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

BRIEF OF APPELLANTS

Pressly M. Millen
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Samuel B. Hartzell
Scott D. Anderson
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Laurel Ashton
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 4, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael Hawkins
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen　　　　Date: April 4, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Melinda Lowrance
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 4, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ellen Beth Richard
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐ YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 4, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Terry Lee Neal
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 4, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Barbara Lynn Amalfi
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Natalie Barnes
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐ YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Claude Boisson
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐ YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mary Degree
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carol Ann Hoard
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

June Hobbs
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Marie Jackson
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael Jackson
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
   If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
   If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Anne Robinson
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

David Robinson
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carol Rose
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐ YES ☑ NO
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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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- Counsel has a continuing duty to update the disclosure statement.

No. 22-1251 Caption: Madison Cawthorn v. Barbara Amalfi, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

James J. Walsh
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s/ Pressly M. Millen Date: April 5, 2022

Counsel for: Defendant-Intervenor-Appellants

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INTRODUCTION

This is an appeal from a final judgment granting Plaintiff-Appellee, U.S. Representative Madison Cawthorn, a permanent injunction against the defendants below, members of the North Carolina State Board of Elections (collectively, the "NCSBE"), from "proceed[ing] under N.C. Gen. Stat. §§ 163-127.1, et seq. [the 'Challenge Statute'] with the challenges lodged against [Cawthorn] based on Section 3 of the Fourteenth Amendment to the U.S. Constitution." JA516. Section 3 bars from Congress those who took an oath to support the Constitution but then engaged in insurrection against the United States.

Appellants (the "Challengers") are the individual North Carolina voters who actually lodged the challenges at issue to Cawthorn's candidacy (the "Challenges"). It was those Challenges that established Cawthorn's injury-in-fact on which the district court found Article III jurisdiction, JA504-05, and provided the district court with the necessary "ripeness" for its ruling. JA506. Yet the Challengers were twice denied intervention – both mandatory and permissive – by the district court, first on the ground that their interests were adequately protected by the NCSBE, and later because of "tardiness" for not renewing their motion to intervene in a one-day window between the refiling of new Challenges to Cawthorn and the district court's order enjoining the Challenges. It was an abuse of discretion for the district court to deny the motions to intervene.

Even more problematic is the district court's substantive ruling in favor of Cawthorn – not appealed by the NCSBE – which holds that Cawthorn was immunized from the reach of the Fourteenth Amendment's Disqualification Clause because of an 1872 Act of Congress, enacted over a hundred years before he was born.

As explained more fully below, this Court should reverse the denials of one or both motions to intervene, and reverse the district court's attempt to harmonize a reading of the 1872 Act with the Fourteenth Amendment to provide amnesty to latter-day insurrectionists.

JURISDICTIONAL STATEMENT

Cawthorn alleged that the district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). JA24. The district court found that it had subject matter jurisdiction. JA492.

On February 21, 2022, the district court denied without prejudice the Challengers' motion to intervene. JA307. On March 4, the district court granted from the bench Cawthorn's motion for a preliminary injunction. JA424. On March 9, the Challengers appealed from the orders denying intervention and granting the injunction. JA19.

On March 10, the district court issued a permanent injunction in favor of Cawthorn. JA491. The next day, the Challengers filed an amended notice of appeal. JA517.

On March 30, and following limited remand by this Court, the district court denied the Challengers' renewed motion to intervene. JA747.[1] The Challengers filed a second amended notice of appeal the next day. JA756.

This Court has jurisdiction under 28 U.S.C. § 1291 to review both orders denying the Challengers' motions to intervene. *See N. Carolina State Conf. of NAACP v. Berger*, 999 F.3d 915, 923-26 (4th Cir. 2021) (en banc), *cert. granted*, 142 S. Ct. 577 (2021). And it has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) to review the district court's injunctions.

ISSUES PRESENTED

1. The district court denied the Challengers' first motion to intervene on the grounds that mandatory intervention was inappropriate because their interests were adequately protected by the NCSBE and permissive intervention was inappropriate because it would prejudice Cawthorn. Did the district court abuse its discretion in denying intervention?

[1] Challenger Ashton was a movant in both motions to intervene; the composition of the other challengers is discussed below.

2. The district court, after limited remand from this Court to reconsider intervention, denied the Challengers' renewed motion to intervene on the ground that it was "untimely" because it was not made within a single-day window between the Challengers filing another set of Challenges and the district court's ruling for Cawthorn. Did the district court abuse its discretion in denying the second intervention motion?

3. The district court ruled that Cawthorn was entitled to a permanent injunction against any challenges to his qualifications under Section 3 of the Fourteenth Amendment because Congress, in 1872, passed a law removing disabilities imposed by that provision not only against civil-war insurrectionists, but also future, even unborn, insurrectionists. Did the district err in granting the injunction?

STATEMENT OF THE CASE

A. The January 2022 Challenges and the Statutory Regime.

1. The Initial Challenges.

On December 7, 2021, Cawthorn filed his candidacy for the upcoming 2022 election for North Carolina's 13th congressional district. JA25. On January 10, 2022, the "Challengers filed a Challenge against Rep. Cawthorn." JA30. As alleged in Cawthorn's complaint, the Challenges were "based upon claims that Rep. Cawthorn engaged in 'insurrection or rebellion' against the United States and was

not qualified to be a Member of Congress under Section Three of the Fourteenth Amendment to the U.S. Constitution." JA30-31.

Those Challenges, however, were stayed the day after their filing by a N.C. Superior Court "until 'final resolution' is reached on the ongoing litigation related to the drawing of North Carolina's congressional districts." JA31. That same court had upheld the maps outlining the district in which Cawthorn had filed, *see* JA31, but its ruling had been appealed, and the N.C. Supreme Court was slated to hear "appellate arguments of that decision as to congressional . . . districts on February 2, 2022." JA31.

On February 4, the N.C. Supreme Court struck down the congressional maps – including the 13th congressional district where Cawthorn had filed – as unconstitutional under the N.C. Constitution, ordered the N.C. General Assembly to submit new maps to the trial court no later than February 18, and advised the parties "to anticipate that new districting plans for Congress . . . will be available by 23 February 2022." *Harper v. Hall*, No. 413PA21, slip op., at 9 (N.C. Feb. 4, 2022).[2]

2. The Challenge Statute.

North Carolina's "Challenge to Candidacy" procedures are set forth in Article 11B of Chapter 163 of the N.C. General Statutes. Under the Challenge Statute,

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[2] https://appellate.nccourts.org/orders.php?t=PA&court=1&id=397836&pdf=1&a=0&docket=1&dev=1.

voters from a candidate's district have a right to challenge the qualifications of a candidate. In fact, they are the only ones who may initiate such challenges. The Challenge Statute, more fully described below, is the flipside of North Carolina's deliberately permissive candidate-qualification regime, N.C. Gen. Stat. § 163-106, which permits candidates to file for office in an essentially perfunctory fashion.

Indeed, the Notice of Candidacy form[3] promulgated by the NCSBE requires candidates for office to provide basic information such as name, address, and the like. Candidates are required only to sign and have the document notarized with a sworn statement that it is "true, correct, and complete to the best of the candidate's knowledge or belief." *Id.* § 163-106(e).

Candidates are required to submit no documentary proof that they meet any other qualifications of office. For example, an averment of the candidate's age – a federal and North Carolina constitutional requirement for multiple offices – is not required. A candidate for the U.S. House of Representatives is not required to state, let alone prove, that he or she has been a U.S. citizen for the constitutionally mandated seven years as required by the U.S. Constitution (at Art. III, § 2, cl. 2).

In sum, North Carolina's candidate filing requirements are markedly lenient and could never be characterized as "burdensome." The sole vetting of the filing is

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[3] https://s3.amazonaws.com/dl.ncsbe.gov/Candidate%20Filing/NC_Candidate_General_Notice_Candidacy_Fillable.pdf.

a county elections board certification, under N.C. Gen. Stat. § 163-106.5 and found on the same form, attesting to the candidate's voter registration. After those minimal steps, the candidate presumptively appears on the ballot.

