No. 22-1844

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JULIETTE GRIMMETT; RALSTON LAPP GUINN MEDIA GROUP; JOSH STEIN FOR ATTORNEY GENERAL CAMPAIGN,

Plaintiffs-Appellants,

v.

N. LORRIN FREEMAN, in her official capacity as District Attorney For the 10th Prosecutorial District of the State of North Carolina,

Defendant-Appellee.

DEFENDANT-APPELLEE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' "EMERGENCY" MOTION FOR ADMINISTRATIVE INJUNCTION AND MOTION TO EXPEDITE AND MOTION FOR INJUNCTION PENDING APPEAL

Defendant-Appellee N. Lorrin Freeman, in her official capacity as the elected District Attorney of the 10th Prosecutorial District of the State

of North Carolina, (hereinafter "the District Attorney's Office" or "Defendant") respectfully submits this response in opposition to Plaintiffs' Emergency Motion for Administrative Injunction and Motion to Expedite and Motion for Injunction Pending Appeal.

INTRODUCTION

Plaintiffs sought a preliminary injunction below, that was denied for failure to establish a likelihood of success on the merits. Plaintiffs then sought an injunction pending appeal below, that likewise was denied. Despite this result, Plaintiffs now recycle their same arguments, and ask this Court to issue the same now-denied injunction against the District Attorney's Office while they pursue an appeal -- a ruling that would effectively give Plaintiffs and those associated with them a back-door win on the merits, given the looming expiration of the relevant criminal statute of limitations. Plaintiffs cannot meet the standard for this extraordinary relief, and the motion should be denied.

FACTS

Plaintiffs filed this lawsuit for declaratory judgment seeking a ruling that North Carolina General Statute §163-274(a)(9) (hereinafter "the Statute") is unconstitutional on its face and as applied "to these

facts" (M.D.N.C. No. 1:22-CV-568, DE-1 at 3)[1], and further seeking to enjoin the District Attorney from presenting any matters to the grand jury relating to a political advertisement run by the Joshua Stein campaign for Attorney General in August through October 2020, referenced in the Complaint (hereinafter "the Stein Political Ad").

I. The Stein Political Ad.

Joshua Stein was a candidate for reelection for the office of Attorney General in the November 2020 campaign. His opponent was Jim O'Neill, the elected district attorney of Forsyth County. During the period August through October 2020, Stein's political campaign ran the Stein Political Ad, a television commercial run throughout the State in which one of the plaintiffs, a survivor of sexual assault who was also an employee of Stein's office (DE-18, Ex. A, ¶6(f)), made the following statement:

> As a survivor of sexual assault that means a lot to me and when I learned that Jim O'Neill left 1,500 rape kits [sitting] on a shelf leaving rapists on the street, I had to speak out.

(DE-1 at 8). Stein and others in his campaign were personally aware of the content of the Stein Political Ad. (DE-18, Ex. A, ¶6(k)). Plaintiffs'

[1] References to the district court record below will be notated as (DE-__).

Complaint spends considerable time arguing that the ad is not false. (DE-1 at 18-26).

II. How Sexual Assault Evidence Collection Kits ("SAECKs") Are Handled Under North Carolina Law.

The State Crime Lab is under the authority of the Attorney General. (DE-18, Ex. A, ¶4). The record below includes the declaration of William Hart, a lifelong public servant and lawyer who served as the Sexual Assault Kit Initiative Site Coordinator at the State Crime Lab in 2019 until October 2020, when he resigned over concerns about the falsity of the Stein Political Ad. Hart's declaration outlines the evolution of how SAECKs are handled under North Carolina law. Relevant to Plaintiffs' allegations, Mr. Hart's declaration establishes (a) that a long and detailed process was developed during the period 2017 through 2020 for the handling of untested SAECKs in possession of law enforcement throughout the State, pursuant to the laws passed by the General Assembly, and (b) that when testing of the SAECKs began after the appropriate protocols were developed, it was required that the SAECKs be submitted in batches, meaning that no law enforcement agency could submit all of their untested SAECKs at one time. (DE-18, Ex. B).

