No. 22-1251

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MADISON CAWTHORN,

Plaintiff-Appellee,

v.

MR. DAMON CIRCOSTA, *et al*.,

Defendants,

BARBARA LYNN AMALFI, *et al*.,

Defendants-Intervenors-Appellants.

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

BRIEF OF NORTH CAROLINA REPUBLICAN PARTY AS *AMICUS CURIAE* IN OPPOSITION OF DEFENDANTS-INTERVENORS-APPELLANTS' MOTION FOR EMERGENCY STAY

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INTEREST[1]

The NCGOP, founded in 1867, is the state political organization of the Republican Party in North Carolina. The NCGOP represents the interests of over two million registered Republicans, Republican candidates (currently there are sixty Republican congressional candidates in NC), 100 county party organizations and fourteen congressional district Republican party organizations.

Allowing the North Carolina State Board of Elections ("NCSBE") to move forward with adjudication of the qualifications of congressional candidates, would significantly undermine the rights of Republicans to run for office and for voters to vote for a Republican candidate of their choice.

SUMMARY

Irrespective of the applicability of the Amnesty Act of 1872, the underlying question remains, *who decides?* The Constitution specifically grants Congress, not the states, the power to determine who is qualified for congressional office. Therefore, as a fundamental matter of constitutional law, the NCSBE does not have the power to judge whether a candidate is qualified for such office, and any attempt to exercise such power violates the Constitution.

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission.

ARGUMENT

I. The State Board of Elections lacks power under the federal Constitution to decide whether a candidate is qualified for congressional office.

At issue here is whether the NCSBE's claimed authority to determine an individual's qualifications to run for congressional office under N.C.G.S. § 163-127.2 is a valid exercise of the State's power under Article I, Section 4 of the U.S. Constitution to prescribe the times, places, and manner of holding elections (the Elections Clause), or is a forbidden infringement upon the power of the House of Representatives under Article I, Section 5 (the Qualifications Clause).

The Challengers do not assert any argument as to the proper body to determine a congressional candidate's qualifications or potential disqualification. The Supreme Court of the United States long ago described the scope of state powers under the Election Clause:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 US 355, 366 (1932). However, state powers under the Elections Clause do not include judging and enforcing qualifications for congressional office. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 832-33 (1995).

In *U.S. Term Limits*, the Supreme Court recognized "the States' interest in avoiding 'voter confusion, ballot overcrowding, or the presence of frivolous candidacies,' in 'seeking to assure that elections are operated equitably and efficiently,' and in 'guarding against irregularity and error in the tabulation of votes.'" *Id.* at 834. However, to stop the analysis here would be to ignore the Supreme Court's holding that such interest only applies when the applicable state statute does "not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process." *Id.* at 835.

A. The power to judge qualifications for congressional office is reserved to Congress, not to the State Board of Elections.

Offices created by the Constitution are to be regulated by their creating authority and any authority the State may have in regulating those offices must have been provided for in the Constitution. *See Cook v. Gralike*, 531 U.S. 510, 525, 149 L.Ed. 2d 44 (2001); *State ex rel. Chavez v. Evans*, 446 P.2d 445 (N.M. 1968). The Constitution reserves to Congress the power to judge the qualifications of its members and the Constitution sets forth those qualifications. *See, e.g.,* U.S. Const. Art. 1, Section 2 (age, citizenship, inhabitancy); *Powell v. McCormack,* 395 U.S. 486, 520 at n.41 (1969) (listing qualifications appearing in other parts of the Constitution, including Section 3 of the Fourteenth Amendment).

While the State may have the power to regulate the mechanics of the *procedural* requirements for a congressional candidate to file, they hold no power to

police a candidate's *qualifications* to file. The Qualifications Clause, specifies that "[e]ach House shall be the judge of the elections, returns *and qualifications* of its own members." U.S. Const. Art. I, § 5, cl. 1. (emphasis added). In *Roudebush v. Hartke,* 405 U.S. 15, 25 (1972), the Supreme Court declared that each House of Congress must make its own "independent final judgment" about the qualifications of its members-elect.

The power to judge and enforce congressional is not given to the courts, *Powell,* 395 U.S. at 550, nor is it given to individual States, *U.S. Term Limits,* 514 U.S. at 806 ("The text of the Constitution thus gives the representatives of all the people [i.e., Congress] the final say in judging the qualifications of the representatives of any one State.").

