No. 22-1830

IN THE

United States Court of Appeals

FOR THE

Fourth Circuit

NORTH CAROLINA GREEN PARTY, *et al.*, *Plaintiffs-Appellees*

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*

On Appeal from the U.S. District Court for the Eastern District of North Carolina, No. 5:22-cv-276-D-BM, Hon. James C. Dever, III

BRIEF OF *AMICUS CURIAE* NATIONAL REPUBLICAN SENATORIAL COMMITTEE IN OPPOSITION TO INTERVENORS' EMERGENCY MOTION FOR STAY PENDING APPEAL

C. Bailey King
BRADLEY ARANT BOULT CUMMINGS LLP
Truist Center
214 North Tryon St., Ste 3700
Charlotte, NC 28202

Thomas Lee Oliver III
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203

Counsel for the National Republican Senatorial Committee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
IDENTITY OF AMICUS 1
ARGUMENT 2
CONCLUSION 5
CERTIFICATE OF SERVICE 6
CERTIFICATE OF COMPLIANCE 7

TABLE OF AUTHORITIES

Page(s)

Cases

K.C. ex rel. Africa H. v. Shipman,
716 F.3d 107 (4th Cir. 2013) 3, 4

Buscemi v. Bell,
964 F.3d 252 (4th Cir. 2020) 3

Cabral v. City of Evansville, Ind.,
759 F.3d 639 (7th Cir. 2014) 4

Cawthorn v. Amalfi,
35 F.4th 245 (4th Cir. 2022) 2

Democracy N.C. v. N.C. State Bd. of Elections,
No. 1:20CV457, 2020 WL 6589359 (M.D.N.C. June 30, 2020) 2

Kopitke v. Bell,
141 S. Ct. 1388 (2021).....3

Smith v. Dairymen, Inc.,
790 F.2d 1107 (4th Cir. 1986) 3

Va. House of Delegates v. Behune-Hill,
— U.S. —, 139 S. Ct. 1945 (2019).....2, 3

Other Authorities

Fed. R. App. P. 29 7

Fed. R. App. P. 32 7

The National Republican Senatorial Committee ("NRSC"), *amicus curiae* in the above-styled action, by and through its representatives, respectfully submits this brief in support of Plaintiff-Appellees' Response in Opposition to Appellants' (the "Intervenors") Emergency Motion for Stay Pending Appeal. Doc. 26.

The NRSC submits this *amicus curiae* brief to introduce Fourth Circuit precedent that establishes that appellants, as Intervenors, lack standing to seek reversal of an injunction entered against a non-appealing party. As the North Carolina Board of Elections and its members and staff (the "Board Defendants") officially state in their Response to the Motion (Doc. 25), the Board Defendants are not joining the Intervenors' appeal of the district court's injunction. Because the Board Defendants have stated their intention to abide by the injunction, which only expressly binds the Board Defendants, the NRSC presents additional Fourth Circuit law showing that Appellants are not proper parties to assert their Motion to Stay.

IDENTITY OF AMICUS

The NRSC is a national organization devoted to aiding Republican candidates in their campaigns for the U.S. Senate, providing thorough support and assistance to current and prospective Republican candidates in areas such as budget planning, election law compliance, fundraising, communications tools and messaging, and research and strategy. As such, the NRSC is heavily vested in ensuring that Republican senatorial candidates, such as Tedd Budd in North Carolina, enjoy a fair

electoral environment in accord with state election laws and the United States Constitution. As explained in the NRSC's motion for leave to file this amicus brief, that interest is directly implicated by this case. On the basis of that interest, the Eastern District of North Carolina permitted the NRSC to participate in the proceedings below as *amicus curiae*. *See* Doc. 4 at A216; *see also Democracy N.C. v. N.C. State Bd. of Elections,* No. 1:20CV457, 2020 WL 6589359, at *2 (M.D.N.C. June 30, 2020) (allowing NRSC to participate as *amicus curiae* in matter involving election integrity). In its motion for leave to file this amicus brief, the NRSC similarly requests that this Court allow it to participate as *amicus curiae*.

No party or party's counsel contributed to the drafting of this brief or funded the preparation or submission of this brief. No person other than *amicus curiae* funded the preparation or submission of this brief.

ARGUMENT[1]

The Intervenors lack standing to appeal an injunction that, by its terms, only applies to the Board Defendants, none of whom have joined this appeal. A party invoking a Court's appellate jurisdiction must demonstrate standing to appeal. *Cawthorn v. Amalfi*, 35 F.4th 245, 251 (4th Cir. 2022) (citing *Va. House of Delegates v. Behune-Hill*, — U.S. —, 139 S. Ct. 1945, 1950 (2019)). Standing requires a "(1)

[1] The NRSC agrees with Plaintiff-Appellees' Response in Opposition to Appellant's Emergency Motion for Stay Pending Appeal in all respects, but this *amicus* brief focuses only on authorities supporting Plaintiff-Appellees' standing arguments.

a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Bethune-Hill*, 139 S. Ct. at 1950. Standing is a jurisdictional requirement, and, without it, the Court must dismiss the appeal. *See id.* at 1950–51.

