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

LAUREL ASHTON, MICHAEL "MIKE" HAWKINS, MELINDA LOWRANCE, ELLEN BETH RICHARD, and TERRY LEE NEAL,

Defendant-Intervenor-Appellants.

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

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DEFENDANT-INTERVENOR-APPELLANTS' RENEWED AND SUPPLEMENTAL EMERGENCY MOTION FOR STAY OF INJUNCTION PENDING APPEAL

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BACKGROUND

Pursuant to Federal Rules of Appellate Procedure 8 and 27, Defendant-Intervenor-Appellants Laurel Ashton, Michael "Mike" Hawkins, Melinda Lowrance, Ellen Beth Richard, and Terry Lee Neal (collectively referred to as "Appellants"), respectfully renew and supplement the emergency request for a stay of the district court's injunction which bars the voter challenge to Plaintiff-Appellee Madison Cawthorn's qualifications under Section 3 of the Fourteenth Amendment and Section 163.127.1, *et seq.*, of the North Carolina General Statutes on the ground that an 1872 congressional act not only granted amnesty to some ex-Confederates, but also prospectively absolved participants in all future insurrections, thus effectively nullifying Section 3 of the Fourteenth Amendment.[1]

SUPPLEMENTAL STATEMENT OF FACTS[2]

North Carolina permits any registered voter to file a challenge before the North Carolina State Board of Elections ("NCSBE") alleging "that the candidate does not meet the constitutional . . . qualifications for the office." N.C. Gen. Stat.

[1] Given the timing exigencies of the May 17, 2022 primary election described below and the district court's multiples denials of the motions to intervene, which have all been appealed, moving first for a stay in the district court would be impracticable. *See* F. R. App. P. 8(2)(i).

[2] Defendant-Intervenor Appellants' Emergency Motion for Stay filed in this Court on March 9, 2022, Doc. No. 3, provides the bulk of the factual background and all of the legal arguments supporting the stay motion. In order to avoid needless repetition, this motion will refer to that filing and incorporate it by reference as appropriate.

§§ 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). Petitioners 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).

On January 10, 2022, Laurel Ashton, and eleven others (the "Original Challengers") filed before the NCSBE a candidacy challenge ("Original Challenge") to Rep. Madison Cawthorn, then a candidate for North Carolina's 13th Congressional District. The basis for the challenge was that, because of Cawthorn's involvement in the January 6, 2021 insurrection, he was disqualified from office by virtue of Section 3 of the Fourteenth Amendment, which provides: "No person shall be a Senator or Representative in Congress . . .who, having previously taken an oath, as a member of Congress . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same." U.S. Const. amend. XIV, § 3.

On January 31, 2022, Cawthorn brought this action against the NCSBE,[3] seeking to enjoin the state candidacy challenge proceeding. ECF No. 1.[4] Just days later, on February 7, 2022, before the named defendants even filed a response, the Original Challengers moved to intervene as defendants and filed their brief opposing an injunction. ECF No. 28. The district court, however, on February 21, 2022, denied their motion to intervene, concluding that their interests were the same as the NCSBE's. ECF No. 56.

After court-ordered redistricting, Cawthorn, on February 28, 2022, refiled his candidacy in the revised 11th Congressional District.[5] Just two days later, on March 2, 2022, one of the Original Challengers, Ashton, and another 11th district voter filed a renewed challenge ("Challenge") that, besides the change in congressional district, is otherwise materially identical to the Original Challenge. *See* ECF No. 70, at 2. The NCSBE considered that challenge valid. *Id.*[6]

On March 4, 2022, the district court from the bench preliminarily enjoined the NCSBE from taking further action on the Challenge. ECF No. 74. The basis for the district court's ruling was that the 1872 Amnesty Act, 17 Stat. 142, prospectively

[3] Defendants are individual members and an employee of the NCSBE, but for simplicity are referred to here as "the NCSBE."
[4] This brief uses the abbreviation "ECF" to refer to filings in the district court, and "Doc." to refer to filings in this Court.
[5] Most of the Original Challengers do not live in the 11th district, but Ashton does.
[6] After those initial challenges were filed, identical challenges were filed by three other 11th district voters.

removed all consequences under Section 3 of the Fourteenth Amendment for participants in future insurrections.

On March 9, Ashton and the other Original Intervenors filed a notice of appeal, ECF No. 75, and, in this Court, an emergency motion to stay the injunction. Doc. No. 3. On March 10, the district court issued a written order permanently enjoining the NCSBE's proceedings. ECF No. 78. On March 14, the NCSBE submitted an amicus brief to the Court of Appeals, stating that it had not decided whether to appeal this Court's order, but if it did, it would *not* seek expedited review. Doc. No. 19.