The primary method for challenging a candidate's qualifications to appear on the ballot – both those required to be stated under N.C. Gen. Stat. § 163-106 and any other qualifications not covered by that statute or the form – is the Challenge to Candidacy procedure outlined in N.C. Gen. Stat. § 163-127.1 *et seq.*, in which a "Challenger" – defined as a "qualified voter registered in the same district as the office for which the candidate has filed," *id*. § 163-127.1(3) – may within 10 business days of the closing of the filing period and by "verified affidavit" raise an issue, "on reasonable suspicion," that a candidate "does not meet the constitutional or statutory qualifications for the office, including residency," *id*. § 163-127.2(a)-(b). Only then is a candidate required to demonstrate by a preponderance of the evidence that "he or she is qualified to be a candidate for the office." *Id*. § 163-127.5(a).

Thus, the N.C. General Assembly has chosen to enact a procedure in which the filing by a candidate to run for office is perfunctory and the primary responsibility for vetting a candidate's qualifications is left to the district's voters who may initiate and ultimately prosecute a challenge under the Challenge Statute. *See* N.C. Gen. Stat. § 163-127.4.

As described by the district court, "[w]hen a candidate is subject to a challenge under the statute, '[t]he burden of proof shall be upon the candidate, who must show by a preponderance of the evidence of the record as a whole that he or she is qualified to be a candidate for the office.'" JA494 (quoting N.C. Gen. Stat. § 163-127.5(a)) (second alteration in original). The statute "does not designate what type of proof the candidate must provide to meet his or her burden of proof" for challenges apart from those based on residency. JA494. "If the [NCSBE] determines that a challenged candidate does not meet the 'qualifications' for office, it may, through its certification authority, remove that candidate's name from the ballot, thereby preventing the candidate from running for office." JA494.

B. Cawthorn's Federal Complaint.

Cawthorn filed this action in the Eastern District of North Carolina on January 31, 2022. JA494. He sought "declaratory and injunctive relief prohibiting the [NCSBE] from proceeding to adjudicate the January challenge under the state statute." JA494. Cawthorn "raised four claims for relief alleging violations of his First and Fourteenth Amendment rights, as well as violations of the U.S. Constitution's Qualifications Clause and the 1872 Amnesty Act." JA494.

Cawthorn contended in Count I that the Challenge Statute's provision "triggering a government investigation based solely upon a Challenger's reasonable suspicion violates Rep. Cawthorn's First Amendment right to run for political

office." JA34-35. Cawthorn's Count II claimed that placing the burden on the candidate to demonstrate his qualifications by a preponderance of evidence "violates the Due Process Clause of the Fourteenth Amendment." JA36-37. Those first two counts were facial challenges to the Challenge Statute.

Cawthorn's two remaining challenges were as-applied. In Count III, Cawthorn alleged that the Challenge Statute usurped the power of the U.S. House of Representatives "to make an independent, final judgment on the qualifications of its Members." JA37-38. Finally, in Count IV, Cawthorn alleged that the "Challenge Statute, as applied to Rep. Cawthorn under Section Three of the Fourteenth Amendment, violates federal law," specifically, 42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142, a general amnesty act passed by the 42nd Congress (the "1872 Act"). JA38-39.

C. The District Court Denies the Challengers' Intervention Motion.

Within days (and indeed before any substantive filing by the NCSBE defendants), on February 7, 2022, the Challengers who filed the January Challenges[4] moved to intervene, JA158, and filed a proposed Memorandum in Opposition to Cawthorn's Motion for Preliminary Injunction. JA163-200.

[4] The original "January Challengers" were Amalfi, Ashton, Barnes, Boisson, Degree, Hoard, Hobbs, Jackson (Marie), Jackson (Michael), Robinson (Anne), Robinson (David), Rose, and Walsh. *See* JA159.

On February 21, without any hearing, the district court issued its Order denying Challengers' motion to intervene. JA307-12. The district court denied intervention as a matter of right under Rule 24(a)(2) and permissive intervention under Rule 24(b)(1)(b). JA311-12.

For mandatory intervention, the district court ruled that the Challengers' motion failed on the third of the three prongs required for intervention: that "the applicant's interest is not adequately protected by existing parties to the litigation." JA308. First, the district court held that there was "a heightened presumption of adequate representation by the [NCSBE]," because the Challengers had "the same ultimate objective as the party to the suit," the NCSBE. JA308. Second, the district court held, the "would-be intervenors share the same ultimate objectives as a government defendant." JA309. Even though the Challengers, as parties ultimately seeking to disqualify Cawthorn under the Challenge Statute, were not in the same position as the NCSBE, a bipartisan Board ultimately in charge of administering the Challenges and perhaps deciding them, the district court ruled that the Challengers and the NCSBE "share the same ultimate objective in *this* case: to obtain a court order rejecting the Plaintiff's claims and upholding the constitutionality of the challenged statute." JA310. That the Challengers and the NCSBE had clearly different ultimate goals – and might have different views on the various grounds asserted by Cawthorn for declaring the Challenge Statute unconstitutional or

inapplicable – was dismissed by the district court as "conflat[ing the] challenge to Plaintiffs' qualifications before the State Board of Elections with this litigation." JA310. Third, the district court held that the Challengers made "no showing of 'adversity or interest, collusion or malfeasance.'" JA311.

As for permissive intervention, the district court determined that it "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." JA311. Even though the Challengers had already provisionally filed their Memorandum in Opposition to Cawthorn's Motion for Preliminary Injunction on February 7, 2022, JA163-200 – a full two weeks *before* denial of the motion to intervene – the district court "conclude[d] that intervention would introduce unnecessary delays and complications 'without a corresponding benefit to existing litigants, the court, or the process,'" JA311 (quoting *Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013)), further referencing the "district court's trial management prerogatives," JA311. The district court denied the intervention motion without prejudice. JA312.

D. The March 2022 Challenges.

Meanwhile the litigation over the maps for North Carolina's congressional districts continued. Two days after denial of the Challengers' first intervention motion, on February 23, 2022, a panel of three state court judges issued "a new map reflecting the congressional districts," which were then confirmed by the N.C.

Supreme Court. JA495. On February 24, the NCSBE "issued a letter to the January challengers informing them that, because they were no longer 'qualified, registered voters' in the newly drawn 13th Congressional District, the challenge filed under N.C. Gen. Stat. 163-127.1 et seq. was 'no longer valid.'" JA495. (While none of the January Challengers lived in the "newly drawn 13th Congressional District," Challenger Laurel Ashton was a voter in both the earlier 13th congressional district struck down by the state Supreme Court and the later 11th congressional district approved by that court – both districts in which Cawthorn filed for candidacy in 2022. *See* JA344.)

In any event, on March 2, 2022, the NCSBE "filed a notice informing the [district] court that [Cawthorn] had withdrawn his January notice of candidacy and filed a notice for the newly drawn 11th Congressional District." JA495. On "March 2, 2022, two individuals [January Challenger Ashton and new Challenger Hawkins] from [the 11th congressional district] filed challenges with the Board" on "the same basis on which the January challengers relied": that Cawthorn "was not eligible to run for office" based on Section 3 of the Fourteenth Amendment. JA495.

The district court, based on the NCSBE's March 2 statement that the new Challenges were valid in the 11th congressional district, ordered that "the hearing on the pending Motion for Preliminary Injunction will be accelerated and heard on March 4, 2022." JA18.

E. The District Court's Ruling Enjoining the Challenges.

At the March 4 hearing, the district court enjoined enforcement of the Challenge Statute in an oral ruling from the bench. JA492. Six days later, it issued a 26-page written Order describing its ruling in more detail and indicating that it was issuing a permanent injunction. JA491-516.

The district court explained that the "case is not about *what* must be decided – that is, whether an insurrection occurred." JA492 (emphasis in original). "Instead," the district court said, "it is about who decides what must be decided – and who decides who decides." JA492.

> It is the Plaintiff's position that Congress decides who decides, but Defendants posit that the North Carolina legislature decides who decides. Because Congress has decided by statute, with two-thirds of both houses concurring, to reserve to Congress the right to decide whether one of its members has engaged in insurrection, the requested injunction was appropriately issued on March 4, 2022.

JA492.

