RECORD NO. 22-1251

In The
United States Court of Appeals
For The Fourth Circuit

MADISON CAWTHORN,
Plaintiff – Appellee,

v.

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; JAMES J. WALSH; MICHAEL HAWKINS; MELINDA LOWRANCE; ELLEN BETH RICHARD; TERRY LEE NEAL,
Parties-in-Interest – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

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INTRODUCTION

The district court's rulings effectively place Cawthorn's candidacy on the ballot through an illogical and anachronistic interpretation of a 150-year-old Act of Congress. Those rulings should be reversed.

JURISDICTION

Cawthorn is wrong to argue that this Court has jurisdiction "to review the district court's injunctions" only "if it determines that March Challengers' motion to intervene should have been granted." Cawthorn Br. 4. The Supreme Court has "never . . . restricted the right to appeal to named parties to the litigation." *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). Even if they "did not intervene below," the Challengers have the right to appeal because they are "directly and adversely affect[ed] by the injunction" barring *their Challenge*. *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Hum. Servs.*, 364 F.3d 925, 933 (8th Cir. 2004). Regardless, the Challengers "clearly have standing to appeal the denial of their intervention motion." *N. Carolina State Conf. of NAACP v. Berger*, 999 F.3d 915, 926 n.1 (4th Cir. 2021) (en banc) (internal quotation omitted).[1]

[1] This brief refers to the Challengers in plural. Challenger Ashton is the only appellant who filed *both* Challenges – in January, when Cawthorn had filed for the 13th Congressional District, and in March, when he filed for the 11th District – and consequently joined *both* motions to intervene.

ARGUMENT

I. The Challengers Have Standing.

Cawthorn claims that the Challengers lack standing. Cawthorn Br. 21-24. This argument contradicts the district court's rulings and the Supreme Court authorities on which Cawthorn relies. An actual controversy exists between the Challengers and Cawthorn, regardless of the participation of the NCSBE. Challengers' special and distinct interest in pursuing their Challenges is so strong that they may appeal as-of-right under North Carolina law if the Challenges are unsuccessful. N.C. Gen. Stat. § 163-127.6(a)(1). A case and controversy exists regarding the Challengers' right to a process afforded to them under state law, but denied to them by a federal court injunction that specifically blocks *their* Challenges.

The district court held that the Challengers "achieved standing" before their notice of appeal. JA752; *accord* Cawthorn Br. 17. Cawthorn's claims that the Challengers lack standing are disingenuous and contrary to the order of the district court.

More importantly given this Court's ability to determine subject-matter jurisdiction *de novo*, Cawthorn's authorities for his contention that the Challengers have only a "generalized grievance" all confirm that the Challengers' interest in this dispute is particular, individual, and concrete.

In the leading case on this issue, *Hollingsworth v. Perry*, 570 U.S. 693 (2013), the intervenors were proponents of a ballot initiative that succeeded and became law. The Supreme Court held that they lost standing "once Proposition 8 was approved by the voters, [and] the measure became a duly enacted constitutional amendment." *Id*. at 707 (internal citation omitted). Because the ballot initiative had become law, those who initially supported it lost their special role. *Id.* The Supreme Court contrasted that stage with the pre-enactment stage, and stated that intervenors had "a unique, special, and distinct" role "when it comes to the process of enacting the law." *Id.* at 706 (internal quotation omitted). Thus, under *Hollingsworth*, intervenors' interest becomes "generalized" only once their special role in the enforcement of state law ceases. *See also Diamond v. Charles*, 476 U.S. 54, 64 (1986) (intervenor-appellant lacked standing only because "[w]ere the Abortion Law to be held constitutional, Diamond could not compel the State to enforce it").

This case is not like *Diamond* or *Hollingsworth*. Unlike *Diamond*, the Challengers have the power to compel the state to enforce its election statutes. *See* N.C. Gen. Stat. §§ 163-127.3, 163-127.4. If the decision is adverse, the Challengers may appeal "as of right" to the NCSBE, and, ultimately, to the appellate courts. N.C. Gen. Stat. §§ 163-127.6(a)(1) & (b)(1). Empowered by state law to participate in

the election challenges, the Challengers have a "unique, special, and distinct" role in the prosecution of the challenge. *Hollingsworth*, 570 U.S. at 706.