This Court, however, did act on an expedited basis. On the very day that the emergency motion to stay the injunction was filed, this Court ordered Cawthorn to respond within five days. Doc. No. 7. And on March 17 – just three days after the completion of briefing on the motion to stay – this Court denied the application for stay without prejudice. But it noted:

> At the same time, events since the district court's denial of intervention – including filings before this Court – reveal that circumstances may have changed, and the district court suggested it would revisit intervention if the posture of the case changed. We thus believe a ***limited remand*** is appropriate ***in aid of our own jurisdiction*** to permit appellants to file and the district court to consider a new motion to intervene ***on an expedited basis***. In 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. This Court retains jurisdiction over the appeal in all other respects.

Doc. No. 33 (emphasis added).

Appellants Ashton and the other 11th district challengers did not delay. On March 17 – the *same day* as this Court's remand order – they filed in the district court an Expedited Renewed Motion to Intervene as Defendants. The district court then ordered Cawthorn and the NCSBE to respond to the intervention motion on March 28 – ten full days later. ECF No. 91.[7]

Also on March 28, 2022, the NCSBE filed a response stating that it did not oppose intervention; noting that it "does not share Defendant-Intervenors' interests that are focused on a particular outcome of a challenge to disqualify a particular candidate in this election"; and stating that it has still not decided whether to appeal the injunction. ECF No. 102. Cawthorn then filed a response opposing intervention. ECF No. 103.

To summarize the timing issues with respect to Appellant Ashton – the "overlapping" Original Challenger who resides in both districts in which Cawthorn has filed – she filed her initial challenge to Cawthorn's candidacy on January 10, 2022, and her initial motion to intervene on February 7, 2022, just days after the filing of this case and before any response was filed by the NCSBE. She then filed her second challenge to Cawthorn's candidacy on March 2, 2022 – two days after Cawthorn refiled his candidacy and the same day that the district court issued its

[7] The order also required Appellants to supply an affidavit in support of their motion. ECF No. 91. They filed that the next business day. ECF No. 92.

order announcing that Cawthorn's motion for preliminary would be "accelerated and heard on Friday, March 4, 2022." ECF. No. 71. After the district court ruled from the bench on March 4, 2022, ECF 74, Ashton filed her second motion to intervene on March 17, 2022 at the direction of this Court and its limited remand to the district court. ECF No. 87.

Nevertheless, on March 30, 2022, the district court entered its second order denying intervention, this time – the NCSBE now having manifestly asserted legal positions differing from Appellants – on the new ground that Appellants were "untimely" and "tardy" in seeking intervention, as well as the rarity of "[p]ermitting intervention after a final order or judgment has been appealed." ECF No. 106, at 4-7. The district court made its ruling notwithstanding the fact that this Court expressly authorized limited remand to consider post-judgment intervention "in aid of [this Court's] jurisdiction." Doc. No. 33. It also denied intervention even though it was Ashton's Challenge which provided the district court's Article III jurisdiction to entertain Cawthorn's action seeking to declare the North Carolina statute unconstitutional in the first instance. ECF No. 78 (finding "injury-in-fact sufficient to satisfy Article III," on the grounds that "[i]t is undisputed that on February 28, 2022, Plaintiff filed a notice of candidacy in North Carolina's 11th congressional district and, two days later, voters in that district filed challenges pursuant to N.C. Gen. Stat. §§ 163-127.1, et seq., seeking a decision finding him unqualified for the office").

In essence, within a period of just over a month, the district court first ruled that the intervenors were too early, ECF No. 56, and then ruled that they were too late. ECF No. 106. The district court ruled that the *only* timely intervention by Ashton could occur "between March 2 and March 10, 2022," ECF No. 106, at 7, a one-week period between the date of her renewed candidacy Challenge to Cawthorn and the issuance of the district court's written ruling memorializing its March 4, 2022 injunction. Furthermore, during this particular time period, the divergence of interests between Ashton and the NCSBE (manifested most clearly by the NCSBE's failure to appeal after issuance of the March 10 written order, and only made plain by the NCSBE's March *14* amicus brief before this Court) had not become fully apparent. Indeed, during this period, much of the purported basis for the district court's original order denying intervention – namely, that Ashton and the NCSBE shared the same objective and that Ashton's brief contained similar legal arguments to the NCSBE's – had not changed. The district court's denial of intervention on tardiness grounds essentially further immunizes Cawthorn from any voter candidacy challenge by placing impossible timing burdens on challengers.[8]

[8] Inexplicably, on March 30, 2022, the same day the district court denied intervention for a second time, it also issued a further Order. ECF No. 105. That Order, issued "sua sponte" and "*nunc pro tunc* to March 4, 2022," purports "to clarify the procedural posture of this action," *id*. at 1, by stating that Cawthorn's "remaining claims for relief" – despite the issuance of a now-appealed permanent injunction as to which this Court provided only "limited remand" to consider a renewed intervention – are somehow "stayed" "pending resolution of any appeals of [the district court's] oral and written orders." *Id*. at 2.