Also part of the record below is the State Crime Lab's the "2017 SAECK Law Enforcement Inventory Report" reflecting the results of this inventory. (DE-18, Ex. C). This report showed that a total of 1,509 untested SAECKs were in the possession of five law enforcement agencies in Forsyth County at that time. Approximately 1/3 of these 1,509 untested SAECKs were matters wherein the subject admitted the sexual encounter, meaning that the SAECKs were not eligible for submission to the State Crime Lab prior to 15 October 2018 without approved deviation from policy by the Lab. Notably, these SAECKs were in possession of the law enforcement agencies in Forsyth County, not the District Attorney's office. There is no provision in North Carolina law giving an elected district attorney authority to order a law enforcement agency to do anything.

Thus, relevant to Plaintiffs' claims in their lawsuit, (a) all untested SAECKs were in possession of law enforcement officers, not any district attorney; and (b) any untested SAECKs in law enforcement possession could not just be submitted wholesale to the State Crime Lab or contracted labs for testing, but rather had to be submitted in batches according to the developed protocol.

III. The SBI Investigation Revealing the Falsity of the Political Advertisement.

In June 2021, a criminal investigation was initiated by the North Carolina State Bureau of Investigation ("NCSBI"), at the request of Defendant, into the Stein Political Ad. District Attorney Lorrin Freeman recused herself from the matter, and a senior assistant district attorney in her office handles the matter.

The district court record includes the declaration of William Marsh, a special agent of the NCSBI. The declaration contains an outline of the information that was gathered during the course of the criminal investigation of the Stein Political Ad. (DE-18, Ex. A).

As outlined in the declaration, the criminal investigation produced evidence tending to show (a) that Stein and others in his campaign were aware of the content of the Stein Political Ad, and approved of same; (b) that the Stein Political Ad was false, because an elected district attorney does not possess any untested SAECKs in North Carolina and could not submit all untested SAECKs to the State Crime Lab at one time, because of the protocol for submission in batches that had been put in place by the Crime Lab itself; (c) Stein and others in his campaign were aware of and/or recklessly indifferent to that falsity, given their positions as

lawyers and elected officials intricately involved in the legislation creating the SAECK initiative; and (d) the Stein Political Ad was derogatory toward his political opponent.

IV. The Presentment of the Investigation to the Grand Jury.

Given this substantial evidence of violation N.C.G.S. §163-274(a)(9), the prosecutor handling the investigation determined that the appropriate course of action would be to submit a presentment pursuant to N.C.G.S. §7A-271 and §15A-641 to the grand jury, to permit the citizens of Wake County through the grand jury to determine whether or not criminal charges would be appropriate against any person associated with the Stein Political Ad. The prosecutor informed counsel for Stein and his campaign on 7 July 2022 of the decision to make a presentment the grand jury later in July. (Ex. A, ¶8).

Plaintiffs then filed this lawsuit, and sought a preliminary injunction barring Defendant from presenting the results of the criminal investigation of the Stein Political Ad to the grand jury to let the citizens of Wake County determine if any criminal charges are appropriate. The injunction was denied, and this appeal by Plaintiff now follows.

Plaintiffs sought an injunction pending appeal in the district court after denial of the motion for preliminary injunction, that was denied. Plaintiffs have now filed a "Motion for Injunction Pending Appeal" (Doc 9-1) and a "Emergency Motion for Administrative Injunction and Motion to Expedite" (Doc. 10-1). It is unclear what authority is cited for an "administrative" injunction, but in any event Defendant submits this response to those motions, on the expedited basis ordered by the Court.

ARGUMENT

Plaintiffs seek an injunction pending appeal under Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure. In considering extraordinary relief of this nature, the Court shall consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). The first two factors "are the most critical," and it "is not enough that the chance of success on the merits be better than negligible." *Id.* at

434 (citations omitted). Likewise, "simply showing some possibility of irreparable injury fails to satisfy the second standard." *Id.*

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433. Rather, it is "an exercise of judicial discretion" and "[t]he propriety of the issue is dependent upon the circumstances of the particular case." *Id.* Relief of this nature is considered "extraordinary," *Middleton v. Andino*, 990 F.3d 768, 770 (4th Cir. 2020) (King, J., concurring), and the moving party bears a "heavy burden" in seeking relief. *Covington v. North Carolina*, 2018 WL 604732 *3 (M.D.N.C. 2018) (denying injunction pending appeal); *see also Nken*, 556 U.S. at 433-34 (party requesting stay bears burden of proof).