The district court determined, over the NCSBE's objection, that Cawthorn had standing by reason of an injury-in-fact, which was that the Challengers, "voters in [the 11th Congressional D]istrict filed challenges pursuant to N.C. Gen. Stat. §§ 163-127.1, et seq., seeking a decision finding him unqualified for the office." JA502. Cawthorn's claims were also "ripe for review" because he "was 'challenged' under the state statute." JA506. At the same time that both injury-in-fact and ripeness were based on the "current challenges," the district court rejected the NCSBE's call

for *Younger* abstention because those Challenges were "in a 'preliminary stage.'" JA508.

The district court ultimately ruled that Cawthorn should prevail only on his Count IV claim that Section 3 of the Fourteenth Amendment was supposedly undone by the 1872 Act and "the disability set forth in Section 3 can apply to no current member of Congress." JA510. The district court also ruled that requiring Cawthorn "to prepare a defense" constituted irreparable harm. JA513. In balancing hardships, those of Cawthorn – "if forced to participate in an unlawful proceeding and defend himself against allegations of insurrection against the United States at the same time he is attempting to campaign for election," JA514-15 – outweighed the "minimal" hardship to the NCSBE "since the injunction simply prohibits the Board from proceeding on the challenges" and the NCSBE "is not prohibited from determining any North Carolina candidate's qualifications based on other valid grounds." JA514. Gone from that equation, of course, was any hardship to the Challengers, who lost a statutorily conferred right to challenge a candidate for public office, including because he does not meet federal constitutional qualifications for office such as not having engaged in insurrection against the United States.

With regard to public interest, the district court in its March 4 oral ruling initially identified the public interest as coterminous with the minority of people who "proceed to the ammunition box" when dissatisfied with the protections offered by

"the soapbox, the ballot box, and jury box," and finding in their interests "an obligation to rule." JA486. In the written Order, however, the district court simply reiterated the same rationale supporting irreparable harm and balance of hardships: "The public interest is also served when candidates are not forced to assume burdens from which they have been explicitly exempted." JA515. The district court's public interest analysis did not account for the interest in adhering to the U.S. Constitution, and in particular, the paramount interest established in the Fourteenth Amendment itself in not having insurrectionists serving in Congress.

F. The Challengers' Initial Appellate Filings and This Court's Order.

On March 9, 2022, the Challengers filed an interlocutory appeal of the denial of their motion to intervene and the district court's oral ruling granting the injunction. JA19. On that same date, the Challengers filed in this Court an Emergency Motion for Stay of Injunction Pending Appeal. Doc. 3. The NCSBE then filed an amicus brief in this Court, stating that (1) it had not yet decided whether to appeal, and (2) if it did appeal, would not do so on an expedited basis.[5] Doc. 10.

On March 17, 2022, this Court issued an Order stating that "[t]his case raises serious substantive questions," and denying "the current application for a stay" "without prejudice," because "the notice of appeal was filed by private individuals

[5] The NCSBE's deadline to appeal was April 11. It did not, in fact, appeal by that date.

who were not named as defendants and who were denied intervention in the district court, and the only defendants before the district court have not appealed." Doc. 33. This Court also stated that "events since the district court's denial of intervention . . . reveal that circumstances may have changed and the district court suggested it would revisit intervention if the posture of the case changed." *Id*. at 2. This Court therefore ordered that "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." *Id*.

G. The Challengers' Renewed Intervention Motion and the District Court's Second Denial.

On March 17, 2022, the same day as this Court's limited remand Order, the Challengers filed their Expedited Renewed Motion to Intervene as Defendants. JA520.[6] Four days later, the district court ordered the Challengers to supplement the motion with any supporting documents, JA538-39, which the Challengers did on March 21. JA540. The district court also ordered Cawthorn to respond to the renewed motion to intervene by March 28, 2022, which he did. JA730.

On March 30, 2022, the district court again denied intervention. Despite having found that Cawthorn had standing and presented a sufficiently ripe dispute based on the Challengers' filing of the Challenges, JA506, the district court now

[6] Also on March 17, 2022, three additional challengers – Lowrance, Neal, and Richard – timely filed Challenges. JA621-80.

ruled that the "January challengers, including Laurel Ashton" (who was a party to both sets of Challenges), "lost any standing they may have had to intervene in this case on February 24, 2022, when they were notified [by the NCSBE] that their challenges were no longer valid." JA750. Notwithstanding the renewed Challenges filed on March 2, and this Court's limited remand, the district court found the renewed intervention motion "untimely," JA750, because "the case progressed to a final order on challenges by two of the proposed intervenors." JA751. Although the district court faulted the Challengers for "provid[ing] no explanation for their delay in filing the motion," JA751, the district court's timeline makes it clear that there was really only a single day – March 3, 2022 – between the time that Challengers "Ashton and Hawkins achieved standing in the case on March 2, 2022," JA751, and the merits hearing on March 4 in which the district court announced its ruling for Cawthorn. JA753.

In denying the second motion to intervene, Cawthorn's interests were once again deemed paramount. The prospect that Cawthorn might "be required to respond to 'new' arguments, unanticipated theories, and possible re-litigation of issues already decided," and "an appeal brought by strangers to the case would be unduly prejudicial to him by causing further unforeseen delay." JA752. That these "strangers" were the Challengers whose actions under the North Carolina statute initiated Cawthorn's filing in the first instance and provided him with Article III

standing was of no moment to the district court. And even though this Court had indicated that the "case raises serious substantive questions" and ordered limited remand "in aid of [its] own jurisdiction," Doc. 33, the district court considered it within its rights to preemptively determine whether Cawthorn should be "subject[] to an appeal." JA752.[7]

On the same day the second intervention motion was denied, March 30, 2022, the Challengers filed another Amended Notice of Appeal, including in it the denial of the second motion to intervene. JA756. On April 7, this Court denied the Challengers' motion to stay the injunction but granted their motion to expedite the appeal. Doc. 69. The deadline for the NCSBE to file an appeal passed on April 11 with no appeal filed by those defendants.

SUMMARY OF ARGUMENT

The district court abused its discretion by denying the Challengers' motions to intervene and by enjoining the NCSBE from hearing the Challengers' statutorily authorized objections to Cawthorn's candidacy. In making those errors, the district

[7] Just prior to issuing the denial of the second intervention motion, also on March 30, 2022, and even though its March 10 order was a final judgment in the form of a permanent injunction then on appeal, the district court issued an order "sua sponte" and "[p]ursuant to it inherent authority" to "clarify the current procedural posture of this action." JA745. The district court purported to "stay" the case "regarding [Cawthorn's] remaining claims for relief pending resolution of any appeals of the oral and written orders." JA746. Without explanation, the district court also stated that "[t]his order is effective *nunc pro tunc* to March 4, 2022." JA746.

court aggrandized to itself the power to decide whether Cawthorn – who swore an oath to support the Constitution but then engaged in insurrection – can appear on the ballot in North Carolina. This Court should reverse both decisions.

The Challengers should have been permitted to intervene because their Challenges are at the center of this case. Cawthorn filed this lawsuit to block the Challenges. And the district court understood the debate to be over "who decides" those Challenges. Yet the district court refused to allow the Challengers to be heard, applying shifting rationales that together adopt a standard no party could meet. The district court first held that the Challengers' prompt request to intervene was premature because it was not yet clear that the NCSBE's and Challengers' interests would diverge. But once that divergence became clear – and this Court remanded for consideration of a new intervention motion because "circumstances may have changed" – the district court flatly refused to permit intervention on the ground that it was now too late.

Together, these two rulings amount to a blanket ban on intervention by the very voters whose interests are most affected by judgment. And, because the NCSBE has chosen not to appeal the judgment, that ban would have the practical effect of forever barring the Challengers from pursuing their Challenges to Cawthorn's qualifications. This Court should reverse the intervention rulings because no rule or precedent gives the district court unfettered discretion to shut the

courthouse doors to those most affected by its decision, especially when, as here, there is a clear divergence in interests between the intervenors and parties.

Reversal of that erroneous intervention ruling is all the more important here to ensure review of the district court's judgment. Faced with a debate over *who* decides the Challenges, the district court held that *no one* should because, in the wake of the Civil War, Congress enacted a law authorizing those who engaged in insurrection to seek public office. That 1872 Act does not apply to Cawthorn or any other modern-day insurrectionist. The text and legislative history both establish that Congress granted amnesty only to those who had already engaged in insurrection, not to those who would decide over a century later to take the oath of office and then seek to undermine the Constitution they swore to defend. The district court's contrary ruling – and its finding that the public interest is best served by an injunction barring inquiry into whether a candidate for public office engaged in insurrection against the United States – should be reversed.