Appellants immediately appealed the order again denying intervention, ECF No. 107, and now have renewed their motion to stay.

REASONS FOR GRANTING THE RELIEF

The reasons for granting the relief sought in this motion are fully stated in the original Emergency Motion for Stay, Doc. No. 3, which is incorporated herein by reference. Appellants, as challengers to Cawthorn's candidacy denied intervention, are proper parties to this appeal and to seek a stay. *Id*. at 3-6.

The district court's repeated denials of Ashton's motions for intervention is plainly erroneous as to intervention as a matter of right and a clear abuse of discretion as to permissive intervention. The primary basis for the district court's most recent ruling was that Ashton's motion was untimely. ECF No. 106, at 4. Yet her first motion to intervene was filed *before* the NCSBE made any substantive filing at all. *Compare* ECF Nos. 27 (Motion to Intervene) & 28-44 (associated filings) *with* 45 (NCSBE Opposition to Preliminary Injunction). On February 21, 2022, the district court denied the motion to intervene on the purported basis that Ashton and the NCSBE shared the same objective and that Ashton's brief contained similar legal arguments to the later-filed NCSBE brief. ECF No. 56. But nothing changed about these factors until *after* Ashton filed her appeal and motion for emergency stay in this Court. The divergence of interests between Ashton and the NCSBE (manifested most clearly by the NCSBE's failure to appeal after issuance of the March 10 written order, and only made plain by the NCSBE's March 14 amicus brief before this

Court) did not become fully apparent until *after* the date that, according to the district court, was the last timely date to intervene (March 10).

The district court's analysis of prejudice to Cawthorn from intervention is even more puzzling. According to the district court, allowing intervention could mean that Cawthorn "may be required to respond to 'new' arguments [and] unanticipated theories" from Ashton. ECF No. 106, at 6. Yet Ashton's arguments are hardly "new"; she presented them on February 7, before the NCSBE filed its own opposition. *See* ECF No. 27-1 (Def.-Int.'s Opp. to Prelim. Inj.). Furthermore, the district court *already held as a matter of law* that Ashton's arguments were substantially similar to the NCSBE's; in the district court's words, her "response brief adds little to nothing" for the Court's consideration. ECF No. 56, at 6. It cannot be true *both* that Ashton's arguments "add little to nothing" to the NCSBE's arguments *and* that allowing intervention would force Cawthorn "to respond to 'new' arguments [and] unanticipated theories" from Ashton.[9]

[9] Ashton concedes that her brief in opposition to preliminary injunction and the NCSBE's later-filed opposition brief raised similar arguments, as they relied on similar authorities, especially given the limited judicial precedent on Section 3. The point here is only that Ashton wishes to press these points on appeal, on an expedited schedule, because her interest (as opposed to the NCSBE's) requires a rapid resolution, whereas the NCSBE either does not wish to appeal at all, or to do so only on a more leisurely timeline given its divergent interest. Under no circumstance, however, would allowing intervention require Cawthorn to respond to "new" arguments or "unanticipated theories."

The exigencies of the timing of the North Carolina primary, set for May 17, 2022, remain critical. *Id*. at 6-8. Most importantly, Appellants are entitled to a stay based on their strong argument on the merits that the district court's ruling that the 1872 Amnesty Act forever absolved future insurrectionists from the electoral-office ban found in section 3 of the Fourteenth Amendment is manifestly wrong, *id*. at 8-15, and that the other stay factors favor the relief sought by this motion, *id*. at 16-17.

CONCLUSION

Appellants' motion for a stay pending appeal should be granted.

This the 31st day of March, 2022.

Respectfully submitted,

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LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), counsel for all parties have been informed of the intended filing of this motion. Plaintiff does not consent and has indicated his intent to file a response to the motion. Defendants have not yet determined their position on the relief sought by this motion.

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 5,200 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 31, 2022

/s/ Pressly M. Millen
Pressly M. Millen

CERTIFICATE OF SERVICE

I certify that today, March 31, 2022, I caused to be electronically filed the foregoing motion with the Clerk of the 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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