Plaintiffs here do not seek a "stay" of enforcement of an order. To the contrary, they seek an order imposing the same injunctive relief that was denied in the district court -- affirmative injunctive relief barring the District Attorney from permitting a grand jury composed of the citizens of Wake County from reviewing the matter. And Plaintiffs seek it in a manner that would give Plaintiffs a win on the merits, through expiration of the relevant criminal statute of limitations. None of the four factors support the special treatment sought by Plaintiffs.

I. The District Court Properly Determined That Plaintiffs Have Failed to Establish a Likelihood of Success on the Merits.

The district court thoroughly considered the extensive briefing and oral argument presented below on Plaintiffs' motion for preliminary injunction, and denied the motion. (DE-23). The basis for the district court's denial of the motion is Plaintiffs' failure to establish a likelihood of success on the merits.

Plaintiffs then sought an injunction pending appeal below, and made the same arguments being made in the instant motion to this Court. The district court again denied Plaintiffs' motion. While Plaintiffs note in their motion to this Court that the district court stated that Plaintiffs "have a good argument," (Doc. 10-1 at 4), Plaintiffs in doing so fail quote the entirety of the district court's conclusion:

> The plaintiffs have a good argument, but it is difficult to say the plaintiffs have made a strong showing of facial invalidity. In any event, other factors weigh against an injunction.

(DE-35 at 3) (emphasis added).

In their motion before this Court, Plaintiffs spend twelve pages arguing essentially that the district court is wrong. But no new ground is plowed here. All of the arguments made by Plaintiffs now were

considered and rejected by the district court below. The district court considered and rejected the non-binding caselaw presented by Plaintiffs on the issue of strict scrutiny. (DE-23 at 8-17). The arguments in Plaintiffs' motion to this Court simply recycle those same arguments here.

Moreover, the district court correctly found *Garrison v. Louisiana*, 379 U.S. 64 (1964), to be relevant and authoritative. (DE-23 at 6-8); *Garrison*, 379 U.S. at 216 ("Although honest utterance, even if inaccurate may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity"). Plaintiffs' protests in their motion to this Court regarding *Garrison* raise no new issues and were addressed below.

In sum, Plaintiffs' arguments on the likelihood of success on the merits in the instant motion are an effort to litigate the merits of this appeal in an injunction motion. As appropriately found by the district court, "it is difficult to say the plaintiffs have made a strong showing of facial invalidity" of the Statute. (DE-35 at 3) (emphasis added). And that is exactly what Plaintiffs must show to meet the first criteria for an

injunction pending appeal. An injunction pending appeal is not warranted on this ground.

II. Plaintiffs Cannot Establish Irreparable Harm.

All of the other factors to be considered likewise weigh against issuance of an injunction pending appeal. The issue of irreparable harm is the second of the two "most critical" factors to be considered is whether "the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434. The district court, in denying Plaintiffs' injunction motion, specifically found that Plaintiffs do not face irreparable harm. (DE-35 at 3-4).

Plaintiffs argue here, as they did in the district court in seeking an injunction pending appeal, that there is some ongoing constitutional violation at issue. (Doc. 9-1 at 19, claiming "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). But Plaintiffs' recycled arguments, *see e.g.* (DE-26 at 7), are incorrect.

The basic premise underlying Plaintiffs' position is faulty. There is no ongoing deprivation of constitutional right regarding the speech at issue in the injunction on appeal sought by Plaintiffs -- the Stein Political

Ad last ran on air almost two years ago. The only speech at issue in this case (and the only speech to which the injunction on appeal sought by Plaintiffs would apply) -- the Stein Political Ad -- is not ongoing or current speech, and therefore there is no present deprivation of constitutional right, even under Plaintiffs' theory. *See* (DE-18 at 19-20). Plaintiffs do not allege an ongoing violation of constitutional rights anywhere in their Complaint. They seek only to enjoin enforcement of the Statute as to past conduct -- the Stein Political Ad.[2] Plaintiffs' argument is no basis for a finding of irreparable harm.