STANDARD OF REVIEW

This Court "review[s] questions of law, including a lower court's determination of its subject-matter jurisdiction, de novo." *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1007 (4th Cir. 2014). Injunctions, orders denying intervention, and decisions to abstain under *Younger* are reviewed for abuse of discretion. *See RXD Media, LLC v. IP Application Dev. LLC*, 986 F.3d 361, 375

(4th Cir. 2021) (injunctions); *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (intervention); *Nivens v. Gilchrist*, 444 F.3d 237, 240 (4th Cir. 2006) (abstention). "A district court 'abuses its discretion when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law.'" *Wilson v. UnitedHealthcare Ins. Co.*, 27 F.4th 228, 242 (4th Cir. 2022) (quoting *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 226-27 (4th Cir. 2009)).

ARGUMENT

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

Viewed together, the twin denials of the Challengers' motions to intervene – based on different and contradictory grounds – amount to closing the courthouse doors to the individuals granted the predominate challenge right under the North Carolina statute who actually initiated the very Challenges that provided Cawthorn and the district court with the injury-in-fact necessary to support federal jurisdiction. JA504. To deny the Challengers intervention based, first, on the now-discredited speculation that the NCSBE would protect their rights, and, second, on "untimeliness" for missing a one-day window to renew their motion elevates form over substance to squelch the rights of Challengers.

A. The Challengers' Interests Were Not Identical to Those of the NCSBE.

The district court denied the Challengers' first motion to intervene as a matter of right because the NCSBE and Challengers had the same alleged ultimate objective in "upholding the constitutionality of the challenged statute." JA310. That proposition, never correct, is now manifestly wrong. The NCSBE has stated that it "does not share [the Challengers'] interests that are focused on a particular outcome of a challenge to disqualify a particular candidate in this election." JA728. The NCSBE, moreover, has not appealed the permanent injunction barring the Challenges. That shows that the Challengers' interest is not adequately represented by the NCSBE.

Under the Challenge Statute, the Challengers are not simply persons entitled to *file* a complaint for the NCSBE to investigate; they are the actual *litigants* before the NCSBE acting as a neutral adjudicative body. N.C. Gen. Stat. § 163-127.4. That is the right afforded the Challengers by statute and, having been afforded that right, they may not be arbitrarily prevented from accessing it without due process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Paul v. Davis*, 424 U.S. 693, 711 (1976) (due process is required where "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished"). Cawthorn has used the federal courts to accomplish just this end, and the district court's permanent injunction is imposing an injury-in-fact

on the Challengers by preventing them from exercising their rights, conferred by state law, to litigate a candidacy challenge.

That the NCSBE is content to accept the district court's ruling and deprive the Challengers of their rights under North Carolina law underlines the reasons why the Challengers themselves should be permitted to defend their rights on appeal. At this point, the Challengers' standing "need not be based on whether they would have had standing to independently bring [the] suit, but rather may be contingent on whether they have standing now based on a concrete injury related to the judgment." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011); *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) ("To determine whether an intervenor may appeal from a decision not being appealed by one of the parties in the district court, the test is whether the intervenor's interests have been adversely affected by the judgment."). Here, the judgment does not just impose some collateral injury on Challengers – it directly bars them from proceeding with the Challenges *they filed*. The Challengers have thus established their Article III standing and right to proceed with this case, despite and because of the NCSBE's refusal to protect their unique interests. *See Diamond v. Charles*, 467 U.S. 54, 68 (1986) (intervenor who satisfies Article III has the "right to continue a suit in the absence of the party on whose side" intervention was made).

In short, the NCSBE never was – and is not now – an adequate protector of the Challengers' rights. The Challengers thus satisfy their "minimal" burden of showing inadequacy of representation: that the "representation of [their] interest 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Having survived Cawthorn's facial attack on the Challenge Statute, the NCSBE is content to step aside and let the ruling on Cawthorn's as-applied claim stand.

The district court recognized this feature of its judgment in its weighing of the hardship to the NCSBE arising from the judgment: "the injunction simply prohibits the Board from proceeding on the challenges filed against [Cawthorn] seeking his disqualification pursuant to Section 3 of the Fourteenth Amendment," but the "Board is not prohibited from determining any North Carolina candidate's qualifications based on other valid grounds." JA514. That recognition, which was apparent from the start (but rejected by the district court), leaves no room for contending that the Challengers share the same "ultimate objective" as the NCSBE. Now that the NCSBE has refused to appeal, the disconnect between its interests and those of the Challengers is palpable.

B. The District Court Erred by Ruling That the Challengers' Renewed Intervention Motion Was Untimely.

Following remand from this Court, the district court denied the Challengers' renewed motion to intervene as "untimely," JA750, even though "[m]ere passage of time is but one factor to be considered in light of all the circumstances," *Hill v. W.*

Elec. Co., 672 F.2d 381, 386 (4th Cir. 1982) (quoting *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980)); *accord NAACP v. New York*, 413 U.S. 345, 366 (1973) ("Timeliness is to be determined from all the circumstances."). The factors relevant to the "timeliness of an intervention motion" include "how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene." *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989).

The Challengers' motions were in no way tardy. They filed their first motion to intervene *before* the NCSBE made any substantive filing. *Compare* JA158 (Motion to Intervene), *with* JA221 (NCSBE Opposition to Preliminary Injunction). The district court denied that motion on the purported basis that the Challengers and the NCSBE shared the same objective and that the Challengers' provisionally filed brief contained similar legal arguments to the later-filed NCSBE brief. JA312. That reasoning was shown to be incorrect after the Challengers filed their appeal of the injunction in favor of Cawthorn and motion for emergency stay in this Court. The divergence of interests between the Challengers and the NCSBE (manifested most clearly by the NCSBE's failure to appeal) did not become fully apparent until *after* the date that the NCSBE refused to join in the emergency stay motion, March 14, 2022. Yet according to the district court, the latest conceivably timely date to

intervene was March 10, when the district court issued the permanent injunction. *See* JA753.

That reasoning conflicts with the line of cases holding that a "motion to intervene was timely filed and should have been granted" where the proposed intervenors promptly moved to intervene "after the entry of final judgment" and "as soon as it became clear to the [intervenors] that [their] interests . . . would no longer be protected by the [parties]." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-96 (1977). In *United Airlines*, the district court refused to certify a class action and the named plaintiffs tried to take a premature appeal from that class-certification decision, but then the named plaintiffs chose not to pursue that appeal after final judgment. At that point, an unnamed member of the class "promptly moved to intervene" and the Supreme Court held that the motion was timely because the movant "quickly sought to enter the litigation" as soon as it became clear that the named plaintiffs would not appeal. *Id*. at 394; *accord U.S. Cas. Company v. Taylor*, 64 F.2d 521, 526-527 (4th Cir. 1933) (intervention "may be allowed after a final decree when it is necessary to do to preserve some right which cannot otherwise be protected"). Here, the Challengers did not just seek to intervene as soon as it became clear that the NCSBE would not protect their interests – they moved to intervene shortly after Cawthorn filed this action, and they renewed that motion on the *same day* that this Court remanded the action to permit the Challengers to file a new

intervention motion. The district court abused its discretion by holding that the Challengers' renewed motion – explicitly contemplated by this Court – was somehow so tardy as to foreclose intervention.

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 the Challengers. JA752. Yet the Challengers' arguments were hardly "new"; they were presented on February 7, before the NCSBE filed its own opposition. JA163-200. Furthermore, the district court *already held* that the Challengers' arguments were substantially similar to the NCSBE's; in the district court's words, their "response brief adds little to nothing" for the district court's consideration. JA312. It was that finding that the district court used to deny the first motion. It cannot, however, be true *both* that the Challengers' 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 the Challengers.

The district court abused its discretion in denying intervention and the Challengers should be permitted to intervene at this appellate stage. If nothing else, Challenger Ashton – who filed *both* underlying challenges and *both* motions to intervene – has a right to intervene.

