STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. _____

REBECCA ANNE EDWARDS,

Plaintiff,

v.

THE BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; KIM WESTBROOK STRACH, in her official capacity as Executive Director of the Bipartisan State Board of Elections and Ethics Enforcement; and THE STATE OF NORTH CAROLINA,

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

In 2017, the General Assembly converted elections for District Court judges from non-partisan to partisan elections, and then eliminated primaries for judicial elections in 2018. S.L. 2017-3, §§ 5, 14; S.L. 2017-214, § 4(a). Without primaries, the General Assembly specified that judicial candidates would be listed on the ballot with their registered party as of the date they filed to run for office. S.L. 2017-214, § 4(a).

Plaintiff Rebecca Edwards followed those rules. In May 2018, after years spent representing families and children in District Court in Wake County, she decided to run for a Wake County District Court judgeship that had just become vacant. (Compl. ¶¶ 22, 25, 31.) Before filing to run, and because judicial elections were now partisan, Ms. Edwards switched her registered party affiliation from Republican to Democrat to match her political views. On June 18, 2018, she filed to run for District Court judge.

More than five weeks after the filing period had closed, the General Assembly changed the rules of the election by passing Senate Bill 3. Overriding the Governor's veto, the General Assembly enacted Senate Bill 3 as Session Law 2018-130 on August 4, 2018. The law retroactively adds a 90-day requirement for a candidate's party affiliation to be listed on the ballot in judicial elections. S.L. 2018-130, § 1. If the law is applied to Ms. Edwards, she will have no party affiliation listed on a partisan ballot, denying her fundamental right to express her political beliefs. The ballot will provide the party or unaffiliated status of her four opponents. This distinction will cripple Ms. Edwards' chances in the November 6 election, making it highly unlikely that she will be able to win election despite her merits.

ARGUMENT

A temporary restraining order or a preliminary injunction is necessary to protect Ms. Edwards' rights during the course of this litigation. Preliminary relief should be issued by the court: "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 423, 571 S.E.2d 8, 11 (2002) (quoting *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983)); *see also* N.C. Rule Civ. P 65(b).

All the requirements for a preliminary injunction are met here. Ms. Edwards is likely to succeed on the merits of both of her constitutional claims. Senate Bill 3 violates Ms. Edwards' due process rights under Article I, Section 19 of the North Carolina Constitution because it retroactively changes the rules for candidates in the middle of an election. Courts have uniformly rejected such attempts to change election rules mid-stream.

Senate Bill 3 also violates Ms. Edwards' rights to association and equal protection because it discriminatorily prevents her party affiliation from being listed on the ballot, singling her out in a field of candidates who will be identified by party affiliation. The failure to list Ms. Edwards' party affiliation imposes a severe burden on her as it was imposed retroactively and cripples her chances of prevailing in a partisan race. No legitimate state interest justifies this differential treatment.

If preliminary relief is not issued, Ms. Edwards will suffer irreparable harm before the merits of her claims can be decided. The current deadline for candidates to withdraw from races is August 8, 2018. The ballot-printing process is scheduled to commence on or about August 9, 2018. Once ballots are printed, Ms. Edwards' constitutional injury will be irreparable. Given the severity of Ms. Edwards' constitutional injury and the complete absence of legitimate countervailing interests, the balance of equities and the public interest in fair elections clearly favors issuance of a preliminary injunction.

This Court has the authority to issue a preliminary injunction to protect Ms. Edwards' rights. This action is an as-applied challenge to the constitutionality of Senate Bill 3. Ms. Edwards is not making a facial challenge because the law has no effect on certain candidates' constitutional rights, such as candidates who did not change their registration in the 90-day period before an election, and candidates running without opposition. And even if this case did present a facial challenge, N.C. Gen. Stat. § 1-267.1 still permits this Court to issue preliminary relief to maintain the status quo until a three-judge panel can resolve the merits.

Because Ms. Edwards is likely to prevail on the merits, this Court should issue a preliminary injunction to ensure she is not irreparably denied her rights under the North Carolina Constitution.

I. Ms. Edwards Is Likely to Prevail on the Merits.

A. The Retroactive Application of Senate Bill 3 to Ms. Edwards Violates Her Due Process Rights.

Senate Bill 3 violates Ms. Edwards' due process rights under Article I, Section 19 of the North Carolina Constitution because it retroactively changes the rules for candidates in the middle of an election. As courts have uniformly held for decades, election rules cannot be changed retroactively.

"The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004). Under the North Carolina Constitution, retroactive legislation violates due process when it "impinge[s] 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). Established rules for elections create rights that are "immune" from retroactive legislation.