In *U.S. Term Limits*, the Court rejected an argument similar to the State's "we're only prescribing rules for *holding elections*" contention. There, the State of Arkansas had put in place "an amendment to the Arkansas State Constitution that prohibit[ed] the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate ha[d] already served three terms in the House of Representatives or two terms in the Senate." *U.S. Term Limits*, 514 U.S. at 783. Defenders of the term-limits measure maintained that it was not a "qualification" but rather a permissible exercise of the state's power under the Elections Clause. The Court noted that its prior Elections Clause cases "were thus

constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." *Id*. at 835 (original emphasis). The Court explained that "[o]ur cases upholding state regulations of election procedures thus provide little support for the contention that a state-imposed ballot access restriction is constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses." *Id.; See* Derek T. Muller, *Weaponizing the Ballot,* 48 Fla. St. Univ. L. Rev. 61, 121-22 (2021) (states cannot use "manner" clauses to add qualifications).

The Supreme Court addressed a similar Qualifications Clause case in *Roudebush*, where the purported winner of an election for U.S. Senate in Indiana challenged the State's attempt to conduct a recount as unconstitutional. *See* 405 U.S. 15. The Court held Indiana's recount procedures did not "usurp" the Senate's authority under the Qualifications Clause because the Senate ultimately would decide which individual would be seated. *Id*. at 25–26; *See* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications,* 90 Indiana L.J. 559, 594–98 (2015).

In *Chavez*, the Supreme Court of New Mexico reviewed a Qualifications Clause issue where the State excluded an allegedly unqualified individual from the ballot on the basis of inhabitancy. *Chavez*, 446 P.2d at 448. The court ruled that determination of "inhabitance" was not for the State to decide, but rather, was a

matter for Congress. *Id.* Accordingly, the court directed the State to certify and include the congressional candidate on the ballot for the election.

Here, it is contended that application of N.C.G.S. § 163-127.2 to congressional offices is simply part of the longstanding enforcement of age and residency requirements. States have authority to exclude from the ballot candidates for *state* office who do not meet *state* constitutional qualifications, but even that power is limited. *See State ex rel. Lee v. Dunn*, 73 N.C. 595, 604-08 (1875) (holding that the General Assembly could not impose any additional qualification on eligibility for elective office, other than what is provided in the State Constitution).

However, neither the State nor the Challengers cite any authority—nor does any exist—to support the NCSBE's claimed power to "police" *congressional* qualifications. Not a single instance has been identified in which a challenge under N.C.G.S § 163.127.2 was applied to dispute a congressional candidate's qualifications for office.

Furthermore, there is no appeal of the NCSBE's decision to Congress—only to state court. *See* N.C.G.S. § 163-127.6. Were that to be the case, the State would have the final and conclusive word on a candidate's qualifications under the Constitution and could disqualify a candidate *ex ante*, thereby usurping the House's power to make an "independent final judgment" of such a candidate's qualifications for congressional office. *See Roudebush,* 405 U.S. at 25–26.

Once a candidate satisfies the procedural requirements of state law, the people decide whether to vote for a candidate, and Congress judges whether that candidate is qualified. *See U.S. Term Limits*, 514 U.S. 779. Permitting State officials to block a candidate from the ballot, "the most crucial stage in the election process—the instant before the vote is cast," *Cook*, 531 U.S. at 525, 149 L. Ed. 2d at 57, would undermine the people's power to elect its own representatives.

To challenge a congressional candidate's qualifications through the NCSBE is a novel,[2] but unconstitutional attempt to evade the ordinary process for judging and enforcing qualifications under the Qualifications Clause. The Constitution does not empower State agencies or courts to make final determinations about qualifications for congressional office.

B. The State's judgment of a candidate's qualifications unconstitutionally adds to congressional qualifications.

Enforcement of N.C.G.S. § 163-127.2 against congressional candidates, would *add* a qualification for congressional office. This is prohibited by both the constitutional text and the Supreme Court's decision in *U.S. Term Limits.*

[2] The novelty of this challenge lies in its attempt to eliminate, at least in part, the grueling nature of the electoral process by seeking to exclude a candidate before any votes are cast. "The supreme art of war is to subdue the enemy without fighting." Sun Tzu, *The Art of War,* 37 (2010). While that might be a valid, and even successful, strategy in game theory, it runs contrary to the Constitution and our democratic process. *See U.S. Term Limits*, 514 U.S. at 793, 131 L. Ed. 2d at 894 (The "fundamental principle of our representative democracy" is "that the people should choose whom they please to govern them.") (internal citations omitted).