Intervenors cannot satisfy the third element of standing – that the injury is likely to be redressed by a favorable decision. The Fourth Circuit has established that it cannot review an injunction when the party to be enjoined did not appeal. *See K.C. ex rel. Africa H. v. Shipman,* 716 F.3d 107, 116-17 (4th Cir. 2013) *cited favorably in Buscemi v. Bell*, 964 F.3d 252, 259 (4th Cir. 2020) *cert. denied sub nom. Kopitke v. Bell*, 141 S. Ct. 1388 (2021). "It is basic appellate practice that a judgment will not be altered on appeal in favor of a party who did not appeal—a rule that applies even if the interests of the party not appealing are aligned with those of the appellant." *Shipman*, 716 F.3d at 116–17 (4th Cir. 2013) (cleaned up) (quoting *Smith v. Dairymen, Inc.*, 790 F.2d 1107, 1109 (4th Cir. 1986)). Indeed, in *Shipman*, this Court determined that it was "*powerless*" to reverse a preliminary injunction that applied to a party not participating in the appeal. *Id.* at 117 (emphasis added). In other words, an appeal by one party "c[an] in no way affect" the binding nature of an injunction on a non-appealing party, because "the [other party]'s choice not to appeal means that the injunction remains binding on it." *Id.* at 116; *accord id.* at 117 ("Indeed where codefendants are held liable below, and one appeals and one does

not, if the district court's order is reversed as to the appealing party, the party not appealing remans liable, despite the fact that the liability of each depends upon the same legal principles" (citation omitted; cleaned up)). This Court reasoned that "offering a non-appealing party the automatic benefit of any appellate decision won without its participation" would create both "an intractable free-rider problem" and "endless follow-on litigation by non-appealing parties to determine whether their interests are closely enough aligned with those of the appealing party to warrant the benefit of the appellate judgment." *Id.* at 117. Because practical redress for the appellant in *Shipman* required reversing an injunction with respect to a non-appealing party, this Court determined that the appellant could not show the redressability requirement of standing.[2] The same is true here, where any redress the Intervenors may hope to obtain through this appeal depends on reversing the injunction that only binds the non-appealing Board Defendants.

[2] The Seventh Circuit, in a case citing *Shipman*, agreed that this was an independent basis for denial of standing. *See Cabral v. City of Evansville, Ind.*, 759 F.3d 639 (7th Cir. 2014). In *Cabral*, the Court was considering an appeal from a preliminary injunction that prohibited a city form issuing a permit to a church to erect a public religious display. *Id.* at 741. As is the case here, only the city was bound by the injunction, but the church, which had intervened at the trial level, appealed the judgment. The Seventh Circuit dismissed the appeal for lack of standing, reasoning that the intervening church could not show redressability where the only party "expressly bound by the injunction" did not join in the appeal. *Id.* at 643 ("The critical question is this: when a district judge enters an order creating obligations only for Defendant A, may the court of appeals alter the judgment on appeal by Defendant B when obligations imposed on A indirectly affect B? . . . We cannot here . . . .").

CONCLUSION

For these reasons, in addition to the arguments presented by Appellees, the Court should deny the Intervenors' Motion and dismiss the appeal.

Dated: August 10, 2022

Respectfully submitted,

/s/ C. Bailey King Jr.
C. Bailey King Jr., N.C. Bar No. 34043
BRADLEY ARANT BOULT CUMMINGS LLP
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone: (704) 338-6027
Facsimile: (704) 332-8858
bking@bradley.com

/s/ Thomas Lee Oliver III
Thomas Lee Oliver III, Ala. Bar No. 8256-W15L
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2119
Telephone: (205) 521-8000
Facsimile: (205) 488-6041
toliver@bradley.com

Attorneys for Proposed Amicus Curiae National Republican Senatorial Committee

CERTIFICATE OF SERVICE

I certify that on this 10th day of August 2022, I caused the foregoing document to be filed and served on all counsel of record by operation of this Court's CM/ECF system.

/s/ C. Bailey King Jr.

C. Bailey King Jr., N.C. Bar No. 34043
BRADLEY ARANT BOULT CUMMINGS LLP
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone: (704) 338-6027
Facsimile: (704) 332-8858
bking@bradley.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 29 and 32 because the brief is typed in 14 point font and contains 1117 words.

/s/ C. Bailey King Jr.

C. Bailey King Jr., N.C. Bar No. 34043
BRADLEY ARANT BOULT CUMMINGS LLP
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone: (704) 338-6027
Facsimile: (704) 332-8858
bking@bradley.com