NO. P18-586 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

CHRISTOPHER J. ANGLIN,

Plaintiff-Respondent,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and KIMBERLY W. STRACH, in her official capacity as EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT.

Defendants-Petitioners.

From Wake County
18-CVS-9748

****

PLAINTIFF-RESPONDENT'S RESPONSE IN OPPOSITION TO DEFENDANTS-PETITIONERS' PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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NO. P18-586 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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CHRISTOPHER J. ANGLIN,

Plaintiff-Respondent,

v.

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****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

On 24 August 2018, Defendant-Appellants Philip E. Berger and Timothy K. Moore ("Petitioners") filed their Petition for Writ of Supersedeas and Motion for

Temporary Stay (collectively, "the Petition") of the trial court's 13 August 2018 preliminary injunction (the "Preliminary Injunction"). The Preliminary Injunction enjoined the enforcement of Session Law 2018-130 ("S.L. 2018-130"), a law that would retroactively divest Plaintiff-Appellee Christopher J. Anglin ("Respondent") of his constitutional and statutory rights to have his Republican-Party affiliation stated on the 6 November 2018 election ballot. Petitioners claim they want the Court to stay the printing of election ballots only to allow the Court an opportunity to decide this case on the merits. In reality, Petitioners have timed the Petition to seek a stay of the Preliminary Injunction at the only time the Preliminary Injunction will ever matter: the moment that the 6 November 2018 election ballots print.

The Petition fails to comply with N.C. R. App. P. 8 and 23 in both timing and substance. Petitioners never sought any stay from the trial court. Petitioners' explanation of that failure—that the entry of other stays in separate cases left in doubt the necessity of a stay in this case—does not demonstrate "extraordinary circumstances." If anything, those stays provided Petitioners with more, not less, time to seek a stay from the trial court.

In any event, a stay in this case would serve no proper purpose. A stay has only one such purpose: "to preserve the status quo pending the exercise of appellate jurisdiction." *Craver v. Craver*, 298 N.C. 231, 237-38, 258 S.E.2d 357, 362 (1979). If the Court grants the Petition, it will stay the Preliminary Injunction and permit the enforcement of S.L. 2018-130's unconstitutional provisions, upending the last peaceable status quo that existed between these parties. *See Anderson v.*

Waynesville, 203 N.C. 37, 46, 164 S.E. 583, 588 (1932) ("The injunction is generally framed so as to restrain the defendant from permitting his previous act to operate, or to restore conditions that existed before the wrong complained of was committed."). The status quo here was the time before the General Assembly unconstitutionally deprived Respondent of his right to have his party affiliation stated on the ballot. The Preliminary Injunction already protects that status quo; a stay of the Preliminary Injunction would permanently and irreparably destroy it.

Even assuming the Petition complied with rather than contravened the purposes of Rules 8 and 23, the Petition must fail because Petitioners have no likelihood of success on this appeal. The trial court correctly concluded that S.L. 2018-130 violated Respondent's state constitutional rights to due process by retroactively depriving him of a vested right, and placed an unconstitutional burden on Respondent's state constitutional rights to free speech, free elections, due process, and equal protection of the law, by stripping him of ballot access without providing him with any means to re-secure it. The trial court also correctly concluded that the enforcement of S.L. 2018-130 would result in irreparable harm to Respondent: it would strip him of the right to have his party designation on the 2018 election ballot. It would violate his due process, equal protection, free speech, and free election rights, leaving him no remedy or recourse.

For these reasons, the writ must not issue. The ballots must be printed by 7 September 2018. As Petitioners note, "ballot preparation could begin as early as Saturday, 25 August 2018." (Pet. at 8.) A stay would not change that; it would only

relieve Defendants from having to comply with the Preliminary Injunction. That is, it would guarantee that the ballots print without Respondent's party affiliation, rendering Respondent's case moot, his injuries irreparable, and his diligent efforts to protect his rights futile. The Court should, therefore, deny the Petition.

FACTS

On 24 July 2018, the General Assembly held a special session to vote on Senate Bill 3 (enacted as S.L. 2018-130). Senate Bill 3 passed, and the Governor vetoed the bill on 27 July 2017. (Pet. Ex. 2, Ver. Compl. Ex. G.) On 4 August 2018 the General Assembly overrode the veto, (Pet. Ex. 2, Ver. Compl. Ex. A), thereby taking advantage of the full machinery of our state government to enact a law that purposefully disadvantages a single citizen seeking public office, a person that leaders of the N.C. Republican Party have designated "the enemy." (Pet. Ex. 2, Ver. Compl. Ex. F.)

The events that led to the General Assembly's panicked passage of S.L. 2018-130 began nearly two years earlier, in 2016, when the General Assembly enacted Session Law 2016-125 ("S.L. 2016-125"). That law made judicial elections partisan. (Pet. Ex. 2, Ver. Compl. Ex. B.) The enactment of Session Law 2017-214 ("S.L. 2017-214") soon followed. That law provided that there would be no party primaries for candidates for judicial offices in 2018, (Pet. Ex. 2, Ver. Compl. Ex. C), an election year that would involve only one race for a state supreme court seat, the seat belonging to incumbent Republican Justice Barbara Jackson. (Pet. Ex. 2, Ver. Compl. ¶¶ 26, 28.) Both S.L. 2016-125 and 2017-214 became effective on January 1, 2018. (Pet. Ex. 2, Ver. Compl. Exs. B, C).

