

No. 23-2317

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,
Plaintiffs-Appellants,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY “FOUR” EGGERS IV in his official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O’DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants-Appellees.

From the United States District Court for
the Eastern District of North Carolina
The Honorable James E. Dever III (No. 4:23-cv-193-D-RN)

**NOTICE OF WITHDRAWAL OF EMERGENCY
MOTION FOR LIMITED INJUNCTION PENDING APPEAL**

Edwin M. Speas, Jr.
POYNER SPRUILL LLP
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

Counsel for Plaintiffs-Appellants

R. Stanton Jones
Elisabeth S. Theodore
Samuel I. Ferenc
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001-3743
(202) 942-6000
stanton.jones@arnoldporter.com

Plaintiffs hereby withdraw their Motion for Limited Injunction Pending Appeal, filed December 29, 2023, stating as follows:

1. Plaintiffs filed the motion for limited injunction on December 29 in light of the State Board's December 22 submission in the district court, which indicated that, absent injunctive relief by January 9, 2024, UOCAVA and absentee ballots would be mailed to voters in the challenged Senate districts on January 19 listing primary candidates. Plaintiffs also separately filed a motion to expedite their appeal.

2. On December 29, this Court ordered parties to respond to Plaintiffs' motions by January 3.

3. Per the attached emails, the State Board's counsel advised all parties today that, "[i]n reviewing whether we needed to respond to Plaintiffs' motion to the Fourth Circuit, we learned important information that we thought we should share." In particular, counsel advised that they learned that there will not be any primaries in the two challenged districts because no more than one candidate from each party filed to run in each district. *See also* N.C. State Board of Elections, 2024 Primary List by Candidate (updated Jan. 2, 2024 10:01 p.m.).¹

4. Counsel further advised today that, because there will be no primaries

¹ https://s3.amazonaws.com/dl.ncsbe.gov/Elections/2024/CandidateFiling/2024_Primary_Election_Candidate_PDFs/2024_primary_candidate_list_by_contest.pdf

in those two districts, the ballots mailed to voters in those districts starting January 19 will not identify any Senate candidates.

5. In light of this new information, the State Board's counsel represented—and Plaintiffs agree—that the requested limited injunction is moot. Plaintiffs sought only to enjoin preparations for primary elections in the two challenged districts, including to stop the mailing of ballots on January 19 listing primary candidates for those districts. That is not necessary now.

6. While an injunction pending appeal relating to the January 19 ballots is no longer needed at this time, Plaintiffs are not withdrawing their separate motion to expedite briefing and decision on this appeal. That motion remains live and the relief requested remains urgent.

7. As explained in that motion, a decision of this Court by February 2 would enable an orderly remedial process and the adoption of two remedial districts in time to hold primaries in those districts (if necessary) on May 14, as the State Board recommended in its December 22 submission below. Per the attached emails, the State Board's counsel confirmed today that all of the dates and deadlines referenced in Plaintiffs' motion to expedite are accurate and are not affected by the absence of primaries in enacted SD1 and SD2.

8. After reviewing any responses to the motion to expedite the appeal, Plaintiffs intend to reply in further support of their motion by January 5 at 12 p.m.

as ordered by the Court.

Dated: January 3, 2024

Edwin M. Speas, Jr.
POYNER SPRUILL LLP
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

Respectfully submitted,

/s/ R. Stanton Jones
R. Stanton Jones
Elisabeth S. Theodore
Samuel I. Ferenc
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001-3743
(202) 942-6000
stanton.jones@arnoldporter.com

Counsel for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2024, the foregoing was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

/s/ R. Stanton Jones

R. Stanton Jones

From: Theodore, Elisabeth
Sent: Wednesday, January 3, 2024 4:57 PM
To: Steed, Terence; Eddie Speas; Jones, Stanton; Ferenc, Sam; phil.strach@nelsonmullins.com; Tom Farr; Alyssa Riggins (alyssa.riggins@nelsonmullins.com); Cassie Holt; Alex Bradley; Lewis, Patrick T.; Raile, Richard; McKnight, Katherine L.
Cc: Babb, Mary Carla (Hollis)
Subject: RE: Pierce v. NCSBE; Uncontested Primaries for SD1 and SD2;

Terence and all:

In light of Terence's emails indicating that the January 19 ballots will not include candidates for Senate Districts 1 and 2, Plaintiffs intend to file a notice with the Fourth Circuit withdrawing our request for an emergency injunction pending appeal prohibiting the State Board from sending out ballots on January 19 including candidates for those districts.

We are not withdrawing our emergency motion to expedite briefing and decision on the appeal, responses to which are also due today.

Best,
Elisabeth

From: Steed, Terence <Tsteed@ncdoj.gov>
Sent: Wednesday, January 3, 2024 3:35 PM
To: Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Eddie Speas <ESpeas@poynerspruill.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; phil.strach@nelsonmullins.com; Tom Farr <tom.farr@nelsonmullins.com>; Alyssa Riggins (alyssa.riggins@nelsonmullins.com) <alyssa.riggins@nelsonmullins.com>; Cassie Holt <cassie.holt@nelsonmullins.com>; Alex Bradley <alex.bradley@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; Raile, Richard <rraile@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>
Cc: Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>
Subject: RE: Pierce v. NCSBE; Uncontested Primaries for SD1 and SD2;

External E-mail

Elisabeth,

If you, or anyone else on this email, have any questions about elections or need clarification about our filings, please feel free to reach out. There is also a lot of information publicly available on the State Board's website, including candidate filing.

