be a candidate for what was at that time North Carolina's Thirteenth Congressional District. [D.E. 1, ¶ 9, 41]. Defendant-Intervenor-Appellants are North Carolina voters who on January 10, 2022 filed with the State Board a challenge to Plaintiff-Appellee's candidacy for the Thirteenth District under North Carolina's candidate challenge law, N.C.G.S. §§ 163-127.1, *et seq.* They alleged that Plaintiff-Appellee was not qualified to be a member of Congress by virtue of Section 3 of Fourteenth Amendment of the U.S. Constitution. [D.E. 1, ¶ 42, 43]. On January 11, 2022, the State Board sought and obtained a stay of all candidate challenges involving candidates subject to redistricting pending resolution of ongoing redistricting litigation from the Superior Court of North Carolina for Wake County. *Id.*, ¶ 46.

On January 31, 2022, Plaintiff-Appellee filed the action below, requesting that the district court enjoin the candidate challenge initiated with the State Board. [D.E. 1]. He alleged that North Carolina's candidate challenge law and its application to him were unconstitutional. [D.E. 1, ¶ 9, 41]. Plaintiff-Appellee also moved for a preliminary injunction and for consolidation of that preliminary injunction motion with a trial on the merits. [D.E. 5, 8]. Defendants moved to dismiss, and Defendant-Intervenor-Appellants filed a motion to intervene. [D.E. 27, 59].

The district court, the Honorable Richard E. Myers chief district judge presiding, granted Plaintiff-Appellee's motion to consolidate. [D.E. 57]. The district court also denied the motion to intervene, without prejudice, recognizing that the posture of the parties could change. [D.E. 56].

While Plaintiff's action was pending in district court, and after redistricting litigation in North Carolina state court moved the Thirteenth Congressional District to another region of the state, Plaintiff withdrew his candidacy for the Thirteenth Congressional District and refiled for the new Eleventh District, where he remains a candidate. [D.E. 70]. As the Defendant-Intervenor-Appellants were no longer residents of the new Thirteenth Congressional District, the State Board informed the Defendant-Intervenor-Appellants that their candidate challenge against Plaintiff-Appellee was no longer valid. [D.E. 67, 67-1]. One of the

Defendant-Intervenor-Appellants and another voter then filed a new challenge under North Carolina's candidate challenge law based upon Plaintiff's status as a candidate for the Eleventh District. [D.E. 70, 70-1]. According to Defendant-Intervenor-Appellants, aside from the change in the congressional district, the new challenge is "materially identical to the original challenge." (Mot. for Stay p. 4 n.3)

On March 4, 2022, the district court held a hearing on Plaintiff-Appellee's request for a preliminary injunction, consolidated with a trial on the merits. [D.E. 74]. Following the hearing, the district court announced in open court that it was granting an injunction, thus enjoining the pending candidate challenge filed against Plaintiff-Appellee's candidacy, and denying Defendants' motion to dismiss. (Emergency Mot. for Stay, Millen Aff., Ex. B)

On March 9, 2022, Defendant-Intervenor-Appellants noticed an appeal from the district court's order denying their motion to intervene [D.E. 56] and oral order granting the preliminary injunction [*see* D.E. 74].

On March 10, 2022, the district court issued its written order granting a permanent injunction. [D.E. 78].

On March 11, 2022, Defendant-Intervenor-Appellants noticed an Amended appeal from the district court's order denying their motion to intervene [D.E. 56], the oral order granting the preliminary injunction [D.E. 74], and the written order granting permanent injunction [D.E. 78].

Defendants' Response

Defendant-Intervenor-Appellants seek an emergency stay of the district court's order enjoining the pending candidate challenge to Plaintiff-Appellee's candidacy. They contend that an emergency stay is necessary to ensure that the candidate challenge process commences expeditiously and will therefore conclude in time for the completion of ballot preparation ahead of North Carolina's May 17, 2022 primary election.

Defendants take no position on Defendant-Intervenor-Appellants' emergency motion or their appeal at this time. They file this response, however, to inform the Court of relevant statutory deadlines and the time it will take to complete the candidate challenge process.

First, the State Board faces a state statutory deadline of March 28, 2022 to commence distribution of absentee ballots to registered voters who have applied for them in advance of the May 17, 2022 primary (*see* N.C.G.S. § 163-227.10(a) (providing that absentee ballots are to be mailed to voters who requested them beginning 50 days before the primary)). The time period for distribution of absentee ballots may be reduced to 45 days before the primary, or April 1, 2022, if "authorized by the State Board under N.C.G.S. § 163-22(k) or there shall exist an appeal before the State board or the courts not concluded, in which case the board shall provide the ballots as quickly as possible upon the conclusion of such an

appeal.” N.C.G.S. § 163-227.10(a). Federal law also sets the floor for distribution at 45 days. *See* 52 U.S.C. § 20302(a)(8), (g) (providing that absentee ballots must be sent to military and overseas voters at least forty-five days before a primary election unless the State Board secures a waiver from the relevant presidential designee).

The State Board estimates that, in order to ensure that ballots are able to be prepared, printed, and delivered to county boards in time to meet the distribution deadline for the May 17, 2022 primary, the challenge process under N.C.G.S. §§ 163-127.1, *et seq.* [see also D.E. 45 at 3-5, 22-23] would need to be complete, and any further appeals resolved, at least 7 days in advance of that deadline -- *i.e.*, by March 21, 2022, or March 25, 2022 if the deadline is extended. This time is required in order for State Board 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.

Second, the candidate challenge process requires a number of administrative steps that must be completed in advance of that deadline. This includes appointment of the panel by the State Board, the hearing before the panel followed by preparation of its written decision, a likely appeal to the State Board, which must issue its own written decision, and a likely further appeal as of right to the North Carolina Court of Appeals. N.C.G.S. § 163-127.1, *et seq.* This process

also allows for the panel hearing the candidate challenge in the first instance to provide time for discovery, depositions, subpoenas, potential motion practice, the hearing itself, and prepare a written order that includes findings of facts and conclusions of law. *Id.*, -127.4. After the State Board issues its decision on appeal from the panel, the parties could still appeal to the North Carolina Court of Appeals and other courts. N.C.G.S. § 163-127.6(a)(2).

Nonetheless, the State Board remains prepared to carry out this candidate challenge should this Court enter a stay of the injunction. Although not ideal for the reasons stated in the State Board's filings before the trial court [D.E. 60, pp. 13-14], if that 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. *See* N.C.G.S. §§ 163-114.

Defendants stand ready to provide additional information to the Court upon request.

Conclusion

Defendants take no position on Defendant-Intervenor-Appellants' emergency motion or their appeals and respectfully submit the above-noted information to the Court.

Respectfully submitted on March 14, 2022.

/s/ Terence Steed

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Certificate of Compliance

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) as it contains 1,465 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface and type-style requirements of Fed. R. App. 32(a)(5) & (6).

Respectfully submitted on March 14, 2022.

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