The N.C. Democratic Party sued in the U.S. District Court for the Middle District of North Carolina to have the scheme—partisan elections with no party primaries—declared unconstitutional. During the hearing on the plaintiff's motion for preliminary injunction in the case, *N.C. Democratic Party v. Berger,* the court engaged in the following exchange with Martin Warf, counsel for Petitioners:

> THE COURT: So, now, in North Carolina, it will not [be] Republicans deciding who's going to run as a Democrat as a group or Democrats deciding for Republicans as a group; it's individuals deciding. An individual who goes in and files as a Republican is deciding who the Republican Party is—who the Republican candidates are basically. They do that individually.
>
> MR. WARF: I think by filing, yes, but *I don't think that that is—equates to the—that because five individuals as Republicans decided to run for a particular judicial seat, that they all are the standard bearers of the party through their individual choice to file. The party still has the ability to come back and say we like person A. Yes, there may be other Republicans, but we're backing person A.*

(Pet. Ex. 2, Ver. Compl. Ex. D, 57:3-16) (emphasis added).

S.L. 2017-214 established Noon on 28 June 2018, as the deadline for filing a notice of candidacy for Associate Justice of the Supreme Court. (Pet. Ex. 2, Ver. Compl. Ex. C.) Respondent filed his notice of candidacy that morning, becoming the second Republican to file, and the third candidate overall for the seat. (Pet. Ex. 2, Ver. Compl. ¶ 26.) He had changed his voter registration from Democrat to Republican on 7 June 2018. (Pet. Ex. 2, Ver. Compl. ¶ 25.) Per S.L. 2017-214, the Wake County Board of Elections certified his registration status as Republican, and

Anglin designated himself Republican on his notice of candidacy. (Pet. Ex. 2, Ver. Compl. ¶¶ 26-27.)

In so doing, Respondent ensured that, pursuant to the law in existence at the time, his Republican Party affiliation would appear on the ballot. On the basis of that fact, the N.C. State Board of Elections and Ethics Enforcement (the "SBOE") circulated official notices with candidate lists for use in connection with military-overseas absentee ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act. (Pet. Ex. 2, Ver. Compl. ¶¶ 48-50.) That list showed Respondent as a Republican candidate for the Supreme Court of North Carolina. (Pet. Ex. 2, Ver. Compl. Ex. H.)

S.L. 2018-130 would retroactively change the consequences of Respondent's conduct and strip him of his designation with no means to re-secure it. Section 1 of S.L. 2018-130 amends Section 4.(b) of S.L. 2017-214 to provide that "[i]f the candidate's political party affiliation or unaffiliated status is the same [on their notice of candidacy] as on their voter registration at the time they filed to run for office and 90 days prior to that filing, the political party designation or unaffiliated status shall be included on the ballot." (Pet. Ex. 2, Ver. Compl. Ex. A.) It revised Section 2.(a) and 2.(c) of Session Law 2018-13 as follows:

> **SECTION 2.(a) …**
>
> The General Assembly notes that election to these offices will be held under a plurality election system, with candidates running under a political party label on the ballot, without having gone through a party primary. The General Assembly finds that ballot language above the sections of 2018 general election ballots regarding these impacted offices setting forth that the listed party affiliation ~~is only the self-identified party~~ of a candidate at least 90

> days prior to the time of ~~filing will~~ filing, consistent with G.S. 163A-973, would aid voters' understanding of the 2018 judicial races.
>
> **SECTION 2.(c)** Notwithstanding G.S. 163A-1112, immediately prior to the placement of the judicial offices listed in subsection (b) of this section on the ballot, the following information shall be printed:
>
> "No primaries for judicial office were held in 2018. The party information ~~listed~~ by each of the following candidates' names ~~indicates~~ is shown only if the candidates' party affiliation or unaffiliated status is the same as on their voter registration at the time they filed to run for ~~office.~~office and 90 days prior to that filing."

(Pet. Ex. 2, Ver. Compl. Ex. A.) Finally, Section 3.1 of S.L. 2018-130 amended Section 4.(c) of S.L. 2017-214 to extend the deadline for a candidate for statewide judicial office to withdraw from the race to 8 August 2018. (Pet. Ex. 2, Ver. Compl. Ex. A.)

On 6 August 2018, the first weekday after its enactment, Respondent filed this action to enjoin the enforcement of S.L. 2018-130. (Pet. Ex. 2, Ver. Compl. at 1.) That same day, the trial court granted Respondent's Motion for Temporary Restraining Order. (Pet. Ex. 4.) On 13 August 2018, after Respondent and Petitioners fully briefed the issues, and after hearing argument, the trial court entered the Preliminary Injunction. (Pet. Ex. 6 at 1.) In the Preliminary Injunction, the trial court concluded that Respondent had shown a likelihood of success in his claims that S.L. 2018-130 violated his rights to due process, free speech, free elections, and equal protection of the law under the N.C. Constitution.[1] (Pet. Ex. 6 at 5-9.) The trial court

[1] Petitioners incorrectly assert that the Preliminary Injunction did not address Respondent's equal protection, free elections, and free speech claims. (Pet. at 6.) The Preliminary Injunction states that "[Respondent] has shown a likelihood that he will prevail on the merits of his case, particularly as it relates to his claim based on a violation of his due process and *associational* rights under Article I, Sections 19 and

also concluded that, in the absence of the injunction, Respondent would suffer irreparable harm. (Pet. Ex. 6 at 9.) For those reasons, the trial court enjoined the enforcement of S.L. 2018-130 as against Respondent.[2] (Pet. Ex. 6 at 10-11.)

In the eleven days between the 13 August 2018 Preliminary Injunction and their 24 August 2018 Petition, Petitioners did not make any attempt to seek a stay of the Preliminary Injunction from the trial court. Instead, Petitioners seek that relief for the first time through the Petition, in the hope that their last-minute tactics will result in having a stay in place at the moment it matters most: the moment that the SBOE prints the ballot. That could happen any time, but it must happen by 7 September 2018.