Below, the State argued it was not judging the qualifications of elected congressional members, but was only policing candidate qualifications prior to the election. But the constitutional qualifications for Congress are qualifications to *hold* office, not to *run for* office. By imposing separate qualifications to run for office (whether identical to or different from the constitutional qualifications), the State would unconstitutionally add qualifications for service in Congress. *See U.S. Term Limits,* 514 U.S. at 827.

The Supreme Court has recognized that Congress's power to judge qualifications under the Qualifications Clause operates at the time a Member-elect presents a state-issued certification of election and seeks to be seated in Congress. *See Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614–15 (1929).

The State's imposition of any qualification for office—even an existing constitutional qualification—*prior to* and *separate from* that time operates as an additional qualification, such as the term-limits deemed unconstitutional in *U.S. Term Limits*. Professor Derek Muller explains:

> Consider the age example, and let's begin with President Joe Biden. In 1972, Biden first ran for Senate at the age of 29. He was not eligible to serve in the Senate. But, after Election Day—after he was elected—he turned 30. He presented his credentials to the Senate several weeks after Election Day and was seated.
>
> If Delaware had excluded Biden from the ballot on the basis that Biden was "ineligible" as of Election Day—or, really, at the ballot access deadline weeks before Election Day—it would have impermissibly added a qualification to a candidate seeking federal office.

Derek Muller, "Adding Qualifications for Congressional Candidates and a Section 3 Puzzle," *Election Law Blog* (Feb. 7, 2022), https://electionlawblog.org/?p=127486.

Other courts have addressed the issue of States attempting to add additional qualifications for congressional candidates and have uniformly held them to be unconstitutional. *See Dillon v. Fiorina*, 340 F.Supp. 729, 731 (D.N.M. 1972) (ruling state laws creating a two-year residency requirement to run for Senate were unconstitutional as an impermissible added qualification); *Stack v. Adams*, 315 F.Supp. 1295, 1297 (N.D. Fla. 1970) (holding that a current county sheriff could not be disqualified as a candidate for House under a dual office holding state statute, because that would impermissibly and unconstitutionally add a qualification); *Chavez*, 446 P.2d at 448-49 (explained *supra*). Ultimately, courts have held that "[t]he constitutional qualifications for membership in the lower house of Congress exclude all other qualifications, and state law can neither add to nor subtract from them." *Id.* at 448.

For the State to deny ballot access to a candidate before he presents to Congress for judgment of his qualifications and seating, would unconstitutionally add a qualification to a candidate for federal office.

C. The State Board has no power to judge whether a candidate is qualified for Congress under Section 3 of the Fourteenth Amendment.

Section 3 of the Fourteenth Amendment does not expressly provide a procedure for its implementation, but Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. Amend. XIV, Section 5. That includes legislation providing for the enforcement of Section 3. Following the repeal of the Klu Klux Klan Act in 1872, "Congress has not since exercised its authority under Section 5 of the Fourteenth Amendment to enact legislation" providing for the enforcement of Section 3. Congressional Research Service, *The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment* 4 (January 29, 2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10569.

Section 3 is not self-executing; its application "can only be provided for by [C]ongress." *In re Griffin*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869). Absent implementing legislation, Congress, and Congress alone, has addressed Section 3 as a constitutional qualification for holding office.[3] There is no other constitutional provision or federal statute authorizing a State to evaluate a congressional candidate's qualifications under Section 3. Accordingly, the NCSBE lacks the

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[3] Congress last used Section 3 in 1919 to refuse to seat Victor Berger, a socialist accused of giving aid and comfort to Germany in World War I. Congressional Research Service*, supra,* at 2.

power to forbid an indvidual from running for congressional office based on its own interpretation and enforcement of Section 3 for the same reasons it cannot enforce nor add other constitutionally-enumerated congressional qualifications: it would violate the Qualifications Clause.

Even if a candidate could be potentially disqualified under Section 3, this is something that Congress *itself* can adjudicate and, at its discretion, change. Section 3 provides that "Congress may by a vote of two-thirds of each House, remove such a disability." Ballot access cannot be conditioned on whether a candidate would allegedly be disqualified by Section 3 because it cannot be known whether Congress would choose to seat such a candidate or would remove any potential disqualification under Section 3. By doing so, the State would be adding a qualification.

The dispute about whether a candidate is subject to Section 3 is not a question for State election officials or judges to decide ahead of an election. It's a question for the voters on Election Day, and for Congress after the election.

CONCLUSION

For the foregoing reasons, the NCGOP respectfully urges the Court to deny the Challengers' emergency motion for stay.

Respectfully submitted the 14th of March, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains less than 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amici curiae* brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on March 14, 2022.

I further certify that the following were served and provided notice by email:

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