II. The District Court Erred in Granting a Permanent Injunction.

In granting a permanent injunction in favor of Cawthorn, the district court found that the N.C. Challenge Statute, "as applied, would violate federal law and cause irreparable harm if not enjoined, monetary damages would were [*sic*] inadequate to compensate for the harm, balancing the parties' interests established that an injunction was warranted, and the public interest was not disserved by a permanent injunction." JA509. None of these factors supports the injunction, and it should be reversed.

A. The District Court's Ruling Is Manifestly Wrong.

1. The Amnesty Act of 1872 Did Not Forever Absolve All Future Insurrectionists.

The district court held that Cawthorn demonstrated that any "claimed power" on the part of the NCSBE to apply the N.C. Challenge Statute in order to "determine [Cawthorn's] qualifications as a candidate pursuant to Section 3 of the Fourteenth Amendment" "has been rendered ineffective by the 1872 Act." JA513. That ruling, which takes up less than four pages in the district court's Order, JA509-13, contradicts any reasonable interpretation of the actual language of the 1872 Act. It is also at odds with the primacy of constitutional enactments over statutory ones, with the legislative history of the 1872 Act, with Congress's own interpretation of its powers, and with basic logic.

Section 3 of the Fourteenth Amendment (the "Disqualification Clause"), adopted in 1868, provides in full:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

In 1872, Congress, by a two-thirds vote, adopted an Amnesty Act which provides in full:

> That all political disabilities imposed by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed from all persons whomsoever, except Senators and Representatives of the thirty-sixth and thirty-seventh Congresses, officers in the judicial, military, and naval service of the United States, heads of departments, and foreign ministers of the United States.

Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872).

At the hearing, the district court stated the crucial question as follows: "Does the 1872 Act state that all political disabilities imposed by the third section of the 14th Article of the Amendments to the Constitution of the United States are hereby removed?" JA481. Cawthorn argued – and the district court agreed – that the 1872 Act granted amnesty to all future insurrectionists from 1872 until the end of time. The district court's oral explanation of its ruling was short and simple: "Is Madison

Cawthorn a person? Yes, he is. Is he a person whomsoever? Yes, he is." JA480. "Is the disability that they seek to impose against him a disability imposed by Amendment 14 Section 3? Yes, it is." JA480-81. "Does the 1872 Act state that all political disabilities imposed by the third section of the 14th Article of the Amendments of the Constitution of the United States are hereby removed from all persons whomsoever? With some exceptions? Yes, it does." JA481.

Six days after its oral ruling (and after the Challengers filed their initial appeal, *see* JA19), the district court issued a written ruling providing some additional detail regarding its reasoning. JA491-516. The district court rejected the NCSBE's argument that the 1872 Act "was a one-time only waiver of Section 3 of the Fourteenth Amendment that applies only to former Confederates," and instead ruled that the 1872 Act "provides that '***all political disabilities imposed*** by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby removed ***from all persons whomsoever***,'" apart from certain listed exceptions. JA510. The district court also referenced a later amnesty act from 1898 [the 1898 Act] by which "Congress removed the disabilities from the excepted persons," providing that "the disability imposed by section three of the Fourteenth Amendment to the Constitution of the United States ***heretofore incurred*** is hereby removed." JA510 (quoting Amnesty Act of 1898, ch. 389, 30 Stat. 432).

Under the district court's analysis, the use of the words "all" and "whomsoever" indicated Congress's intent to immunize not only the ex-Confederates under the disability at the time of the passage of the 1872 Act, but also all future members of Congress who might – by means of later insurrectionary activities – subsequently fall under the constitutional disability. The district court explained that the "plain language of these statutes, first removing the disability from 'all persons whomsoever' *except* those listed in the statute and, second, removing the disability from the excepted persons, demonstrates that the disability set forth in Section 3 can apply to no current member of Congress." JA510.

The district court, however, never explains how the use of the putatively all-encompassing language of the 1872 Act – "all" and "whomsoever" – coupled with the later "heretofore incurred" language from the 1898 Act, necessarily leads to the conclusion that the constitutional disability "can apply to no current member of Congress." At best, several logical steps are missing from the analysis. At worst, it is a *non sequitur* to contend that the "all persons whomsoever" language of the 1872 Act embraces both living insurrectionists and future, unborn insurrectionists.

In putting forward that proposition, the district court noted that the Fourteenth Amendment's description of those disqualified from office – individuals who "shall have engaged in insurrection" – "reflects the 'future perfect tense,' which describes an action that will be completed between now and some point in the future." JA510.

Thus, the district court necessarily recognized that the Disqualification Clause applies to persons who would engage in future insurrections. The district court reasoned that because the "ratifiers of the Constitution" did not "simply disqualify[] members or officers 'who had engaged' in insurrection or rebellion," (*i.e.*, in the past), the language of the 1872 Act reflected an "intent that disqualification be available for members or officers who had or will have taken the oath, then at some point in the future, engaged in insurrection or rebellion." JA511. In other words, by the district court's lights, the use of the putatively all-encompassing language in the 1872 Act necessarily included those "future" persons. *See* JA511. In sum, while the district court purported to interpret the "plain language" of the statute by giving the operative terms "their ordinary, contemporary, common meaning," JA512, it failed to explain how those terms – in any "ordinary" sense – could be read to apply to those like Cawthorn, not born by 1872, but who later "shall have engaged in insurrection" in violation of the Constitution.

In arriving at its conclusion, the district court pointedly failed to grapple with a critical feature of the "plain language" of the 1872 Act: the Act's use of the past tense in describing the political disabilities of the Fourteenth Amendment as those "impos*ed*," and the statutory action by which they were "remov*ed*." In interpreting statutory language, "a court must look to the structure and language of the statute *as a whole*." *Nat'l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407,

417 (1992) (emphasis added) (quoting *K-mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). The district court, however, simply ignored those critical past-tense usages integral to the language of the 1872 Act.

In construing whether the 1872 Act intended to reach forward in time to immunize future insurrectionists, the tense used in the statute matters. As the Supreme Court has put it, "[c]onsistent with normal usage," it has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010). In *United States v. Wilson*, 503 U.S. 329, 333 (1992), the Court held that "Congress' use of a verb tense is significant in construing statutes." The district court here, however, ignored the fact that the description of the disability to be "removed" by the 1872 Act was framed in the past tense, and necessarily so.

While the present tense "include[s] the future as well as the present," *Carr*, 560 U.S. at 448, the use of the past tense indicates that a statute applies to pre-enactment conduct. *See Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019). For that reason, the district court's interpretation of the interplay between the Fourteenth Amendment and the 1872 Act ignores the basic language of both enactments, most particularly the tenses used by each. The Fourteenth Amendment's use of the future perfect tense – "shall have engaged in insurrection" (which the district court recognized, JA511) – clearly indicates that it would apply not only to those who had

engaged in the recent Civil War against the United States, but also to persons who would do so in the future. The 1872 Act, however, used only *past tense* to describe its effect: "all political disabilities *imposed* by the third section of the fourteenth article of amendments of the Constitution of the United States are hereby *removed* from all persons whomsoever" (emphasis added). The 1872 Act, moreover, was enacted under the constitutional grant of authority to Congress to "remove" the disability as spelled out in the constitutional provision.

If the 1872 Act had intended to render the Disqualification Clause forever nugatory, then, at a minimum, Congress would have said so. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Scalia, J.). Rather, in both its title ("An Act to remove political Disabilities imposed by the fourteenth article of the Amendments to the Constitution of the United States") and in its statutory text, the 1872 Act is framed in the past tense. That necessarily means disabilities *already* imposed – not disabilities the amendment might impose in the future. By analogy, we do not say the First Amendment "protected" freedom of speech; we say it "protects" that freedom. Likewise, the Disqualification Clause *imposes* disqualification on all people who engage in insurrection. In addition, the 1872 Act uses the word "remove," which means to take *away* something already present. *American Heritage College Dictionary* (3d ed. 1997), at 1155. The prefix "re" in the word "remove"

presupposes something already in place prior to removal. Therefore, no disability can be "removed" prior to its imposition and the 1872 Act could not "remove" disabilities from people not yet alive with no disabilities to remove. Any plain reading of the 1872 Act necessarily must recognize that it could apply only to lives in being, not future generations of insurrectionists. Under the district court's interpretation immunizing Cawthorn, the 1872 Act "pre-removed" from "all persons" (even those, like Cawthorn, not yet in existence) disabilities not yet "imposed."