Nor does the prospect that persons associated with the Stein Political Ad could face criminal prosecution as a result of their conduct create irreparable harm. Both the Supreme Court and this Court have

[2] It is for this reason that Plaintiffs' reliance on this Court's decision in *Legend Night Club v. Miller*, 637 F.3d 291 (4th Cir. 2011) (Doc. 9-1 at 19) is inappropriate. *Miller* involved a nude dancing club's overbreadth challenge to a new statute that would affect its ability to serve alcohol if it continued to host nude dancing. Thus, *Miller* involved the present and ongoing conduct of the plaintiff, not an examination of past conduct as is at issue here. Likewise, Plaintiffs' citation to this Court's decision in *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013) has no application to this case. (Doc 9-1 at 20). *South Carolina* examined the abstention doctrine, and held only that abstention is not appropriate where there is not yet a pending state criminal prosecution. Neither *Miller* nor *South Carolina* has application to this instant motion.

made clear that facing a criminal charge is not "irreparable harm" as that term is used in equity. 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." *Younger v. Harris*, 401 U.S. 37, 46 (1971). Rather, the harm "must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.; see also Beal v. Missouri Pacific R.R. Corp.*, 312 U.S. 45, (1941); *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) ("[O]rdinarily irreparable harm cannot be shown simply because a defendant will be subject to a single criminal prosecution in which he must raise any constitutional claims he wishes as a defense to his conviction"). Thus, the law is clear that the prospect of facing criminal indictment is not irreparable harm.[3]

Finally, Plaintiffs attempt to create an irreparable harm argument by including a declaration from Ms. Freeman's current political opponent in the 2022 election, claiming that "the District Attorney is raising the

[3] As properly found the district court in denying Plaintiffs' motion for injunction pending appeal, any person associated with the Stein Political Ad subject to prosecution would have available to him the defense of litigating the constitutionality of the Statute in that criminal case. (DE-35 at 3); *see, e.g. State v. Petersilie*, 432 S.E.2d 832, 837-38 (N.C. 1993).

threat of criminal enforcement against anyone who publicly argues that a district attorney is responsible for failing to lead to test old rape kits in their jurisdiction." (Doc. 9-1 at 20 and Ex. C). Plaintiffs' statement in this regard is patently wrong on multiple levels. First, the investigation of the Stein Political Ad at issue in this case cannot reasonably be considered as a blanket "threat of criminal enforcement against anyone" who runs a rape kit ad -- this hyperbole by Plaintiffs should be rejected out of hand. The Statute does not prohibit the treatment of rape kits from being debated in a political ad; it only bars someone from knowingly lying about it.

In addition, it is difficult to understand how this argument is relevant in any way to the motion before the Court. Plaintiffs seek an injunction, prior to any decision on the merits, to prevent Defendant from seeking to enforce the Statute as to Plaintiffs or those associated with them for activity relating to the Stein Political Ad. This lawsuit is about the Stein Political Ad. Claims regarding a hypothetical ad by some other candidate in some other election at some other time simply have nothing to do with this lawsuit. Plaintiffs' manufactured claims of "suppression of political debate in North Carolina" (Doc 9-1 at 21) are imaginary and,

more to the point, completely unrelated to this lawsuit -- Plaintiffs seek an injunction as to the Stein Political Ad.

Plaintiffs have failed to establish irreparable harm, and the motion should be denied on that basis.

III. Injury to Defendant From an Injunction Pending Appeal.

Another factor to be considered in the injunction pending appeal calculus is any injury that the defendant would incur as a result of issuance of the requested relief. *Nken*, 556 U.S. at 426. In this case, as noted by the district court, (DE-35 at 5), this issue is paramount. The record below establishes that there is a two-year statute of limitations for enforcement of the Statute as to the Stein Political Ad, that will expire in early October 2022. Should an injunction pending appeal be granted, and no decision issued in time for the matter to be presented to a grand jury in September, then Defendant will be effectively barred from enforcing the statute as to the Stein Political Ad -- in effect, an injunction grants the Plaintiffs a win on the merits by means of a procedural bar. This cannot be the law -- especially where the district court has ruled against the Plaintiffs on the merits.