For the reasons that follow, the Court should deny the Petition.

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14 of the North Carolina Constitution." (Pet. Ex. 6 at 6 ¶ 2.) Article 1, Section 14, is the Free Speech Clause. Article 1, Section 19 contains the Equal Protection Clause. Associational rights derive from a combination of free speech, due process, free election, and equal protection rights. *See Libertarian Party of N.C. v. North Carolina*, 365 N.C. 41, 48, 707 S.E.2d 199, 204 (2011) ("We are thus persuaded that the analysis used by the Supreme Court in *Twin Cities* is the proper approach for determining whether [a ballot-access statute] violates our state constitution's due process, free speech and assembly, and equal protection provisions." (internal citations and quotations omitted)).

[2] The Preliminary Injunction does not require the SBOE to print the ballots by a date certain. It instead enjoined the SBOE from "issuing or causing any county Board of Elections to issue any official state publication . . . which states that [Respondent] is anything other than a Republican candidate for Associate Justice of the Supreme Court," and from "[a]uthorizing any change to [Respondent's] verified designation as a Republican candidate for Associate Justice of the Supreme Court of North Carolina on the official ballot." (Pet. Ex. 6 at 10 ¶ 2(a)-(b).)

REASONS THE COURT SHOULD DENY THE PETITION

The Court should deny the Petition because a stay of the Preliminary Injunction would contravene the interests of justice. Our appellate courts grant a petition for writ of supersedeas only "in case of necessity." *McArthur v. Land & Timber Co.*, 164 N.C. 383, 384, 80 S.E. 403, 403 (1913); *see also* Alan D. Woodlief, Jr., Shuford North Carolina Civil Practice & Procedure, § 62:5 at 1077 (2016-17 ed.). Such stays comprise "extraordinary relief" and should rarely issue. *See, e.g., Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers) (denying stay); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) ("Stays are not commonly granted in redistricting, or any other type of litigation.").

Accordingly, Petitioners must meet an exceedingly high standard to prevail: they must show "why the writ should issue in justice." N.C. R. App. P. 23(c). Federal courts have enumerated four prerequisites for an applicant seeking a stay: (1) that the applicant have a strong likelihood of success on appeal; (2) that the applicant will suffer irreparable harm if the stay is denied; (3) that no other party will be substantially harmed by the requested stay; and (4) that the public interest will be served by the requested stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Blankenship v. Boyle*, 447 F.2d 1280 (D.C. Cir. 1971); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); G. Gray Wilson, North Carolina Civil Procedure, § 62-3, at 62-6 (3d ed. 2007).

Petitioners cannot satisfy any of the above four requirements and, for that reason, the Court should deny the Petition.

I. THE PETITION IS PROCEDURALLY DEFECTIVE.

Rule 23 of the N.C. Rules of Appellate Procedure provides that an appellant may seek a writ of supersedeas and a temporary stay only where "(1) a stay order has been sought by the applicant . . . and such order has been denied or vacated by the trial tribunal, or (2) extraordinary circumstances make it impracticable to obtain a stay . . . by application to the trial tribunal." N.C. R. App. P. 23(a). Failure to satisfy these requirements constitutes a valid *per se* basis for denying the Petition. *See Rodriguez v. Sampson Cty. Mem'l Hosp., Inc.*, 322 S.E.2d 559, 559 (N.C. 1984) (dissolving writ of supersedeas because the petitioner had "not shown extraordinary circumstances pursuant to Appellate Rule 23(a)(1)(ii) and ha[d] not complied with N.C.G.S. § 1-289, Civil Procedure Rule 62, or Appellate Rule 23(a)(1)(i)").

Petitioners never moved the trial court to stay the Preliminary Injunction and no extraordinary circumstances justify that failure. Respondent commenced this action on the first business day after S.L. 2018-130's enactment. (Pet. Ex. 2 at 1.) Due to the SBOE's impending deadlines, the trial court made itself available to hear the TRO motion later that afternoon, and heard Respondent's motion for preliminary injunction just one week later. (Pet. Exs. 4, 6.) There is no reason to believe that the trial court would not have heard Petitioners' motion to stay the Preliminary Injunction expeditiously, had such motion been made.

Petitioners make no argument to the contrary, arguing instead that they did not need to seek a stay until 24 August 2018 because of stays entered in other cases. As an initial matter, that argument fails to address why Petitioners needed to seek the stay before this Court as opposed to the trial court. The argument also defies logic: if anything, the stays in other cases gave Petitioner more, not less, time to seek a stay before the trial court.

In any event, a stay would serve no proper procedural purpose. Courts use stays to "prevent the judicial process from being rendered futile by defendant's action or refusal to act." *See Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 813 (3rd Cir. 1989) (quoting Wright & Miller, Federal Practice and Procedure § 2947 at 424 (1973) (modifications in original)). The purpose of a stay is thus to "preserve the status quo." *Craver*, 298 N.C. at 237-38, 258 S.E.2d at 362. "[T]he phrase 'preservation of the status quo' [serves] as a summary explanation of the need to protect the integrity of the applicable dispute resolution process." *Ortho Pharm.*, 882 F.2d at 814. A stay of the Preliminary Injunction would not protect the integrity of the Court's power to resolve this dispute: it would rather render the dispute moot, as the ballots would print without Respondent's Republican Party affiliation, causing Respondent to suffer a loss of his constitutional rights without remedy or recourse. For that reason, the Court should deny the Petition.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT RESPONDENT HAS A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CLAIM THAT S.L. 2018-130—AS APPLIED TO HIM—VIOLATES THE NORTH CAROLINA CONSTITUTION.