The Challengers' unique standing in this appeal, moreover, is underlined by the district court's order, which specifically enjoined "the challenges lodged against the Plaintiff." JA516. Thus, the injunction has the targeted effect of enjoining the specific challenges filed by *these Challengers*. They have standing to seek reversal of an injunction targeting their interests.

Cawthorn also argues that for the Challengers to have an Article III "injury," "they would need to have a 'property' interest protected under the Fourteenth Amendment." Cawthorn Br. 25. But a property interest is not a *necessary* criterion for Challengers' standing. If *only* a property interest conferred standing, then Cawthorn himself would lack standing since he has no property interest in a political office. *See Snowden v. Hughes*, 321 U.S. 1, 7 (1944).

Cawthorn finally contends that "Congress must provide a private right of action" for the Challengers to have standing, and that there is no federal "private cause of action to seek to remove Cawthorn from the ballot." Cawthorn Br. 26-27.

This argument misstates the Challengers' position and North Carolina law. The Challengers did not file this lawsuit and have never contended that they would be proper *plaintiffs*. The Challengers are not plaintiffs here; Cawthorn is. The Challengers are intervenor-*defendants* whose state-law Challenges were enjoined.

JA516. Thus, the Challengers do not need a federal cause of action. Instead, the Challengers have a right, under state law, to prosecute a Challenge to Cawthorn's qualifications.[2]

In re Griffin is not to the contrary. That case noted in dicta that procedures for enforcing the Disqualification Clause "can only be provided for by congress." 11 F. Cas. 7, 26 (C.C.D. Va. 1869). But *Griffin* was decided when Virginia had no state government, and was under direct federal rule; much like D.C. today, *all* its laws could "only be provided for by congress." Gerard Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comment. 87, 130 & n.91 (2021) (noting *Griffin* "was not denying states the power to enforce Section Three on their own"). The contrary decision of an Arizona state trial court fails to identify this critical fact. *See Hansen v. Finchem*, No. CV 2022-004321, slip. op. (Ariz. Maricopa Cty. Superior Ct. Apr. 21, 2022), *appeal filed*, No. CV-22-0099-AP/EL (Ariz. Sup. Ct. filed Apr. 22, 2022).

[2] Moreover, if there is no private right of action under Section 3 of the Fourteenth Amendment, then *Cawthorn* had no right to initiate this action. Cawthorn's "Count IV," and the district court order adjudicating that count and no others, assumes that Cawthorn has a private right of action under the 1872 Act. *See* JA38-39. Last week, in a case in which Cawthorn's counsel is lead counsel, another district court observed that "the Court sees no basis at this preliminary juncture to find that the 1872 Amnesty Act was intended to create enforceable individual legal rights of action that could be asserted in the federal courts." *Greene v. Raffensberger*, No. 22-cv-1294-AT, 2022 WL 1136729, at *8-9 (N.D. Ga. Apr. 18, 2022).

In any event, Congress *did* pass legislation requiring North Carolina to apply the Disqualification Clause. 40 Cong. Ch. 70, 15 Stat. 73 (1868) ("no person prohibited from holding office under the United States . . . by section three of the proposed amendment to the Constitution . . . shall be deemed eligible to any office in [any] of said States, unless relieved from disability as provided by said amendment"). That provision remains in force.

II. The District Court Abused Its Discretion by Denying the Motions to Intervene.

Challenger Laurel Ashton twice sought to intervene in the district court. With the other January Challengers, she sought to intervene at the beginning of the case, recognizing that the NCSBE's interests diverged from their own. That belief was confirmed in March 2022, when the district court entered a preliminary injunction barring the Challenge from proceeding and the NCSBE chose not to seek appellate review. Ashton and the other March Challengers then filed a renewed motion to intervene immediately after this Court issued a limited remand to permit that intervention. The district court erred in denying each intervention motion, but its error is clearest for the renewed motion.

Even if earlier in the proceedings it may not have been as clear to the district court that the NCSBE's interests diverged from the Challengers', by March 17, there was no room to argue the NCSBE was representing the Challengers' interests on appeal. Moreover, this Court remanded to the district court, directing it to consider

a renewed intervention motion in aid of its appellate jurisdiction. Yet the district court *still* refused to permit the Challengers to intervene. The district court held – contrary to Supreme Court precedent and the premise of this Court's remand Order – that the Challengers' renewed motion was "untimely." JA750. That holding was legally erroneous for two reasons.