Not only did the district court fail to consider *all* of the "plain language" at issue (*e.g.*, the words "imposed" and "removed"), it also engaged in the discredited practice of "constru[ing] words 'in a vacuum,'" *Gundy*, 139 S. Ct. at 2126, when it failed to construe the words of the statute "in their context and with a view to their place in the overall statutory scheme." *Id*. Neither Cawthorn nor the district court offers any explanation for why a Congress just seven years past the Civil War would seek to "remove" not only disabilities "imposed," but also those that might be imposed in the future.

2. Legislative History Confirms Congressional Intent to Apply the Disqualification Clause Prospectively but Amnesty Only Retrospectively.

The district court, having erroneously concluded that the statutory language was "clear and unambiguous" in immunizing Cawthorn, explicitly found that

"consideration of the legislative history was unnecessary and improper." JA511. (It also rejected the legislative history as "late-arriving" because the NCSBE raised it at the hearing even though the Challengers raised it in their rejected brief in opposition to the injunction, and, in any event, the district court found it "unpersuasive" (without explaining why it was unpersuasive). *See* JA511.) In doing so, the district court rejected what the Supreme Court called the "non-blinkered brand of interpretation" which "beyond context and structure," also looks to "'history [and] purpose' to divine the meaning of language." *Gundy*, 139 S. Ct. at 2126 (alteration in original).

In fact, if there were any ambiguity concerning Congress's lack of intent to immunize unborn insurrectionists, an examination of the legislative history puts the possibility of any such construction to rest. Indeed, the "legislative history backs up everything" in Challengers' preferred interpretation. *Id.*

For example, in drafting the Disqualification Clause, Congress twice rejected alternative language that would apply *only* to the Civil War. *See* Cong. Globe, 39th Cong., 1st Sess. 2900 (1866)[8] (proposed amendment limiting disqualification to those who "within ten years preceding the 1st of January, 1861" swore oath to support Constitution; rejected 32-10); Cong. Globe, 39th Cong., 1st Sess. 2545

[8] https://memory.loc.gov/ll/llcg/073/0000/00222900.gif.

(1866)[9] (earlier House version referring to "the late insurrection"). Both times, Congress instead chose to disqualify *future* insurrectionists as well.

By contrast, the 1872 Act's legislative history – passed just four years after the Fourteenth Amendment's enactment, with several amendment framers still in office – exclusively addressed amnesty for *ex-Confederates*. *See* Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 Const. Comm. 87, 111-20 (2021) ("Magliocca"). Neither Cawthorn nor the district court has identified *any* indication in the legislative record that Congress in 1872 had any intention or inkling of absolving *future* insurrectionists.

In fact, the legislative history of the 1872 Act, is consistent with the plain meaning of its text to remove only those disabilities already imposed. As early as 1869, Congress began passing private bills to remove Section Three disabilities from thousands of people who had fought for or aided the Confederacy. *See, e.g.*, Private Act of December 14, 1869, Ch. 1, 16 Stat. 607, 607-13.

As pressure to relieve former Confederates of the Disqualification Clause grew over time, the enormous number of requests for amnesty "soon overwhelmed Congress and led to calls for general Section Three amnesty legislation." Magliocca, *supra*, at 112. One of the last private bills that the House considered originally contained some "sixteen or seventeen thousand names," and was then amended to

[9] https://memory.loc.gov/ll/llcg/072/0600/06272545.gif.

include "some twenty-five more pages of additional names." Cong. Globe, 42nd Cong., 2nd Sess. 3381-82 (1872) (Rep. Butler).

As members kept adding names to the list, one member proposed adding the words "and all other persons" to the bill. *Id*. at 3382 (Rep. Perry). The sponsor of the bill rejected that proposal out-of-hand precisely because it suggested that amnesty would be extended to those who had not yet incurred disqualification under the Fourteenth Amendment, joking that he "did not want to be amnestied" himself. *Id*. at 3382 (Rep. Butler). That remark elicited laughter on the House floor, *see id.*, underscoring the fact that the interpretation adopted by the district court – that Congress could grant Section Three amnesty prospectively – was the punchline of a joke at the time of the 1872 Act's passage.

Instead, the Judiciary Committee proposed "a general amnesty bill," which became the 1872 Act. *Id*. at 3381 (Rep. Butler). Thus, the 1872 Act was an omnibus replacement for a string of private bills and not a blanket grant of future amnesty from the effects of the Constitution's Disqualification Clause.

In summary, nothing in the history of the 1872 Act suggests that it granted immunity prospectively to all future insurrectionists, thereby leaving Section Three without practical effect.

3. Congress Has Consistently Interpreted the 1872 Act as Retrospective Only Because It Lacks the Power to Enact a Prospective Amnesty.

When interpreting issues at the nexus of congressional action and constitutional text, federal courts "put significant weight upon historical practice." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). Courts "treat[] practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Id.* at 525. Here, Congress has consistently interpreted its 19th-century amnesties as retrospective only – not merely as a matter of interpreting its own past actions, but because it has correctly understood that its own constitutionally circumscribed power under the Disqualification Clause is limited and cannot absolve future insurrectionists.

In 1919, the House of Representatives investigated whether congressman-elect Victor L. Berger, who had been convicted of violating the Espionage Act of 1917, was disqualified from serving as a Member of Congress under the Disqualification Clause. Jack Maskell, Cong. Rsch. Serv., *Qualifications of Members of Congress* 19-20 (2015).

Before the special committee investigating his case, Berger argued that the Disqualification Clause had been "entirely repealed by an Act of Congress." 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives of the*

United States, ch. 157, § 56 (1936) (referring to the 1898 Act (rather than the 1872 Act) as forever nullifying the Disqualification Clause). As noted above, the 1898 Act removed the Disqualification Clause from those remaining Confederates still subject to the exceptions found in the 1872 Act, providing – again using the past tense – that "the disability imposed by section three of the fourteenth amendment to the Constitution of the United States heretofore incurred is hereby removed." Act of June 6, 1898, Ch. 389, 30 Stat. 432.

Like Cawthorn, Berger argued Congress could effectively repeal a constitutional amendment by statute because Section Three allows for its own repeal by giving Congress the power to lift its disqualification by a two-thirds vote of both Houses of Congress. 1 *Hearings Before the Special Comm. Appointed Under the Auth. of H. Res. No. 6 Concerning the Right of Victor L. Berger to be Sworn in As a Member of the Sixty-Sixth Cong.*, 66th Cong. 32 (1919) (Henry F. Cochems, Counsel for Victor L. Berger).

The House, however, rejected Berger's argument outright. After acknowledging that Section Three authorizes Congress to remove insurrectionists' political disabilities, the House concluded that "manifestly it could only remove disabilities incurred previously to the passage of the [1898 A]ct, and Congress in the very nature of things would not have the power to remove any future disabilities." *Cannon's Precedents* § 56. In other words, the 1898 Act did not (and could not)

prospectively remove Section Three disqualifications because Congress was not empowered to do so.

Here, the district court followed Cawthorn's lead by finding a salient distinction in the fact that the Berger case concerned the 1898 Act – with its "heretofore incurred" language – not the 1872 Act. JA513 ("The court's findings in this case are not inconsistent with those by the Berger committee, particularly because the committee did not consider the 1872 Act."). That contention, however, ignores the fact that the House's conclusion about the effect of the 1898 Act was not based on distinctions in the language of the later Act versus the 1872 Act, but instead based on Congress's understanding of the scope of Section Three of the Fourteenth Amendment vis-à-vis its own power which it determined only permitted the removal of disqualification retrospectively:

> Congress has no power whatever to repeal a provision of the Constitution by a mere statute, and . . . no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself. While under the provisions of section 3 of the fourteenth amendment Congress was given the power, by a two-thirds vote of each House, to remove disabilities incurred under this section, *manifestly it 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. It is rare enough for Congress to acknowledge limits on its own constitutional power in *any* context. Given that the House of that

era held an expansive view of its own powers to exclude Members,[10] the fact that it acknowledged a limitation on its own Section Three power – an interpretation preventing prospective amnesties – is especially noteworthy. *See also* Cong. Res. Serv., "The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment" (Jan. 29, 2021), at 2 ("The [1872] Act appears to be retrospective and apparently would not apply to later insurrections or treasonous acts")[11]; Cong. Res. Serv. Rept. R41946, "Qualifications of Members of Congress" (Jan. 15, 2015), at 18 (similar).[12]

4. The 1872 Act Must Be Construed to Avoid Unconstitutionality.

Under the canons of constitutional avoidance, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (cleaned up). Indeed, "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (cleaned up). The district court's reading, however, presents substantial constitutional problems for the 1872 Act.