Petitioners cannot demonstrate a likelihood of success in this appeal as S.L. 2018-130, as applied, deprives Respondent of his constitutional rights. For the same reason, any stay will cause Respondent to suffer irreparable harm.

A. S.L. 2018-130 Violates Respondent's Rights under the North Carolina Constitution by Retroactively and Arbitrarily Depriving him of a Vested Statutory Right.

Changing the rules of an election after it begins violates fundamental principles of fairness and equality, principles embodied in and protected by our state constitution. The Declaration of Rights in the N.C. Constitution provides that "all persons are created equal" and "endowed by their Creator with certain inalienable rights," including "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. Art. 1 § 14. It denies our state government the power to deprive any person "of his life, liberty, or property, but by the law of the land." or of "the equal protection of the laws." N.C. Const. Art. 1 § 19. It forbids unwarranted interference in the exercise of free speech or participation in free elections. N.C. Const. Art. 1 §§ 10, 14.

"The Declaration of Rights was intended to protect individual rights from infringement by the State," safeguarding those rights against "shifting political majorities." *Corum v. Univ. of N.C.*, 330 N.C. 761, 787, 413 S.E.2d 276, 292 (1992). Yet here, for political advantage, the General Assembly has enacted a law that alters the consequences of the past conduct of a single individual, thereby interfering with

his vested right to participate in a free election and stripping him entirely of his vested right to be designated as a Republican candidate on the ballot. Rather than being narrowly tailored to serve a legitimate government purpose, S.L. 2018-130 was intentionally crafted to destroy Respondent's right to run as a Republican candidate for the Supreme Court in the 2018 general election. For these reasons, Petitioners cannot demonstrate any likelihood of success in this appeal, and the Court should deny the Petition.

1. *S.L. 2018-130 violates fundamental concepts of due process and thus the law of the land.*

In this State, "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. Art. 1 § 19. As it appears in Article 1, Section 19 of the North Carolina Constitution, the phrase "the law of the land" has a "substantive content," and "has become the focus for judicial thinking concerning fundamental fairness." Orth, John V. and Paul M. Newby, *The North Carolina State Constitution*, 69-70 (2013). "The expression . . . is synonymous with 'Due Process of Law.'" *Bulova Watch Co. v. Brand Distr. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

S.L. 2018-130 infringes on Respondent's due process rights both by reason of its retroactive application to deprive him of a vested right and its arbitrary nature. For that reason, Petitioners have no likelihood of success in this appeal and the Court should deny the Petition.

a. S.L. 2018-130 is a retroactive statute that will deprive Respondent of a vested right.

The Law of the Land Clause prohibits retrospective legislation depriving citizens of vested rights. *See Letendre v. Currituck Cty.*, No. COA17-1108, 2018 N.C. App. LEXIS 501 *73 (May 15, 2018) ("The common law vested rights doctrine is rooted in the due process of law and the law of the land clauses of the federal and state constitutions and has evolved as a constitutional limitation on the state's exercise of its police powers."); *see also Overman Co. v. Md. Cas. Co.*, 193 N.C. 86, 92, 136 S.E. 250, 253 (1927) ("Every law that takes away or impairs rights that have vested under existing laws is generally unjust and may be oppressive. Hence such laws have always been looked on with disfavor. While the Constitution of the United States and Constitutions of many of the states contain no provisions directly forbidding retrospective laws, such laws are void if they impair the obligations of contracts or vested rights." (ellipses omitted) (quotation omitted)).

Thus, a "statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis." *Gardner v, Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). "The application of a statute is deemed 'retroactive' or 'retrospective' when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment." *Gardner*, 300 N.C. at 718, 268 S.E.2d at 471.

Petitioner does not—and could not successfully—argue that S.L. 2018-130 is not a retroactive statute. S.L. 2018-130 alters the legal consequences (i.e., whether a candidate will have a stated party designation) of conduct completed (i.e., the filing

of a notice of candidacy and certification of party registration) prior to its enactment. It can, therefore, survive judicial scrutiny only if it does not divest Respondent of a vested right.

S.L. 2018-130's retroactive application will deprive Respondent of a vested right. As noted in *Gardner*, "[t]he tautology is apparent" in the definition of a "vested" right. *Gardner*, 300 N.C. at 719, 268 S.E.2d at 471. But, just as "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in the determination of whether a statute may be deemed to apply retroactively, *see Landgraf v. Usi Film Products*, 511 U.S. 244, 255 (1994), such considerations aid in the determination of whether a right "is so far perfected as to permit no statutory interference," *Gardner*, 300 N.C. at 719, 268 S.E.2d at 471.

Those familiar considerations led the Supreme Court of Michigan to refuse to apply the state's change in election laws to restrict ballot access for a particular candidate in *Todd v. Bd. of Election Comm'rs*, 104 Mich. 464, 62 N.W. 564 (1895), a case strikingly similar to Respondent's. In *Todd*, the unamended state election laws permitted a candidate who received multiple party nominations to appear as a candidate for each nominating party on the ballot. *Id.* at 475, 62 N.W. at 564. After the plaintiff, a Congressional candidate, was nominated by three separate parties, the legislature changed the election law to require any candidate that received more than one party nomination to select a single party designation on the ballot. *Id.* at 476, 62 N.W. at 564-65. The candidate would have five days after being certified by multiple parties to make such selection, and, if the candidate did not make the

selection in time, the candidate would appear on the ballot as a candidate of the party that submitted its certification first. *Id.*

The plaintiff sued for a writ of mandamus to compel the ballots to print with his name appearing three times, once for each party nomination, and the Supreme Court of Michigan determined that the writ should issue, stating:

> We are of the opinion that the amendatory act of March 14 cannot be held applicable to the present case. The time within which the candidate is authorized by law to exercise his choice of tickets had in the present case expired before the law took effect. He, therefore, under the law, had no opportunity to exercise the right conferred. If it be attempted to apply the terms of this act to the present case, the election commissioners would be bound under the other provisions of the act to print the name of the candidate on the ticket first certified, thus excluding wholly the right of choice plainly intended to be conferred by the statute.