First, the district court's decision contradicts *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), which establishes that the March 17 motion to intervene was timely because the Challengers filed it within the 30-day window for filing a notice of appeal. As the district court recognized, the Challengers filed their March 17 motion "solely to determine the extent to which [they] may maintain further proceedings in the Court of Appeals." JA752. In other words, that motion sought "post-judgment intervention for the purpose of appeal." *McDonald*, 432 U.S. at 395. The "critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *Id*. at 395-96. This standard is met – and a "motion to intervene was timely filed and should have been granted" – when a proposed intervenor "filed her motion within the time period in which the named [parties] could have taken an appeal." *Id*. at 396.

All agree that the Challengers met this appeal deadline. In fact, the district court explicitly "recognize[d] that, like the proposed intervenor in *McDonald*, the movants here have filed their motion within the 30-day notice period for appeal."

JA754 n.3. But neither the district court nor Cawthorn offer any basis for distinguishing *McDonald.* The district court stated that the March 17 motion to intervene was "not . . . in accordance with Rule 24 and *McDonald*" because the Challengers filed that motion "only at the direction of the Fourth Circuit," *id*., but the district court did not explain why the March 17 motion to intervene was *less* timely because this Court directed the Challengers to file it. Cawthorn makes no attempt to defend that reasoning, or even address *McDonald* in his brief.

The district court's reasoning is indefensible. This Court's Order directing the Challengers "to file and the district court to consider a new motion to intervene on an expedited basis" cannot be interpreted as closing the window for filing a timely intervention motion. Doc. 33 at 2-3. The Challengers filed their renewed motion *that same day* but the district court held that it was futile because it came too late. That ruling was a repudiation of this Court's decision to remand for consideration of a new motion to intervene. Even worse, the district court used this Court's Order *against* the Challengers, suggesting that the Challengers' compliance with that Order somehow contradicted *McDonald*. The misapplication of *McDonald* and this Court's own remand Order are enough to justify reversal.

Second, the district court overlooked the "most important circumstance relating to timeliness": the Challengers "sought to intervene 'as soon as it became clear' that [their] interests 'would no longer be protected' by the parties in the case."

Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002, 1012 (2022) (quoting *McDonald*, 432 U.S. at 394).

The district court had earlier rejected the Challengers' argument concerning divergent interests on the ground that their interests and the NCSBE's "in seeking an order denying the motion for preliminary injunction are the same." JA312. "The bottom-line effect of the [district] court's ruling was clear: The [Challengers] were not entitled to intervene under then-current circumstances," and under this Court's precedents, "that determination was final" such that "if the [Challengers] disagreed, then they were required to take a timely appeal." *Berger*, 999 F.3d at 924-25.

The Challengers did disagree, so they filed a notice of appeal on March 9. JA488. The circumstances then changed in a way that confirmed the Challengers' position that the NCSBE did not adequately represent their interests. On March 10, the district court issued its permanent injunction, and explained that "any 'hardship' or impact on [the NCSBE's] interest as a result of the injunction is minimal, since the injunction simply prohibits the [NCSBE] from proceeding on the challenges filed against [Cawthorn] seeking his disqualification pursuant to Section 3 of the Fourteenth Amendment." JA514. This explanation highlights the divergence between the Challengers' and the NCSBE's interests: while the injunction imposes a "minimal" burden on the NCSBE because the NCSBE's interests extend far beyond adjudication of this Challenge, the same cannot be said of the Challengers,

whose only interest in this litigation is pursuing their Challenge to Cawthorn's candidacy.

This divergence in interests became concrete four days later, on March 14, when the NCSBE told this Court that it had not decided whether it would appeal the district court's injunction and it declined to support the Challengers' emergency motion to stay that injunction pending appeal. *See* Doc. 19 at 3. And the divergence had a direct effect on March 17, when this Court denied the Challengers' stay motion because "the only defendants before the district court have not appealed." Doc. 33 at 2.

All these developments – the district court's March 10 Order, the NCSBE's March 14 representations to this Court, and this Court's March 17 Order denying a stay – occurred while the Challengers' interlocutory appeal from the district court's preliminary injunction was pending before this Court. As Cawthorn observes, that pending appeal "precluded filing any intervention at all in the district court." Cawthorn Br. 20. But this Court removed that obstacle to intervention on March 17, when it remanded the case "in aid of [its] own jurisdiction." Doc. 33 at 2. Ashton and the other March Challengers then moved to intervene *that same day* – the earliest possible opportunity after it became clear that the NCSBE would not defend the Challengers' interests on appeal.