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[10] *See* H.R. Rep. No. 66-413, at 9-11 (1919) (stating expansive view of power to exclude but recognizing that Section Three amnesty power does not authorize prospective amnesties).
[11] https://crsreports.congress.gov/product/pdf/LSB/LSB10569.
[12] https://sgp.fas.org/crs/misc/R41946.pdf.

a. The Article V Workaround.

The district court did not technically endorse an interpretation that the 1872 Act *directly* repealed the Disqualification Clause, instead finding that Congress simply used its amnesty power to the broadest possible extent by absolving *all* insurrectionists *whomsoever*, past and future. JA510. That empty formalism, however, elides the real consequences of the district court's ruling, which interprets the 1872 Act as tantamount to nullification of the Disqualification Clause found in the Constitution. Under the district court's logic, Congress could extend a president's term indefinitely through calendar reform legislation that eliminates the month of January. *Cf.* U.S. Const. amend. XX, § 1. If the Disqualification Clause was intended to amend the Article V process, it would have said so. Without such explicit language, the power conferred by that clause cannot be read to give Congress the power to repeal it without the consent of the States. The district court's interpretation would render the 1872 Act an unconstitutional attempt to amend the Constitution. Any attempt to assert the contrary position – for example, what Cawthorn describes as Congress's "plenary power to remove any and all § 3 disabilities," Doc. 16-1 – simply cannot logically extend to removal of those disabilities prior to their attachment without falling into the logical trap of recognizing a "plenary power" to read that section out of the Constitution entirely.

b. Prospective Amnesties.

The law provides that a president cannot pardon crimes not yet committed. *See Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (describing the pardon power as "unlimited," but holding it may be exercised only after the commission of an offense). The power to pardon future crimes would be "a power to dispense with the observance of the law." William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 525-26 (1977). The same logic necessarily applies to prospective congressional amnesties. This is especially so given that the text of the Disqualification Clause only gives Congress the power to "remove such disabilit[ies]" incurred under that clause – that is, disabilities incurred *prior* to the act of removal. Even if Congress had written that "all future insurrectionists hereby have their disabilities removed," such an act would be null because it is not part of the power conferred by the Constitution. As noted in § II.A.3, *supra*, for well over a century Congress has agreed, understanding that its own Section Three power is limited because "Congress in the very nature of things would not have the power to remove any future disabilities." 6 *Cannon's Precedents of the House of Representatives of the United States*, ch. 157, at 55.

B. The Other Injunction Factors Do Not Favor Cawthorn.

1. Cawthorn Did Not Establish Irreparable Injury.

Neither Cawthorn nor the district court identifies a sufficient threatened "irreparable injury" that Cawthorn would face without an injunction. Instead, they each identify a series of supposed harms that Cawthorn will not face or which are insufficient to satisfy the "irreparable harm" necessary for a district court to issue an injunction.

Cawthorn relied on the presumption that the violation of a constitutional right can constitute irreparable harm. JA103. As identified by Cawthorn, his supposed constitutional rights are "the rights to run for office, to have one's name on the ballot, and to present one's views to the electorate." JA87, JA93.

By contrast, the district court disagreed with Cawthorn and did not find an irreparable harm based on any of these interests. The district court explicitly refused to decide whether Cawthorn has a *constitutional* interest at play in this litigation, and resolved the claims based purely on (incorrect) resolution of statutory interpretation questions. JA509 ("this court will not reach the constitutional questions"), JA515 ("Plaintiff demonstrated a violation of the 1872 Act.").

Without finding any threatened deprivation of a constitutional right, the district court instead found that irreparable injury would take the form of "prepar[ing] a defense" to the Challenges and being "forced to defend an

'insurrection' allegation." JA513-14. But participation in a quasi-judicial proceeding cannot be an irreparable harm. Indeed, even participation in a criminal proceeding cannot serve as irreparable harm. *Younger v. Harris*, 401 U.S. 37, 46 (1971) ("in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term"). The district court's injunction must be reversed because the district court identified no irreparable injury.

The district court further erred in suggesting that it is somehow relevant to a showing of irreparable harm that the Challengers are (in the district court's view) Cawthorn's "political opponents." JA513. This line of analysis was both factually and legally flawed. On the facts, neither the district court nor Cawthorn identified any evidence to impugn the motives of any of the Challengers. There is no evidence of the political party of any of the Challengers; there is no evidence that any of the Challengers are aligned with Republican politicians who are running against Cawthorn in the primary; and there is no evidence of who the Challengers' preferred representative might be. Surely the mere fact that the Challengers are interested in being represented by persons who have not engaged in insurrections against the United States cannot generate an inference about the Challengers' motives.

Equally troubling, the Challengers' motives are legally irrelevant. The only legally relevant fact about the Challengers is whether they are registered voters in

the district Cawthorn seeks to represent. The district court's suggestion that challenges brought by "political opponents" are somehow defective has no basis in any known body of law.

Meanwhile, Cawthorn correctly notes that the deprivation of a constitutional right *could* constitute irreparable harm, but he fails to show any constitutional right that is imminently threatened. Yet the injunction Cawthorn obtained is untethered from any threat that he would be deprived of an opportunity to assert his constitutional rights in presenting his case; and the district court only found that statutory, and not constitutional, rights were at risk. Instead of circumventing constitutional rights, the very purpose of the challenge procedure described by state statute is to determine whether Cawthorn can run for office – requiring Cawthorn to participate in the challenge process is not equivalent to the process of actually removing him from the ballot, just as requiring a person sued to defend himself at trial does not breach any constitutional right warranting injunction.

2. The Balance of Hardships Favors the Challengers.

As set forth above, Cawthorn faces no threat to his constitutional rights. Instead, the district court's injunction would prohibit the parties from even having the opportunity to have the facts of Cawthorn's insurrection adjudicated, or having any court or other body determine the constitutional questions that Cawthorn raised and that the district court did not reach.

The district court failed to appropriately balance the equities. Its reasoning appears dependent on the precedent that injunctions are appropriate in order to prevent states from imposing restrictions "likely to be found unconstitutional." JA515 (quoting *Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021)). But the district court's reasoning misses the point of its own analysis, since the district court went out of its way to state that it was not resolving any constitutional questions Cawthorn raised. JA509. The district court abused its discretion by issuing an injunction based on the possibility of a constitutional violation that it expressly refused to analyze, let alone find.

3. The Public Interest Is Not Served by a Permanent Injunction.

The only interest the district court analyzed in considering the public interest was Cawthorn's own *individual* interests as a candidate. And even those interests were attenuated, like Cawthorn's interest in avoiding the "burdens" associated with his state's candidacy challenge statute. To the contrary, the public interest would be much better served if citizens like the Challengers were allowed to exercise the right given to them under North Carolina law to demonstrate that Cawthorn is constitutionally unfit for office. North Carolina, through its democratically elected General Assembly, has enacted a statutory regime which presumes that candidates

for election are qualified, subject to a voter challenge provision overseen by a bipartisan elections board and subject to judicial review.

The district court chose, for Cawthorn's sole benefit, to displace what the Fourth Circuit termed the bedrock "policy of commanding federal restraint when the federal action is duplicative, casts aspersion on state proceedings, disrupts important state enforcement efforts, and is designed to annul a state proceeding." *Moore v. City of Asheville, N.C.*, 396 F.3d 385, 394-95 (4th Cir. 2005). Given "our system of dual sovereignty," federal courts, therefore, 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), particularly in "cases involving complex state administrative procedures." *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 248 (4th Cir. 2013).