Id. at 477-78, 62 N.W. at 565.

As in *Todd*, S.L. 2018-130 will act to change the consequences of Respondent's conduct after the fact, depriving him of his vested right to have his Republican affiliation stated on the ballot. In June 2018, the law applicable to Respondent's Republican affiliation included the following mandatory provisions:

- S.L. 2016-125 made appellate court judicial elections partisan.

- Section 4.(a) of S.L. 2017-214 provided that "[c]andidates seeking the office of Justice of the Supreme Court . . . shall file their notice of candidacy with the State Board of Elections and Ethics Enforcement no earlier than 12:00 noon on June 18, 2018, and no later than 12:00 noon on June 29, 2018."

- Section 4.(b) of S.L. 2017-214 required any candidate filing a notice of candidacy pursuant to Section 4.(a) to "indicate on the notice of candidacy the political party recognized

> under Article 18 of Chapter 163A of the General Statutes with which that candidate is affiliated" and stated that the verified party designation . . . *shall* be included on the ballot," (emphasis added).
>
> - Section 2.(a) of S.L. 2017-214 included the General Assembly's finding "that ballot language above the sections of election ballots regarding these impacted offices setting forth that the listed party affiliation is only the self-identified party of a candidate at the time of filing will aid voters' understanding of the 2018 judicial races."
>
> - N.C. Gen. Stat. § 163A-1107(a) charges the State Board of Elections with the responsibility of certifying official ballots, stating "[t]he State Board shall certify the official ballots and voter instructions to be used in every election that is subject to this Part."
>
> - N.C. Gen. Stat. § 163A-1112(a)(4) provides that "each official ballot shall contain . . . [p]arty designations in partisan ballot items."

Respondent relied upon and complied with all of these laws. Once filing closed, Respondent had no further requirements to fulfill or necessary actions to take: these mandatory provisions would result in him appearing on the ballot as a Republican candidate.

Petitioners argue that Respondent's right could not vest until the SBOE printed the ballots, and that "it is not uncommon for actions that affect the ballot to be taken *after* candidate filing." (Pet. at 18.) As an initial matter, the only statute that Petitioners cite in support of that position relates not to any substantive ballot content, but instead to the arrangement of that content on the ballot. In any event, as the U.S. District Court for the Eastern District of North Carolina stated in *Poindexter v. Strach*:

> Under [the SBOE's] reasoning, a legislature would be empowered to retroactively alter any election rule, no matter how minor, and disqualify any candidate, even after that candidate had fulfilled the requirements in effect at the relevant time, as long as that election rule would prospectively pass constitutional muster. Such erratic execution of election laws is inconsistent with the well-established state interest in ensuring orderly, fair, and efficient procedures for the election of public officials.

(Resp. to Pet. Ex. 2, Order at 12-13.)[3]

Petitioners' argument effectively claims unfettered power for the legislature: if correct, then that rule would empower the General Assembly to make virtually any after-the-fact change to our election laws, so long as the ballot had not printed. By contrast, recognizing the deadline for filing notice of candidacy as the moment that ballot access rights "vest" provides candidates with a fair, clear, and workable understanding of when and how they can obtain access without fear of undue interference.

As in *Todd*, S.L. 2018-130 upends Respondent's settled expectation and provides him with no notice or opportunity to cure any defect in his notice of candidacy. Respondent had every reason to believe as of 29 June 2018, that he had taken all steps necessary to secure a place on the general election ballot as a Republican candidate. S.L. 2018-130 destroyed that expectation without reopening the filing deadline or otherwise providing Respondent with any means to keep that designation.

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[3] In *Poindexter*, the federal district court enjoined the enforcement of S.L. 2018-30 as against candidates of the Constitution Party, preventing that law from retroactively divesting them of the right to appear on the November ballot. (Resp. to Pet. Ex. 2 at 16.)

These facts demonstrate the flaw in Petitioners' position that S.L. 2018-130 is a neutral election law affecting all candidates equally. A prospective election law may burden some candidates' rights to ballot access more than others, but, at the very least, every candidate will have an equal chance to comply. When a legislature enacts a retrospective election law, the legislature already knows who that law will and will not affect, and how it will affect them.

Had S.L. 2018-130 been in place on 1 January 2018, Respondent could have complied with its terms. By waiting until 4 August 2018 to enact S.L. 2018-130, the General Assembly deliberately ensured that Respondent could not comply. For all of its effort to appear as a neutral, non-discriminatory election law, S.L. 2018-130 may as well read "Christopher J. Anglin cannot appear on the ballot as a Republican candidate for Associate Justice of the Supreme Court of North Carolina."

S.L. 2018-130 does not just deprive Respondent of a vested right, it does so without any legitimate government purpose—let alone a compelling purpose—and in arbitrary fashion. For these reasons, Petitioners cannot demonstrate a likelihood of success in this appeal and the Court should deny the Petition.

b. S.L. 2018-130 has no legitimate government purpose.

Arbitrary or unreasonable state action untethered to the public interest violates fundamental principles of due process and contravenes the law of the land and principles of equal protection. *North Carolina v. Barrett*, 138 N.C. 630, 648, 50 S.E. 506, 512 (1905). "'Arbitrary' means fixed or done capriciously or at pleasure… done without adequate determining principle; not done according to reason or

judgment, but depending on the will alone—absolute in power, tyrannical, despotic, nonrational—implying either a lack of understanding of or a disregard for the fundamental nature of things." *In re Housing Auth. of Salisbury*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952). Reasonableness is a question of degree that turns on weighing of the public interests involved in the state's action and the private interests that the action will harm. *See, e.g., N.C. Assoc. of Licensed Detectives v. Morgan*, 17 N.C. App. 701, 704, 195 S.E.2d 357, 359 (1973) ("Whether [a law] is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it.").