Plaintiffs tacitly acknowledge the unfairness of this result, offering that "Plaintiffs and their affiliates would be willing to enter into a time-limited tolling agreement in order to allow the Fourth Circuit to rule in this matter." (Doc. 9-1 at 23 and DE-25 at 2 n.1). But the district court held that there is 'no authority for forcing the District Attorney to sign a tolling agreement on [Plaintiffs] terms."[4] (DE-35 at 5).

It should also be considered that, if an injunction is denied, Plaintiffs lose nothing. Plaintiffs or their "affiliates" can still raise their objections regarding the constitutionality of the statute as a defense in any state court prosecution, should one occur. *See, e.g. Petersilie*, 432 S.E.2d at 837-38 (N.C. 1993). Nothing in the cases cited by Plaintiffs establish irreparable harm or support issuance of an injunction pending appeal in this case that would result in a win on the merits for Plaintiffs.

In the end, Plaintiffs seek special treatment for themselves and their "affiliates." They propose a tolling agreement, but only on their

[4] It is not at all clear what "affiliates" would include (and Plaintiffs authority to engage and bind same). The record below establishes that the subjects of the criminal investigation are not parties to this lawsuit. (DE-29 at 6 n.2); (DE-18, Ex. A). A tolling agreement is not a solution to this issue, and Plaintiffs' suggestion of such is a tacit admission of the unfairness of the relief they seek.

terms. They blame Defendant for not bringing a prosecution fast enough, when the record below establishes that they have been aware of a criminal investigation and the possibility of criminal charges since August 2021, yet waited until just days before the grand jury presentment to file this lawsuit. (DE-18 at 21). They argue that the ability to raise the unconstitutionality of the statute as a defense in any state criminal prosecution -- while sufficient under the law for any other putative defendant -- is not sufficient for them. The analysis of the relative harms imposed by granting or denying an injunction pending appeal weigh in favor of Defendant, and the denial of an injunction.

IV. The Public Interest Weighs Against an Injunction.

In denying Plaintiffs' motion for preliminary injunction, the district court noted the United States Supreme Court's recognition of a State's "historical interest in protecting citizens from defamation … [that] does not disappear because the citizen is a candidate for public office," and the State's "compelling interest in preventing fraud and libel in elections." (DE-23 at 10) (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012) and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 349 (1995)). As stated by the Supreme Court in *Garrison*:

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.

Garrison, 379 U.S. at 75. Denial of the requested injunction pending appeal serves these important and compelling public interests.

CONCLUSION

Plaintiffs have not met the "heavy burden" necessary for the "extraordinary" relief of an injunction pending appeal. Moreover, the grant of such an injunction would result in a win on the merits for Plaintiffs through expiration of the criminal statute of limitations -- which is particularly inappropriate given that the district court has ruled against the Plaintiffs on the merits. Plaintiffs' emergency motion for administrative injunction pending appeal and motion to expedite and motion for injunction pending appeal should be denied.

This the 18th day of August, 2022.

GAMMON, HOWARD & ZESZOTARSKI, PLLC

/s/ Joseph E. Zeszotarski, Jr.
Joseph E. Zeszotarski, Jr.
State Bar No. 21310
P.O. Box 1127
Raleigh, NC 27602
(919) 521-5878
jzeszotarski@ghz-law.com

Counsel for Defendant N. Lorrin Freeman, in her official capacity

CERTIFICATE OF COMPLIANCE

This document complies with the requirements of Rule 27 and 32 of the Federal Rules of Appellate Procedure, in that it has been prepared using 14 point Century Schoolbook font and contains 3,890 words.

This the 18th day of August, 2022.

/s/ Joseph E. Zeszotarski, Jr.
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that the foregoing RESPONSE has been filed with the Clerk of Court through the electronic filing function of the Court's electronic filing system, and all parties are registered CM/ECF users and service will be accomplished by the Court's electronic filing system.

This the 18th day of August, 2022.

/s/ Joseph E. Zeszotarski, Jr.
Counsel for Defendant