"[T]here can be no dispute that the very integrity of the [election] process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Brown v. O'Brien*, 469 F.2d 563, 570 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972) (finding that the National Democratic Party's decision to exclude delegates selected in compliance with pre-existing rules violated due process). Due process is violated when a change made to "the election process itself reaches the point of patent and fundamental unfairness[.]" *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995). Such unfairness undeniably lies where a decisionmaker "changed the rules of the game midstream" after candidates and voters have already relied on pre-existing election rules. *Charfauros v. Board of Elections*, 249 F.3d 941,

945 (9th Cir. 2001) (finding that an election authority violated the Constitution by changing rules during election by implementing a new procedure for hearing and adjudicating pre-election voter eligibility challenges).

It is rare that a government would brazenly attempt to change the rules governing an ongoing election. But when government actors attempt such changes, courts consistently reject their efforts as violating due process. In *Libertarian Party of Ohio v. Husted*, No. 2:13-CV-953, 2014 WL 11515569 (S.D. Ohio Jan. 7, 2014), the State of Ohio attempted to change the requirements for a candidate to gain access to a primary ballot after the State had "indicated Plaintiffs could qualify for the primary ballot, Plaintiffs[] expend[ed] significant time and resources to qualify, and Plaintiffs [had a] legitimate expectation that, having complied with the process that was (and remains) in place, they would have the opportunity to reap the political benefits of participating in the primary." *Id.* at *7. The court recognized that changing the rules after candidates had relied on their earlier pronouncements amounted to "the Ohio Legislature mov[ing] the proverbial goalpost in the midst of the game," in a way that would be "patently unfair" and violated due process. *Id.*

In *Roe*, an Alabama state court changed the standard for counting absentee ballots after a closely contested election had been held. *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). The Eleventh Circuit held that this change amounted to a substantive due process violation. *Id.* at 581. The court emphasized the unfairness of changing election rules to those who had relied on them: "[H]ad the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and supporters of [the candidates] who did not vote would have voted absentee." *Id.* at 582.

In *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970), an election board adopted strict standards for evaluating signatures on ballot-access petitions only after candidates had already secured their petitions under pre-existing standards. The Seventh Circuit found that the board's changes violated due process, ruling that an election board could not apply a "new . . . rule to nullify previously acceptable signatures without prior notice." *Id.* It announced that such changes in policy could not be made "without announcing in advance its change in policy," concluding that this was "especially true where, as here, fundamental, constitutionally protected liberties are adversely affected, and those interested require certain knowledge of what is expected of them by the state." *Id.*

In *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978), a municipality distributed absentee ballots to a group of voters, and then retroactively invalidated those ballots as having been improperly authorized. The First Circuit found that these actions reached "the point of patent and fundamental unfairness[.]" *Id.* at 1076. The court therefore found that the retroactive change in policy "violated the voters' rights" to due process of law. *Id.* at 1070; *see also Griffin v. Burns*, 431 F. Supp. 1361, 1366 (D.R.I. 1977), *aff'd*, 570 F.2d 1065 (1st Cir. 1978) (in the same dispute, finding a due process violation because plaintiffs "attempted in good faith to exercise" their right to vote and "through no fault of their own, and in reliance on the representations of state officials . . . somehow 'lost' that right.")

In *Williams v. Sclafani*, 444 F. Supp. 906, 914 (S.D.N.Y.), *aff'd* 580 F.2d 1046 (2d Cir. 1978), a candidate "justifiably relied on the advice of the City Board of Elections and as a result was affirmatively misled into following an unauthorized method of signature gathering" to gain ballot access. The candidate "was not given notice of the appropriate procedure until after the

petition-gathering period had ended." *Id.* at 911. The court therefore found that the candidate's due process rights had been violated. *Id.* at 914.

Here, the North Carolina General Assembly established the system for 2018 judicial elections in 2017. Judicial elections were to be partisan elections without any primaries. Under this system, all candidates would appear on the general election ballot along with the identity of their registered political party at the time they filed for office.

After deciding to run for office and leaving her private practice, Ms. Edwards followed all of the rules set out by the General Assembly. She updated her partisan affiliation to reflect her political beliefs and filed for office with the statutory assurance that her "verified party designation . . . shall be included on the ballot." S.L. 2017-214, § 4(a). Nearly two months later, the General Assembly decided to change the rules, and stripped her of the right to have her party designation included on the ballot. It thereby crippled her ability to compete in the election, regardless of her qualifications and the vigor of her campaign. This retroactive change to the election rules is fundamentally unfair, denied Ms. Edwards her rights without due process of law, and must be enjoined.

B. Senate Bill 3 Violates Ms. Edwards' Rights to Association, Speech, and Equal Protection.

"[B]allot access rights, though distinct from voting rights, are central to the administration of our democracy." *Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 205 (2011); *see also Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937) ("A free ballot . . . must be held inviolable to preserve our democracy."). Statutes affecting ballot access "implicate individual associational rights rooted in the free speech and

assembly clauses of the state constitution." *Libertarian Party*, 211 N.C. at 49, 707 S.E.2d at 204–05 (citing N.C. Const. art. 1, §§ 12, 14.)