No public good will result from S.L. 2018-130. The law amends S.L. 2017-214, which, itself, will have no application beyond the 2018 general election for judicial offices. S.L. 2018-130 has one obvious purpose: to prevent Respondent from having his Republican designation on the ballot in order to secure a higher likelihood of success for the party's favored candidate, Respondent's Republican opponent. That is, the General Assembly, after stripping the parties and the people of the right to decide on Supreme Court candidates through a primary process, now asserts that it alone has the power to determine who can, and cannot, call themselves a Republican in the 2018 general election.

Moreover, Petitioners' proffered justification for their power grab directly contradicts their prior position in federal court. In the judicial primary litigation, counsel for Petitioners discussed the very scenario this case involves, noting that the removal of the primary as a barrier to entry would *not* result in any public

misconception as to a particular party's standard-bearer. As noted in counsel's colloquy with the court:

> THE COURT: So, now, in North Carolina, it will not [be] Republicans deciding who's going to run as a Democrat as a group or Democrats deciding for Republicans as a group; it's individuals deciding. An individual who goes in and files as a Republican is deciding who the Republican Party is—who the Republican candidates are basically. They do that individually.
>
> MR. WARF: I think by filing, yes, but *I don't think that that is—equates to the—that because five individuals as Republicans decided to run for a particular judicial seat, that they all are the standard bearers of the party through their individual choice to file. The party still has the ability to come back and say we like person A. Yes, there may be other Republicans, but we're backing person A.*

(Pet. Ex. 2, Ver. Compl. Ex. D, 57:3-16) (emphasis added). Mr. Warf's argument makes Respondent's case for him. S.L. 2018-130 serves no legitimate government purpose, let alone a compelling one, because political parties *already had the power* to clearly and effectively identify their standard-bearers. If this is so, the public has no need for any further protection from a non-primary system for electing supreme court justices.

Even if that need existed, S.L. 2018-130 does not serve it. The General Assembly's primary concern as stated in the legislative findings for S.L. 2018-130 appears to comprise questions as to Respondent's integrity—that is, whether he is a "true" Republican—and the 90-day lookback provisions of S.L. 2018-130 wholly fail to address that issue. Had S.L. 2018-130 been enacted fairly and in time for anyone

to comply with its provisions, persons like Respondent could have changed their party registration on the 91st day prior to filing and secured a place on the ballot as a Republican candidate. A party change made 91 days prior to filing in contemplation of compliance with a 90-day rule would be just as suspect and open to political attack as one made, as here, 22 days prior to filing.

Indeed, Petitioners have previously dismissed the very idea that a 90-day lookback period would do anything to prevent even *false* party registrations. In disclaiming that notion, Petitioners scoffed:

> Plaintiffs can cite no instance where that type of false registration has occurred, *much less that a requirement that party affiliation be set 90 days prior to filing to run for office would have allowed the parties to discover a false registration prior to the person filing as a candidate.* Moreover, Plaintiffs acknowledge that *they do not exclude people from becoming members of the Democratic Party.*

(Resp. to Pet. Ex. 1, Defs.' Trial Brief at 6 n.5, *N.C. Democratic Party v. Berger, et al*, 1:17-cv-1113 (M.D.N.C. May 25, 2018) (emphasis added)).

Petitioners have thus already recognized the truth of the matter: the only thing that affiliates a candidate with a party is registration as a member of that party. Beyond that, inquiry into a candidate's party *bona fides* is a matter for the party and its voters, not the General Assembly.

S.L. 2018-130 will, moreover, amplify voter confusion rather than decrease it. As discussed in more detail below, S.L. 2018-130's enforcement will result in official state and county elections publications containing conflicting designations of Respondent's party designation. Voters who have received those communications,

and who are entitled by law to vote with the federal overseas write-in ballot, may do so based on conflicting and confusing information.

Even assuming that S.L. 2018-130 serves the public interest at all—and it does not—the harm to Respondent greatly exceeds the public benefit. By operation of S.L. 2018-130, it will appear to every voter in this State on election day that the Republican Party has only one candidate in the race: Respondent's Republican opponent. The loss of the right to receive that designation leaves Respondent with a difficult choice that he should not have to make: either appear on the ballot with no party status, or withdraw from the race entirely.

The political circumstances of its hurried adoption and Petitioners' complete reversal from their prior stated position on voter confusion, reveal the arbitrary and capricious nature of S.L. 2018-130. For these reasons, Petitioners have no likelihood of success on this appeal and the Court should deny the Petition.

2. *S.L. 2018-130 severely burdens Respondent's associational rights, in violation of his rights to a free election, free speech, and equal protection of the law.*

In addition to the protections that the Law of the Land Clause affords against retroactive and arbitrary legislative deprivation of a vested right, the Declaration of Rights imposes strict limitations on government interference with public political debate and personal political choice. It provides that "[a]ll elections shall be free." N.C. Const. Art. 1 § 10. It recognizes that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const. Art. 1 § 14. Finally, it states that no person shall be deprived of equal

protection of the law. N.C. Const. Art. 1 § 19. Together, these clauses safeguard the public from unwarranted or arbitrary government interference in the free and fair exchange of information or the exercise of the franchise, keeping elections "free from interference or intimidation." Orth & Newby, *supra*, 56 (discussing the Free Election Clause).