* * *

The district court's repeated refusals to permit intervention here reflect the same problem as its ruling on the merits: the district court decided that it, and it alone, should decide whether Cawthorn would appear on the ballot despite allegations that he engaged in insurrection against the United States. The district court explained that "[s]ubjecting [Cawthorn] to an appeal brought by strangers to the case would unduly prejudice him by causing further unforeseen delay." JA752. ("Strangers to the case" is the district court's locution for the people who filed the Challenges that led to the federal case and provided Cawthorn with Article III standing.) But the district court has no more power to decide whether Cawthorn should be subject to appeal in this Court than it does to decide whether he should be subject to challenge in the NCSBE. This Court should reverse the district court's attempt to insulate Cawthorn from appellate review by refusing the Challengers' repeated requests to intervene. The Challengers have never been "strangers" to this dispute, and they are the only parties prepared to defend their interests on appeal.

III. The Injunction Should Be Reversed.

A. Cawthorn's Interpretation of the 1872 Amnesty Act Is Wrong.

The Challengers' opening brief (at 28-44) described at length why the district court's reading of the 1872 Act to immunize future insurrectionists was wrong based on its "actual language," as well as "the primacy of constitutional enactments over

statutory ones," its "legislative history," "Congress's own interpretation of its powers," and "basic logic." (*Id*. at 28.)

The only other court to consider this issue head-on flatly rejected the district court's decision here, and it did so just days after the Challengers filed their opening brief in this Court. *See Greene v. Raffensberger*, 2022 WL 1136729, at *25 (N.D. Ga. Apr. 18, 2022) ("The Court has no basis for concluding, as the court did in *Cawthorn*, that the challenge proceeding violated federal law on the ground that the State's power to enforce Section 3 had been 'rendered ineffective' by the passage of the 1872 Amnesty Act."). The *Greene* court's extensive analysis led to the inexorable conclusion "that the 1872 Act does not provide amnesty prospectively." *Id*.

Yet Cawthorn fails to cite (let alone distinguish) *Greene* in his brief to this Court, even though his counsel was the counsel propounding the losing argument in *Greene*. *See* 2022 WL 1136729. The reasoning in *Greene* is consistent with that of the Challengers here and supports reversal.

Nor does Cawthorn address the two Supreme Court decisions, referenced in *Greene*, which contradict his contention that Section 3 has been a dead letter since 1872 for all but the top officials of the Confederacy. As noted by the *Greene* court, the Supreme Court, in 1969 and again in 1995, considered the disqualification embodied in Section 3 of the Fourteenth Amendment to have continuing viability.

Greene, 2022 WL 1136729, at *25 (citing *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969), and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 787 n.2 (1995)). That the Supreme Court has twice within the past 53 years referenced the constitutional provision as extant defeats Cawthorn's contention that it was effectively repealed in 1872. The district court failed to address this, as does Cawthorn in his briefing here.

Cawthorn's reliance on the district court's erroneous conclusion that the "clear and unambiguous" language of the 1872 Act granted amnesty to future insurrectionists for all time conflicts with both the contextual history of the 1872 Act and its more narrowly circumscribed legislative history. Cawthorn Br. 31 (citing JA510 n.8). The Challengers, in their opening brief (at 35-38), provided extensive citation to the congressional record and the historical record more broadly, showing that the 1872 Act was a reaction to the continuing need to pass a series of private bills granting amnesty to thousands of former Confederates, with no discussion at all that Congress should, would – or could – immunize future insurrectionists. Even more detail concerning the historical record was provided in the Amicus Brief of the Constitutional Accountability Center (Doc. 76 at 3-14). Yet Cawthorn ignores the historical record and insists that Congress in 1872, just seven years after the end of hostilities in the Civil War and four years after passage of the Fourteenth Amendment, sought to grant amnesty not only to the lower echelons of the

Confederates, but to any and all persons – born and yet unborn – who might seek to serve in Congress after committing some future insurrectionary act. Such an interpretation – entirely void of context – is unwarranted. *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019). If, in fact, Congress in 1872, with the horrific memories of the Civil War in the recent past, had sought to engage in the extraordinary legislative feat Cawthorn claims, there would be some historical record of it, yet the historical record points to the opposite conclusion.