The injunction issued by the district court is furthermore contrary to the public interest because it undermines public confidence in the judiciary. *See CASA de Maryland, Inc. v. Trump*, 591 F.3d 220, 261 (4th Cir. 2020) (injunctions should not issue where "patently political manipulation of the judiciary undermines the public's confidence in the federal courts and casts judges as advocates for their favored policy outcomes"), *reh'g en banc granted*, 981 F.3d 311. Here, Cawthorn's express litigation strategy was to politically manipulate the judiciary and cast judges as

political actors.[13] Such comments are especially pernicious coming from a sitting member of Congress, a co-equal governmental branch. Cawthorn's comments put the district court in the unenviable position of issuing an injunction that unnecessarily creates the perception that the judiciary is first and foremost political or that it can be politically manipulated.

C. Cawthorn's Other Bases Are Also Insufficient to Justify an Injunction.

As noted above, in addition to his amnesty argument, Cawthorn asserted three other arguments not reached by the district court. None has merit.

1. A Candidacy Challenge Based on a Reasonable Suspicion Standard Does Not Violate Cawthorn's First Amendment Rights.

Under the Supreme Court's *Anderson-Burdick* balancing test,[14] a court must weigh the burden on First Amendment rights with a State's regulatory interests. The Supreme Court has explicitly recognized a State's substantial interest in regulating elections. *Anderson*, 460 U.S. at 788 ("as a practical matter, there must be a

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[13] *See* David Edwards, *'This is only going to lead to one place': Madison Cawthorn foreshadows violence over ballot disqualification*, Raw Story (Feb. 9, 2022) https://www.rawstory.com/madison-cawthorn-nc-ballot/ (Cawthorn appearing from the halls of the Capitol on a podcast hosted by a former White House adviser who has been indicted for contempt of Congress and declaring that "we filed a counterpunch lawsuit in federal court with a good Trump-appointed judge, so I genuinely believe we will be able to win this").

[14] *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes"). The Court has also recognized States' "important interests in protecting the integrity of their political process from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections." *Clements v. Fashing*, 457 U.S. 957, 965 (1982). The Supreme Court, therefore, has consistently "upheld generally-applicable and evenhanded restrictions" imposed by States on candidates' eligibility for the ballot under the First Amendment "to protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9.

The interests of the State, and more importantly, the voters, to ensure candidates for office meet the constitutional qualifications vastly outweigh any interest of a candidate to access the ballot. The Challenge Statute, thus, survives First Amendment scrutiny. *See Hassan v. Colorado*, 495 F. App'x 947, 948-49 (10th Cir. 2010) (Gorsuch, J.) ("a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office"); *see also Lindsay v. Bowen*, 750 F.3d 1061, 1065 (9th Cir. 2014).

2. The Challenge Statute Does Not Violate Cawthorn's Due Process Rights by Requiring Him to Prove He Is a Constitutionally Qualified Candidate.

Cawthorn's Count Two claim that placing the burden of proof on him to show that he is qualified to be a candidate fails under the same *Anderson-Burdick* balancing test described above. Requiring a candidate to participate in a hearing, with notice, before a neutral tribunal – and with full appeal rights – where the candidate (the one most knowledgeable about his qualifications) must prove by a preponderance of the evidence that he qualifies under the handful of requirements expressly imposed by the text of U.S. Constitution to run for Congress – and only in the limited circumstances where those qualifications are challenged – imposes a minimal burden, if any, on a candidate's access to the ballot. And balanced against that burden is North Carolina's unquestionably strong state interest in excluding ineligible candidates from its ballots. *See Hassan*, 495 F. App'x at 948-49 (finding a legitimate state interest in excluding "from the ballot candidates who are constitutionally prohibited from assuming office").

Few candidates would find demonstrating their non-participation in an insurrection to be burdensome. That Cawthorn contends that the burden is unconstitutional betrays more about his circumstances than it does about the "generally-applicable and evenhanded restrictions," *Anderson*, 460 U.S. at 788 n.9, found in the North Carolina Challenge Statute.

3. The Qualifications Clause Does Not Prevent North Carolina from Exercising Its Constitutionally Delegated Authority to Verify Congressional Candidates' Constitutional Eligibility as a Condition for Ballot Access.

Contrary to the contentions in Cawthorn's Count III, North Carolina has the authority and responsibility to prevent constitutionally unqualified candidates from running for office. The Qualifications Clause, U.S. Const. art. I, § 5, cl. 1, does not prevent North Carolina from verifying the constitutional eligibility of congressional candidates as a condition for ballot access, consistent with the power delegated to the State by the Elections Clause, U.S. Const. art. I, § 4, cl. 1.

Under the Elections Clause, "broad powers [are] delegated to the States." *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972). This power "embrace[s an] authority to provide a complete code for congressional elections . . . [and] 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 U.S. 355, 366 (1932). This authority extends to ballot access. "[A] State has an interest, if not a duty, to protect the integrity of its political process from frivolous or fraudulent candidacies." *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *see also Storer*, 415 U.S. at 733 (extending that interest to the congressional context); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) ("we have approved the States' interests in avoiding voter confusion, ballot overcrowding, or the presence of

frivolous candidacies"). Thus, "[t]here is no question that the State can insure that its candidates meet the minimum requirements of [U.S. Const. art. I, § 2, cl. 2] and in turn represent this fact to its electors through affidavits or a variety of other means." *Campbell v. Davidson*, 233 F.3d 1229, 1235-36 (10th Cir. 2000).

Congress's authority under the Qualifications Clause to assess a member's eligibility attaches *after* an election. This authority does not prevent States from barring unqualified candidates' access to the ballot *before* an election. But under Cawthorn's theory, if a teenager in another country (or hundreds of them) submitted paperwork for Congress, states would be required to include them on the ballot.

In fact, as to the Disqualification Clause in particular, Congress readmitted North Carolina to the Union after the Civil War by an Act explicitly *requiring* the State to exclude insurrectionists from office. *See An Act to admit the States of North Carolina [et al.], to Representation in Congress*, 15 Stat. 73 (June 25, 1868).

III. The Need for Reversal Is Exigent Given the Timing of the North Carolina Election.

Cawthorn, by initiating this litigation and obtaining a permanent injunction, has managed to find his way onto the May 17, 2022, primary ballot without having to comply with the requirements of the Challenge Statute otherwise applicable to all candidates for office in the State of North Carolina. As described above, the district court was in error to allow that to occur. The Challenges initiated by these

Challengers should be allowed to proceed, and, if successful, Cawthorn should not be permitted to appear on the ballot.

The Challenge Statute procedure is designed to move expeditiously. For a challenge in a district covering multiple counties but less than the entire State, like the one directed at Cawthorn, the NCSBE must appoint a hearing panel "within two business days after the challenge is filed." N.C. Gen. Stat. § 163-127.3(2). That panel, in turn, must announce within five days the time and place of the hearing, *id*. § 163-127.4(a)(1), render its "written decision within 20 business days after the challenge is filed," and serve that decision the same day, *id*. § 163-127.4(a)(4). Any necessary depositions must occur within that narrow time period. *Id*. § 163-127.4(a)(3).

Any appeal to the NCSBE from that panel must be filed within two business days after service of the panel's decision, and the NCSBE must render its opinion on "an expedited basis." *Id*. § 163-127.6(a)(2). That decision can later be appealed, as of right, to the North Carolina Court of Appeals within two days of the NCSBE's decision. *Id*. In all, the process, including appeals, is designed to take weeks, not months, and a realistic schedule based on the statutory framework could proceed from the filing of a challenge through the exhaustion of appeals in no more than 30-40 days – and possibly considerably less.

If Cawthorn becomes the nominee as a result of the primary on May 17, 2022 (by leading the vote and by obtaining more than 30% of the vote), he can be replaced on the general election ballot using the process outlined in N.C. Gen. Stat. § 163-114(a). In that case, his replacement on the ballot would be chosen by the Republican Party district executive committee. *Id.* With the general election set to occur on November 8, 2022, a final decision on Cawthorn's eligibility this summer would pose no timeliness issues.

If no candidate obtains more than 30% of the vote in the May 17 primary, a second primary will occur on July 26, 2022. Thereafter, ballots could be prepared to be available 60 days before the November 8 General Election.

CONCLUSION

The Court should reverse the denials of the motions to intervene and the entry of permanent injunction in favor of Cawthorn so that the Challenges against Cawthorn can proceed forthwith.

Respectfully submitted,

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Dated: April 14, 2022

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I hereby certify that on this 14th day of April, 2022, I caused this Brief of Appellants and Joint Appendix 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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