As applied to Respondent, S.L. 2018-130 violates all of these Clauses. It will deprive Respondent of the right to have his Republican affiliation stated on the ballot and will prevent him from conveying crucial information to voters in the voting booth. It has the effect of branding Respondent as something other than a "real" Republican. Under S.L. 2018-130, Respondent will not have a free election and he will not be free to self-identify as a Republican in the same manner as his Republican opponent. These facts are fatal to the Petition.

a. Strict scrutiny applies to S.L. 2018-130 because it totally deprives Respondent of his associational rights.

"In North Carolina, statutes governing ballot access . . . implicate individual associational rights rooted in the free speech and fair assembly clauses of the state constitution." *Libertarian Party of N.C. v. North Carolina*, 365 N.C. 41, 49, 707 S.E.2d 199, 205 (2011). "Indeed, ballot access rights, though distinct from voting rights, are central to the administration of our democracy." *Id.* Party-designation requirements also implicate those rights: "party affiliation has the same, if not more, importance than the identity of the candidate." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 592 (6th Cir. 2006). Laws that impose severe burdens on these rights must

withstand strict scrutiny. *Libertarian Party of N.C.*, 365 N.C. at 49, 707 S.E.2d at 205.

S.L. 2018-130 does not merely burden Respondent's associational rights; it deprives him of those rights without affording him with any opportunity to obtain the same access to the ballot as his Republican opponent. "Constitutional challenges to specific provisions of a State's election laws [] cannot be resolved by any 'litmus-paper test.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Instead, courts must scrutinize such laws by weighing "the character and magnitude of the asserted injury" against "the precise interests put forward by the State as justification for the burden imposed" and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* "The inquiry is whether the restriction unfairly or unnecessarily burdens the availability of political opportunity." *Id.* at 793. "In determining the magnitude of the burden imposed by a state's election laws, the Supreme Court has looked to the associational rights at issue, including *whether alternative means are available to exercise those rights*." *Blackwell*, 462 F.3d at 587 (emphasis added).

Here, Respondent's injury comprises a total deprivation of his right to associate with the Republican Party on the general election ballot. Unlike in *Libertarian Party of N.C.*, where the Libertarian Party had nearly four years to collect necessary signatures, *see Libertarian Party of N.C.*, 365 N.C. at 50, 707 S.E.2d at 205, the retroactive nature of S.L. 2018-130 makes it impossible for Respondent to obtain a Republican designation on the 2018 general election ballot.

Our courts have recognized for more than a century that even where a law only retroactively affects remedial or procedural rights, it must leave citizens with some alternatives. *See Tabor v. Ward*, 83 N.C. 291, 1880 N.C. LEXIS 63 *6 (1880) ("It is well settled by a long current of judicial decisions, State and Federal, that the Legislature of a State may at any time modify the remedy, even take away a common law remedy altogether, without substituting any in its place, *if another efficient remedy remains* . . . ." (emphasis added)). S.L. 2018-130 wholly fails to provide Respondent with any means of having his party affiliation stated on the ballot, and, therefore, severely burdens his associational rights.

S.L. 2018-130 also imposes a severe burden on Respondent's associational rights because it discriminates in its application between candidates for the same office. As the U.S. Court of Appeals for the Sixth Circuit noted in *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992):

> With respect to the political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns. Once a state admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.

Id. at 175 (citing *Bachrach v. Sec'y of Mass.*, 382 Mass. 268, 415 N.E.2d 832, 835 (1981)). Of course, if a law gives some candidates for [an office] a party identifier, but not other candidates for [that office], it would impose a burden on the associational

rights of the candidates left unidentified." *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 177 (4th Cir. 2017). S.L. 2018-130 does just that.

For these reasons, S.L. 2018-130 severely burdens Respondent's associational rights. Since S.L. 2018-130 cannot survive strict scrutiny, the Court should deny the Petition.

b. S.L. 2018-130 is not narrowly tailored to further any compelling government interest.

There can be no mistake. S.L. 2018-130 was not intended to prevent voter confusion or avoid the spread of misinformation about a person's political affiliation. It was intended to help Respondent's Republican opponent win the 2018 general election. It codifies the General Assembly's endorsement of a particular candidate for the Supreme Court.

North Carolina has no compelling interest in determining who is and is not a "true" Republican. That determination is properly left to the State's political parties and its voters. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Just as the State has no right to endorse particular religious beliefs or discriminate amongst expressive viewpoints, the State has no business acting as "the ideological guarantor of the Republican Party's candidates." *Tashijan v. Republican Party*, 479 U.S. 208, 220 (1986).

Here Petitioners' prior statements to the federal district court in *N.C. Democratic Party v. Berger* demonstrate that the stated concerns of avoiding voter

confusion are merely pretextual. Indeed, Petitioners have previously denied that a ballot's party designation can lead to voter confusion at all:

> [Under S.L. 2017-214, unamended] [a]ll candidates' party affiliations on the ballot are based on the party affiliation they choose on their voter registration forms. . . . Importantly, a candidate does not seek, or need, the party's permission to be affiliated when registering to vote or when filing to run for office. Thus, under North Carolina law, a party identifier on a ballot does not signal a party's endorsement of a candidate. As recognized by the Supreme Court, "There is *simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate*."

(Resp. to Pet. Ex. 1, Defs. Trial Brief at 11-12, *N.C. Democratic Party v. Berger*, 1:17-cv-1113 (M.D.N.C. May 25, 2018) (internal citations and parenthetical quotations omitted)). The claim that S.L. 2018-130 is necessary to prevent voter confusion thus directly contradicts Petitioners' prior position.