Indeed, Cawthorn's interpretation defies "pure common sense," as the court put it in *Greene*:

> [I]t would make little sense for Congress to have prohibited Jefferson Davis and other leaders of the Confederacy from serving in Congress in 1872 while simultaneously granting blanket amnesty to all future insurrectionists regardless of their rank or the severity of their misconduct. But that is precisely the reading that [Greene] asks this Court to adopt. The far more plausible reading is that Congress's grant of amnesty only applied to *past* conduct.

2022 WL 1136729, at *25 (emphasis in original).

Cawthorn also fails to account for the fact that if Congress had intended to pardon future insurrectionists from the operation of the Fourteenth Amendment's bar, it would have tracked the concededly future-perfect language of Section 3 – "shall have engaged in insurrection" – and stated that "[a]ll disabilities that *shall be imposed* by Section Three are hereby removed." The most natural interpretation of the text is that Congress used *two past-tense* verbs – "imposed" and "removed" –

whereas Cawthorn's interpretation requires assuming that Congress mixed tenses by using one past participle and one past-tense verb.

The court in *Greene* rejected the "prospective" interpretation, holding that Greene's "position is not supported by the text of the 1872 Act":

> For one thing, the text of the statute contains no language suggesting that it applies prospectively. For instance, it does not say that it removes all future disabilities, disabilities that may be incurred, disabilities that shall be incurred, or the like. Although Section 3 itself utilizes the future perfect tense by applying its restriction to any individual who "shall have engaged in insurrection or rebellion," the 1872 Amnesty Act utilizes only the past tense phrase that "all political disabilities imposed by the third section of the fourteenth article . . . are hereby removed from all persons whomsoever . . . ." Moreover, as Intervenors argue, it strains credulity for Plaintiff to argue that Congress can "remove" something that does not yet exist.

2022 WL 1136729, at *23.

The Challengers, in fact, argued that in their opening brief (at 34 ("[t]he prefix 're' in the word 'remove' presupposes something already in place prior to removal")), but Cawthorn never explains how something can be "removed" before it has occurred.

Cawthorn also persists in the obtuse reading of the "subsequent history" of Congressional amnesty as revealed in the Berger case from 1919. Cawthorn, as did the district court, JA512-13, simply dismisses that case on the grounds that the discussion in Congress concerned the 1898 Act, not the 1872 Act. But Cawthorn ignores the House Report's conclusion that Congress "manifestly" could "only

remove disabilities incurred previously to the passage of the act, and Congress in the very nature of things would not have the power to remove any future disabilities." *Cannon's Precedents* §§ 56-59, at 55. In other words, irrespective of whether the Act in question was the 1872 Act or the 1898 Act, Congress, according to its own historical practice, has found that it does not have the power to make prospective amnesties, and, in its later considerations of Section 3, it continues, like the Supreme Court, to find that section viable. *See* Opening Br. 42. Yet, as with the Supreme Court precedent, Cawthorn ignores those authorities. (Moreover, under Cawthorn's analysis, Berger and his counsel completely but inexplicably failed to raise a sure-fire winning argument under the 1872 Act.)

The district court's reliance on the 1898 Act to interpret the 1872 Act is pure anachronism. The *Greene* court rejected the argument that "one could infer that, in 1872, Congress must have intended for the 1872 Act to apply prospectively, solely by virtue of the fact that Congress did not include the 'heretofore incurred' language that was later included in the 1898 Act." 2022 WL 1136729, at *23.[3] The 42nd Congress passed the 1872 Amnesty Act while the 1898 Amnesty Act was passed by

[3] The court in *Greene* agreed with the 1919 Berger Committee that the inclusion of the "heretofore incurred" language in the 1898 Act "was merely a 'recogni[tion]' of the fact that Congress 'manifestly' lacked the power to remove the disabilities imposed by Section 3 prospectively." 2022 WL 1136729, at *24.

the 55th Congress, some 26 years and 13 Congresses later. The plain meaning of the 1872 Act cannot be inferred from language included in an act 26 years later.[4]

