

No. 22-1844

**IN THE 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,

and

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State
Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of
the North Carolina State Board of Elections; JEFF CARMON, III, in his official
capacity as Member of the North Carolina State Board of Elections; STACY
EGGERS, IV, in his official capacity as Member of the North Carolina State Board
of Elections; TOMMY TUCKER, in his official capacity as Member of the North
Carolina State Board of Elections,
Defendants.

On Appeal from the United States District Court for the
Middle District of North Carolina, No.1:22-cv-00568-CCE-JLW

**PLAINTIFFS-APPELLANTS’ EMERGENCY MOTION FOR
ADMINISTRATIVE INJUNCTION AND MOTION TO EXPEDITE**

Defendant-Appellee, the District Attorney for Wake County, NC (“District
Attorney”), will soon present testimony to a grand jury to determine whether to
initiate criminal proceedings against individuals associated with the Attorney

General of North Carolina for alleged violations of a ninety-one-year-old North Carolina statute that purports to criminalize campaign speech. Plaintiffs-Appellants have moved in this Court for an injunction pending appeal, and they file this Emergency Motion to preserve the status quo while the Court considers that pending Motion for Injunction Pending Appeal.

Because grand jury proceedings are imminent, Plaintiffs request that the Court grant the relief requested herein on or before Friday, August 19, 2022.

1. The challenged criminal libel statute makes it a crime “[f]or any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.” N.C. Gen. Stat. § 163-274(a)(9).

2. In 2020, Josh Stein and Jim O’Neill ran for Attorney General. *Grimmett v. Circosta*, No. 1:22-CV-568, 2022 WL 3212325, at *1 (M.D.N.C. Aug. 9, 2022). The Stein Campaign ran an advertisement in which one of the Plaintiffs stated, “[a]s a survivor of sexual assault that means a lot to me and when I learned that Jim O’Neill left 1,500 rape kits on a shelf.” *Id.*

3. On July 21, 2022, and shortly after learning that grand jury proceedings were looming, Plaintiffs filed this lawsuit and sought a temporary restraining order prohibiting enforcement of § 163-274(a)(9). *Id.* at *2.

4. After notice and hearing, the district court “on July 25, 2022, issued a temporary restraining order, holding, *inter alia*, that the plaintiffs showed a likelihood of success on the merits of their claim that § 163-274(a)(9) facially violated the First Amendment.” *Id.*

5. On August 9, 2022, however, the district court denied Plaintiffs’ motion for a preliminary injunction and vacated the restraining order. Expressing “no opinion as to whether application of § 163-274(a)(9) to the arguably metaphorical speech here would be unconstitutional,” *id.* at *8 n.8, the district court concluded that the District Attorney could move forward with the prosecution because “[f]alse malicious defamatory speech can be ‘used as an effective political tool to unseat the public servant or even topple an administration’ and can lead to volatile, unstable, and even violent results ‘at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected,’” *id.* at *8 (quoting *Garrison v. State of La.*, 379 U.S. 64, 75 (1964)).

6. The next day, August 10, Plaintiffs filed in the district court an emergency motion for injunction pending appeal.

7. On August 15, the district court denied that emergency motion. In so doing, the district court acknowledged that Plaintiffs “have a good argument,” that there “is case law tending to support the plaintiffs’ arguments that [the law] on its face violates the First Amendment,” and that “two circuit courts and one state Supreme Court have held similar statutes violate the First Amendment.” Dist. Ct. ECF No. 35, at 3 (attached).

8. On August 17, Plaintiffs filed in this Court their Motion for Injunction Pending Appeal.

9. Plaintiffs now move under Federal Rule of Appellate Procedure 8(a)(1)(C) for an administrative injunction barring the District Attorney from taking any step to enforce N.C. Gen. Stat. § 163-274(a)(9) while this Court decides whether to grant Plaintiffs’ pending Motion for Injunction Pending Appeal. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

10. The issues in this appeal are important – they implicate ongoing restrictions on core political speech – and, as shown by the district court’s orders granting a restraining order but then denying an injunction, complex. The Court should act now to ensure that these issues are preserved for appellate review. As the Supreme Court held in *Nken v. Holder*, 556 U.S. 418 (2009), “[i]t takes time to decide a case on appeal,” and “if a court takes the time it needs, the court’s decision

may in some cases come too late for the party seeking review,” *id.* at 421. This Court should take the time it needs to receive adversarial briefing on Plaintiffs’ Motion for Injunction Pending Appeal and to decide the important issues presented therein. But Plaintiffs should not in the meantime remain under threat of an unconstitutional, speech-based prosecution.

11. An administrative injunction is appropriate for all the reasons given in Plaintiffs’ Motion for Injunction Pending Appeal. In addition, a short, temporary injunction intended to preserve the status quo will inflict minimal, if any, potential injury on the District Attorney.

12. Plaintiffs also request that the Court expedite this appeal. As Plaintiffs explain in their Motion for Injunction Pending Appeal, the District Attorney has claimed that the applicable statute of limitations will expire in October 2022. And the threat of future criminal prosecutions for campaign speech will continue to chill public debate in North Carolina in the 2024 elections until these issues are resolved.

CONCLUSION

Plaintiffs request the Court to (1) issue an administrative injunction barring the District Attorney from taking any step to enforce N.C. Gen. Stat. § 163-274(a)(9) until Plaintiffs’ pending Motion for Injunction Pending Appeal is resolved and (2) expedite this appeal.

Dated: August 17, 2022

Respectfully submitted,

/s/ Pressly M. Millen

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LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), counsel for all parties have been informed of the intended filing of this Emergency Motion. Defendant has not consented to the relief requested herein and Plaintiffs expect that Defendant will seek to respond.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 907 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman.

Dated: August 17, 2022

/s/ Pressly M. Millen

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system on August 17, 2022. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 17, 2022

/s/ Pressly M. Millen

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