The claim that S.L. 2018-130 is necessary to prevent voter confusion also condescends to voters and undervalues Respondent's right to have his Republican designation stated on the ballot. As the Supreme Court of the United States stated in *Tashijan*, "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism," 479 U.S. at 221, a concern only enhanced here by the General Assembly's incessant rewrites to the State's election laws. Yet, at the expense of putting Respondent at a serious disadvantage in the general election, the General Assembly has elected to restrict the flow of information to voters, purportedly because

of its sudden realization that 2017-214 could, in fact, lead to voter confusion, a risk that Petitioners dismissed months earlier as having "simply no basis."

Additionally, given the SBOE's prior acts, S.L. 2018-130 can only increase, not decrease, voter confusion. Respondent's notice of candidacy and his current voter registration indicate that he is a Republican. Based on his notice of candidacy and the law in place at the time, the SBOE sent Official Election Notices pursuant to the Uniformed and Overseas Citizens Absentee Voting Act to North Carolina counties that included lists of candidates for use on military absentee ballots that included Respondent as a Republican. Those ballots are already in use. If S.L. 2018-130 takes effect, then subsequent publications of the SBOE will not show Respondent as a Republican, creating the very confusion and frustration that the State has a compelling interest to prevent.

Even if S.L. 2018-130 served a compelling interest, the legislature did not narrowly tailor it to be the least restrictive means for that purpose. S.L. 2018-13, unamended, already required every official ballot to state: "No primaries for judicial office were held in 2018. The information listed by each of the following candidates' names indicates only the candidates party affiliation or unaffiliated status on their voter registration at the time they filed for office." That disclaimer provides accurate information to voters and makes it impossible for voters to believe that a party designation for a judicial candidate reflects any actual party endorsement. *See Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 456 (2008) (noting that a virtually identical disclaimer would suffice to "eliminate the possibility

of widespread voter confusion"). Since S.L. 2018-13 demonstrates at least *one* less restrictive means for accomplishing the State's purported goals, S.L. 2018-130 cannot possibly be *the* least restrictive means for accomplishing those goals.

Due to its arbitrary and unreasonable retroactive deprivation of Respondent's statutorily vested rights, S.L. 2018-130 would not even survive rational-basis scrutiny. S.L. 2018-130 restricts Respondent from accessing the official election ballot as a candidate of his own party. The General Assembly is not the Republican Party, and it has no right to conduct its own Republican primary in the race for Associate Justice of the Supreme Court of North Carolina. S.L. 2018-130 functions as that sort of impermissible, legislative primary. Petitioners cannot succeed on the merits of this appeal and the Court should deny the Petition.

B. If the Stay is Granted, Respondent is Certain to Suffer an Irreparable Deprivation of his Statutory and Constitutional Rights.

Petitioners seek an opportunity to enforce an unconstitutional law at the one and only moment that the enforcement of that law will matter: when the official ballots print. No State has any interest in the enforcement of an unconstitutional law, *Ayers v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 114 (3rd Cir. 2013), so Petitioners cannot claim that the non-enforcement of S.L. 2018-130 will cause them to suffer irreparable injury. The public also has no interest in the enforcement of an unconstitutional law, *id.*, so Petitioners likewise cannot claim that the non-enforcement of S.L. 2018-130 negatively affects the public interest.

The only party who stands to suffer injury in this case is Respondent, and, if the Court grants the Petition, that injury is certain to occur. The ballots must print

not later than 7 September 2018. If the Preliminary Injunction is not in full force and effect on that date, then the ballots that the SBOE certifies and prints, pursuant to S.L. 2018-130, will not include Respondent's Republican Party affiliation, placing him at a distinct disadvantage in the election. (*See* Resp. to Pet. Ex. 3, Aff. of Gary Bartlett ¶¶ 6-9.) He will have taken all of the steps he needed to take to obtain that ballot designation, filed this action, obtained a temporary restraining order and the Preliminary Injunction, all for nothing.

Petitioners have waited until the final hour to avail themselves of appellate court rules for an improper purpose. Those rules are not intended to allow parties to avoid the consequences of trial court orders altogether. They are intended only to preserve the status quo pending appellate court review of those orders. Yet here, Petitioners attempt to bend the rules to render Respondent's case moot and the Preliminary Injunction meaningless.

The Court should not allow Petitioners to game our appellate court system. The Petition fails to show procedural or substantive grounds for a stay of the Preliminary Injunction. Petitioners have not sought a stay before the trial court, have not explained why they could not have done so, have not shown a likelihood of success in this appeal, have not shown that they will suffer irreparable harm if the stay is not granted, have not shown that a stay would serve the public interest, and have not shown that Respondent will not suffer irreparable injury if the writ issues. For these reasons, the Court should deny the Petition.

CONCLUSION

We teach our children to play fair; the North Carolina Constitution requires that the General Assembly do the same, particularly in the context of a contested election. For the foregoing reasons, the Court should deny the Petition for Writ of Supersedeas and the Motion for Temporary Stay.

This 24th day of August, 2018.

Respectfully submitted,

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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ATTACHMENTS TO THE PETITION

Attached to this Response to the Petition for Writ of Supersedeas and Motion for Temporary Stay for consideration by the Court are copies of the following documents:

Exhibit 1 – Defendants' Trial Brief, *N.C. Democratic Party v. Berger*, 1:17-cv-1113 (M.D.N.C. May 25, 2018)

Exhibit 2 – Order, *Poindexter v. Strach*, 5:18-CV-366 (E.D.N.C. Aug. 22, 2018)

Exhibit 3 – Affidavit of Gary Bartlett

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this date served a copy of the foregoing Response in Opposition to Petition for Writ of Supersedeas and Motion for Temporary Stay on the parties via email, with written consent of the parties to receive such service, as follows:

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This 24th day of August, 2018.

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