B. Cawthorn Fails to Defend the Court's Injunction on Any Ground Necessary to Support an Injunction.

Cawthorn fails to defend the district court's injunction on any of the requirements that are *necessary* to an award of a permanent injunction other than success on the merits. *See* Cawthorn Br. 43 n.8 ("Since this is an appeal from a final judgment granting a permanent injunction . . . it is irrelevant whether the district court's preliminary injunction met the other three preliminary injunction factors."). That failure alone is sufficient to warrant reversal. A permanent injunction, like a preliminary injunction, is "an equitable remedy that does not follow from success on the merits as a matter of course." *SAS Inst. Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (2017) (internal quotation omitted). A permanent injunction still requires proof of irreparable harm, that remedies available at law are inadequate, that the balance of the hardships favors the plaintiff, and that the public interest would not be disserved by a permanent injunction. *Id.*; *see also eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). These other factors cannot be ignored. *SAS Inst.*, 874 F.3d at 385 ("Satisfying these four factors is a high bar, as it should be."). And each factor must be independently satisfied. *See id.* at 386

[4] Cawthorn also fails even to respond to the argument that his interpretation of the Amnesty Act would functionally repeal a provision of the Constitution outside the requirements of Article V.

("[T]he Supreme Court has made clear that, regardless of the other factors, '[t]he equitable remedy [of an injunction] is unavailable absent a showing of irreparable injury.'" (citation omitted)).

Cawthorn implies it would suffice for a federal court to enjoin a state proceeding any time it determined for itself what the outcome of that proceeding should be under federal law – without regard to the other injunction factors. But federal courts are not courts of plenary review, available to intervene in any state proceeding on an emergency basis whenever some federal issue – even, as here, a federal *statutory interpretation issue* – is in play. That is not the law, and would turn federalism on its head. *See Moore v. City of Asheville, N.C.*, 396 F.3d 385, 394-94 (4th Cir. 2005).

IV. Cawthorn's Alternative Grounds for Affirming the Injunction Lack Merit.

Each of Cawthorn's alternative claims lacks merit, and none warrants the drastic remedy of an injunction. Nor should this Court remand for further consideration by the district court.[5]

[5] In *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), this Court determined that because the remaining question in the case "was purely a legal one . . . remand was unnecessary." 344 F.3d at 435. The Challengers agree with Cawthorn that the case should not be remanded given the circumstances present here – with no factual determinations required and a fast-approaching election. In other election-related circumstances, this Court has recognized that it ought not remand where "[s]uch a remand would inevitably delay the elections." *Cane v. Worcester Cnty., Md.*, 59 F.3d 165 (table), 1995 WL 371008, at *2 (4th Cir. 1995) (per curiam) (unpublished).

A. This Court Should Abstain from Entertaining Cawthorn's Facial Challenges to the North Carolina Challenge Statute.

Cawthorn's Counts I & II are facial constitutional challenges to the North Carolina candidacy challenge statute generally. Count I seeks a declaration that the statute is unconstitutional by virtue of permitting a challenge based on "reasonable suspicion," while Count II claims that the statute's placing of the burden on the candidate is unconstitutional. JA34-37. Federal courts, however, should abstain from deciding those claims when they may be raised as part of the state court proceeding.

In light of "our system of dual sovereignty," federal courts should "avoid interference with a state's administration of its own affairs." *Johnson v. Collins Ent't Co. Inc.*, 199 F.2d 710, 719 (4th Cir. 1999); *see also id*. at 715 (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). As this Court held:

> Federal courts should thus "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." [quoting *Burford*] . . . And the federal judiciary should accordingly abstain from deciding cases (1) that present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or (2) whose adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Id. at 719 (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989)).

Here, as in *Burford*, details about the candidacy challenge procedures such as the appropriate standard for asserting a challenge or the placement of burdens of proof, can and should be determined within the state proceedings, which provide Cawthorn with due process and multiple expedited routes of appeal in the event he is unsuccessful in the Challenge. Federal courts, particularly at this early stage, ought to avoid "federal intrusions into areas of core state prerogative." *Id.* (citing *Burford*, 319 U.S. at 327).

B. The North Carolina Challenge Statute Does Not Violate Cawthorn's First or Fourteenth Amendment Rights.

If the Court reaches the merits of Cawthorn's constitutional claims, those claims fail. Cawthorn's First and Fourteenth Amendment claims are subject to the Supreme Court's *Anderson-Burdick* test, which balances "the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that order, rather than chaos, is to accompany the democratic process." *Fusaro v. Howard*, 19 F.4th 357, 368 (4th Cir. 2021) (citation omitted).