For cases like these, we always try to provide the information most relevant to the parties and the Court at the time of filing. As I am sure you can appreciate, it is very difficult to predict the path these cases will take. It ranges from a small change requiring a small amount of administrative work to a new map for the entire state. But nobody wants a 30 page filing explaining every possible fork in the road from the party taking no position on the merits, so we try to keep it concise.

Turning to your question, we previously reviewed your motion to expedite and did not identify any references to our filings or inferences made from our filings by Plaintiffs that would require a corrective response from us to the Fourth Circuit. If you have a more specific question about a specific date in your filings, I'm happy to provide a specific

response, but generally, the State Board said that if new maps are ordered, it would need those maps in time to complete candidate filing by March 15th in order to meet the May 14th second primary. How long it takes to draw new maps, approve them, and how long candidate filing will take are outside the control the State Board.

Can you tell us whether you will be withdrawing any of the filings pending with the Fourth Circuit?

Thanks,

Terence

From: Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>

Sent: Wednesday, January 03, 2024 1:52 PM

To: Steed, Terence <Tsteed@ncdoj.gov>; Eddie Speas <ESpeas@poynerspruill.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; phil.strach@nelsonmullins.com; Tom Farr <tom.farr@nelsonmullins.com>; Alyssa Riggins (alyssa.riggins@nelsonmullins.com) <alyssa.riggins@nelsonmullins.com>; Cassie Holt <cassie.holt@nelsonmullins.com>; Alex Bradley <alex.bradley@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; Raile, Richard <rRaile@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>

Cc: Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>

Subject: Re: Pierce v. NCSBE; Uncontested Primaries for SD1 and SD2;

Terence,

Thank you for this new information. We had understood from your December 22 submission to the district court that there would be primaries for the two districts at issue, and that primary candidates for those districts would be listed on the UOCAVA and absentee ballots being mailed to voters in those districts starting January 19. We now understand from your email that this was incorrect.

Can you confirm that the dates provided in your December 22 submission that we relied on in our motion to expedite remain correct with respect to when new districts would be needed to enable a new candidate filing period in advance of a potential May 14 primary for two remedial districts?

Best,
Elisabeth

From: Steed, Terence <Tsteed@ncdoj.gov>

Sent: Wednesday, January 3, 2024 12:35:49 PM

To: Eddie Speas <ESpeas@poynerspruill.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Theodore, Elisabeth <Elisabeth.Theodore@arnoldporter.com>; Ferenc, Sam <Sam.Ferenc@arnoldporter.com>; phil.strach@nelsonmullins.com <phil.strach@nelsonmullins.com>; Tom Farr <tom.farr@nelsonmullins.com>; Alyssa Riggins (alyssa.riggins@nelsonmullins.com) <alyssa.riggins@nelsonmullins.com>; Cassie Holt <cassie.holt@nelsonmullins.com>; Alex Bradley <alex.bradley@nelsonmullins.com>; Lewis, Patrick T. <plewis@bakerlaw.com>; Raile, Richard <rRaile@bakerlaw.com>; McKnight, Katherine L. <kmcknight@bakerlaw.com>

Cc: Babb, Mary Carla (Hollis) <MCBabb@ncdoj.gov>

Subject: Pierce v. NCSBE; Uncontested Primaries for SD1 and SD2;

External E-mail

Counselors,

In reviewing whether we needed to respond to Plaintiffs' motion to the Fourth Circuit, we learned important information that we thought we should share.

Plaintiffs, please correct me if I have this part wrong. It is my understanding that Plaintiffs' proposed emergency injunctive relief requested from the Fourth Circuit is for an order enjoining the primary contests in Senate District 1 and Senate District 2 by January 9th in order to allow the State Board enough time to remove those contests from the ballots to be distributed on January 19, 2024.

Assuming I have that correct, the relief requested appears to be moot. There are no contested primaries in SD1 or SD2, and as a result, neither will appear on the March primary ballot. Senate District 1 has one Democratic candidate and one Republican candidate. Senate District 2 has one Democratic candidate, one Republican candidate, and one Libertarian candidate.

When there is only one candidate in a party primary contest, the contest does not appear on the ballot, and the sole candidate becomes the general election nominee by default. G.S. 163-110. Thus, if the Fourth Circuit were to issue an order enjoining these contests for the primary, there is no contest to enjoin or remove from the affected ballots in the affected counties.

Even though not requested by Plaintiffs, and not intended by me to reflect what relief, if any, might come out of this action, the same is true for most adjacent Senate Districts, but not all see SD3 below.

1. Senate District 3 – One Dem ONLY – No contest;
2. Senate District 3 – Two Republican candidates - Contested
3. Senate District 5 – One Dem and One Rep – No contest;
4. Senate District 6 – One Dem and One Rep – No contest;
5. Senate District 9 – One Dem and One Rep – No contest;
6. Senate District 11 – One Dem and One Rep – No contest;

The candidate filing information can be confirmed on the State Board's website: <https://www.ncsbe.gov/results-data/candidate-lists>.

Due to this information, we are now preparing a filing to relay this information to the Court today. If Plaintiffs would like to spare us that additional work by withdrawing the appeal or at least the emergency motions, we would appreciate it. Again, assuming I am reading your requested relief correctly.

Feel free to contact me if you have any questions.

Thanks,



Terence Steed
Special Deputy Attorney General
North Carolina Department of Justice
Special Litigation Section
Phone: (919) 716-6567
tsteed@ncdoj.gov
114 W. Edenton St. Raleigh, NC 27603

Please note messages to or from this address may be public records.

immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:

<http://www.arnoldporter.com>