Rather than apply this balancing analysis, Cawthorn attempts to fashion a "right to run for political office" that is on par with "fundamental First Amendment right[s]." Cawthorn Br. 35, 36. But a candidate's "right to appear on a ballot does not rise to the level of a fundamental constitutional right." *Greene*, 2022 WL 1136729, at *16; *see also Clements v. Fashing*, 457 U.S. 957, 963 (1982) ("Far from

recognizing candidacy as a fundamental right, we have held that the existence of barriers to a candidate's access to the ballot does not of itself compel close scrutiny." (internal quotation omitted)).

Accordingly, the Supreme Court has consistently "upheld generally-applicable and evenhanded restrictions" imposed by States on candidates' eligibility for the ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). State election laws that pose only a "modest" burden are generally upheld based on "the State's important regulatory interests." *Buscemi v. Bell*, 964 F.3d 252, 262-63 (4th Cir. 2020).

Here, the strength and importance of the State's interests are beyond question. Indeed, Cawthorn himself concedes that the State has an "important" and "legitimate" interest in determining whether candidates are constitutionally qualified to access the ballot. Cawthorn Br. 41. *See Hassan v. Colorado*, 495 F. App'x 947, 948-49 (10th Cir. 2010) (Gorsuch, J.).

While Cawthorn asserts various arguments for a "severe" burden (many for the first time on appeal), he cannot establish that the Challenge Statute poses more than a "modest" burden on a candidate's access to the ballot, if even that much.

First, Cawthorn complains that a challenge may be initiated based upon a "reasonable suspicion" that a candidate does not meet the requirements for office. N.C. Gen. Stat. § 163-127.2. But candidates for office in North Carolina *benefit*

from a remarkably lenient process that treats them as *presumptively* qualified unless or until a challenge is brought based on a "reasonable suspicion" that the candidate is not qualified. *See* Opening Br. 6-7. By establishing a procedure for voters to challenge the qualification of a candidate in this way, North Carolina imposes a minimal burden by requiring him to present evidence of his qualification only in that limited circumstance. Tellingly, Cawthorn does not cite a single ballot access case. Cawthorn Br. 36-40. *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013), holding that a peaceful protester may not be arrested based upon a mere suspicion and without probable case, is inapposite; Cawthorn has not been arrested or subjected to criminal prosecution in any way related to the Challenge.

Second, Cawthorn complains that the Challenge Statute places the burden on him to establish by a "preponderance of the evidence" that he is qualified under the handful of requirements expressly imposed by the U.S. Constitution to hold the office he seeks. While Cawthorn claims that the Challenge Statute "shifts the burden," Cawthorn Br. 38, there is no *shifting* of the burden. Instead, *at all times*, North Carolina law quite reasonably places the burden to demonstrate "qualification" on the candidate – the one best situated to make that showing. N.C. Gen. Stat. § 163-127.5(a).

Cawthorn complains, however, that the burden of proving his qualifications under Section Three of the Fourteenth Amendment is "orders of magnitude higher."

Cawthorn Br. 36. But there is no reason to treat this constitutional requirement for office differently. His complaint that his access to the ballot is unconstitutionally burdened because it requires him "prove" a "negative[]," Cawthorn Br. 39, is unpersuasive. He could meet his burden by testifying truthfully that he did not engage in insurrection against the United States in a manner that the fact-finder finds credible, and by credibly addressing any contrary evidence. *See Greene*, 2022 WL 1136729, at *17.

Again, Cawthorn does not cite a single case involving unconstitutional burdens on a candidate's right to access the ballot. Instead, he cites *Speiser v. Randall*, 357 U.S. 513, 520 (1958), which does not involve ballot access.

Third, Cawthorn raises other due process claims regarding the procedures applicable during the administrative hearing process – *e.g.*, the rules applicable during an administrative hearing, the lack of a specific reference to a motion to dismiss, or that his constitutional challenges will first be heard on appellate review. Ironically, while the district court was concerned that intervention would expose Cawthorn to the need to defend against new arguments from the Challengers on appeal, JA752, it is *Cawthorn* raising new complaints about the challenge process that were not raised in Counts I or II of his Complaint or in the briefing below. These arguments are waived. *See Bell v. Brockett*, 922 F.3d 502, 513 (4th Cir. 2019).

Finally, after delaying the commencement of the challenge process for approximately two months through federal court intervention, Cawthorn now argues that there is not enough time to complete the process before the primary. Cawthorn Br. 39-40. The NCSBE has already stated that there is not time for any challenge process to disturb the May 17 primary, NCSBE Br., Doc. 94 at 6, but that it is still possible that disqualification may occur before the November election, *id.* at 6-7.

C. The North Carolina Challenge Statute Does Not Violate the Qualifications Clause.

The Constitution's Elections Clause authorizes states to adjudicate qualifications of congressional candidates, U.S. Const. art. I, § 4, cl. 2, without "usurping" the appropriate House's power under Article I, § 5, cl. 1 ("Qualifications Clause"). *Adjudicating* qualifications is not *adding* qualifications.

North Carolina's power to adjudicate candidates' qualifications stems from the Elections Clause. The *Greene* court held that such action does not violate the Qualifications Clause, found the precedent from presidential cases persuasive, held that the Qualifications Clause applies to "*its own members*," not candidates, and recognized that deciding otherwise would leave a state defenseless to protect its ballot. *See* 2022 WL 1136729, at *26-28.

Amicus Professor Muller argues that the Elections Clause only applies to "procedural rules." Br. of Professor Muller as *Amicus Curiae*, Doc. 86 at 11. But this is not the law – the Elections Clause confers a broad power that includes control

over ballot access. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (the Elections Clause "embrace[s] authority to provide a complete code for congressional elections"); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (the Elections Clause "empowers the States to regulate the conduct of senatorial elections").

Moreover, state candidate eligibility challenges do not "usurp" the House's power to judge qualifications. The House's power applies to Members-elect, not candidates. *Cf. Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929). North Carolina's adjudication of the eligibility challenge cannot "usurp" the House's role as the *final* judge of qualifications. If North Carolina determines Cawthorn is disqualified, he can file a contest in the House under 2 U.S.C. § 382; if the House then determines that he is in fact qualified, it can refuse to seat anyone from his district, thus creating a vacancy and triggering a new election under N.C. Gen. Stat. § 163-13.

Muller's attempt to distinguish the Elections Clause from states' power to regulate presidential elections is also unpersuasive. The precedent he cites is comparable to the language used to describe Elections Clause power. *Compare Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (describing states' power to regulate presidential elections as "far-reaching"), *with Inter Tribal Council of Ariz.*,

570 U.S. at 8-9 (describing Elections Clause power as authorizing a "complete code" for congressional elections).

Cawthorn argues that *adjudicating* qualifications before the election is the functional equivalent of *adding* qualifications. But his position was rejected in *Greene*, 2022 WL 1136729, at *27 (application of the Disqualification Clause is application of "an existing provision enshrined in the Fourteenth Amendment"), and cannot be reconciled with the precedent recognizing the states' authority to adjudicate qualifications before the election for presidential candidates, *see Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014); *Hassan*, 495 F. App'x 947.

When the Framers wanted a qualification to attach at a specific time, they made it clear: the residency requirement in Art. I, § 2, cl. 2, attaches "when elected." Every other enumerated qualification is silent as to when it attaches, disproving the idea that the qualification can be adjudicated only when the Member presents himself. Muller cites "easy" cases involving someone just barely underage when elected, which can be remedied by the mere passage of time during the congressional term. But his logic would also apply to a candidate who could not possibly qualify during the entire congressional term, e.g., a 19-year-old candidate.

Similarly, the speculative hypothetical possibility that intervening events of Congress (by a two-thirds vote of each chamber) might render Cawthorn qualified are irrelevant. Unless and until such intervention occurs, he is not qualified. Muller

dismisses as fanciful the possibility that foreign operatives might collect signatures for the ballot, but disrupting elections by sowing electoral chaos is hardly fanciful in 2022[6] and Muller's position would disempower states from excluding even absurdly unqualified candidates.

Finally, neither Cawthorn nor Muller explains why their positions would not apply to presidential elections. Presidential candidacies face similar restrictions based on age and citizenship. Yet Muller concedes that states may exclude presidential candidates from the ballot who do not meet age and other constitutional qualifications. The same logic applies here.

CONCLUSION

The Court should reverse the denials of the motions to intervene and the entry of the permanent injunction.

Respectfully submitted,

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[6] *See United States v. Internet Res. Agency*, No. 18-cr-00032, ECF No. 1 (D.D.C. filed Feb. 16, 2018), *available at* https://www.justice.gov/file/1035477/download.

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Dated: April 29, 2022

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I hereby certify that on this 29th day of April, 2022, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel of record as registered CM/ECF users.

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