To determine if a limitation on ballot access runs afoul of the State Constitution, the North Carolina Supreme Court has adopted the analytical approach set out "in *Timmons v. Twin Cities Area New Party* and its progeny[.]" *Libertarian Party*, 365 N.C. 41, 47, 707 S.E.2d 199, 203 (2011) (citing, *inter alia, Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)). This approach requires courts to apply strict scrutiny to any law that "severely burden[s]" an associational right. *Id.* at 47, 707 S.E.2d at 203.

To pass strict scrutiny, the State has the burden to prove that the law is "narrowly tailored" to "advance a compelling state interest." *Id.* If a law does not severely burden an associational right, the State interests must be "sufficiently weighty to justify the limitation imposed on the party's rights." *Id.* at 47, 707 S.E.2d at 203-204.

In this case, Ms. Edwards has a substantial likelihood of success on the merits because (1) Senate Bill 3 burdens her associational rights; (2) the burden is severe; (3) the law does not advance legitimate state interest, let alone a compelling interest; (4) even if it did advance a compelling state interest, it is not narrowly tailored to accomplish that interest; and (5) the law does not advance an interest sufficient to survive even the lower level of scrutiny.

1. Senate Bill 3 Burdens Ms. Edwards' Rights.

Candidates for public office have the constitutional right to "associate and to form political parties[.]" *Libertarian Party*, 365 N.C. at 49, 707 S.E.2d at 204 (2011) (quoting *Twin Cities*, 520 U.S. at 357).

North Carolina is not required to include candidates' partisan affiliations on ballots. "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." *Rosen v. Brown*, 970 F.2d 169, 175 (6th Cir. 1992). However, once North Carolina establishes that candidates for certain races will appear on the ballot with party identifiers 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.*

North Carolina therefore impairs candidates' associational rights when it allows some, but not all, candidates in an election to appear on the ballot with partisan identifiers. "[I]f a law gives *some* candidates for [a specific race] a party identifier, *but not other* candidates for the [same race], it would impose a burden on the associational rights of the candidates left unidentified[.]" *Marcellus v. Virginia State Bd. of Elections*, 849 F.3d 169, 177 (4th Cir. 2017) (emphasis in original); *see also Rosen*, 970 F.2d at 175 (holding that a statute permitting ballots to display partisan affiliation for only a subset of candidates infringed associational rights of the excluded candidates).

Ms. Edwards has the constitutional right to identify with her political party of choice. Senate Bill 3 created a system in which Ms. Edwards' opponents will appear on the ballot with information broadcasting their party affiliation, but in which Ms. Edwards will appear with no such information. This plainly burdens Ms. Edwards' right to association, speech, and equal protection. *See Libertarian Party*, 365 N.C. at 49, 707 S.E.2d at 204-05; *Rosen*, 970 F.2d at 175; *Marcellus*, 849 F.3d at 177.

2. The Burden Imposed on Plaintiff's Rights Is Severe.

The burden on Ms. Edwards' rights is severe. "Burdens are severe if they go beyond the merely inconvenient" or are "virtually impossible" to satisfy. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008). It is literally impossible for Ms. Edwards to satisfy what the State now requires of candidates who wish to have their partisan affiliation appear on the ballot. The requirements of Senate Bill 3 did not go into effect until August 4, 2018, more than five weeks after the candidate filing period closed, and more than four months after Ms. Edwards would have had to correct her party registration if she wished to appear on the ballot with accurate information regarding her partisan affiliation.

Absent a time machine, Ms. Edwards will have had no opportunity to comply with the new requirements. *Compare Libertarian Party*, 365 N.C. at 50, 707 S.E.2d at 205 (finding that a burden was not severe when a minority political party had "over three and one-half years" to reach a "readily achievable" ballot access requirement). And given the importance of party identifiers in contested partisan elections, Senate Bill 3 will seriously diminish Ms. Edwards' odds of winning the election. (See Bartlett Affidavit, ¶¶ 6-9); *Rosen*, 970 F.2d at 176 (recognizing that it was "virtually impossible" for a candidate lacking any partisanship information to prevail when the ballot showed their competitors as being affiliated with the Democratic and Republican parties). Because it has never been possible for Ms. Edwards to satisfy Senate Bill 3's requirements and because it seriously impairs her ability to compete in the election, its burden on her associational rights is severe.

3. SB3 Does Not Advance A Legitimate Government Interest, Let Alone a Compelling Government Interest.

The State cannot meet its burden to prove that Senate Bill 3 advances a compelling government interest. North Carolina has an interest in regulating elections "to reduce election- and campaign-related disorder." *Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204 (2011) (citing *Timmons*, 520 U.S. at 358.) But retroactively changing election rules shortly before an election does nothing but create disorder.

There is no clearer example of the chaos created by Senate Bill 3 than Ms. Edwards herself – a qualified candidate with a history of service in Wake County District Court who filed for office after being recruited by members of the local bar. She complied with all filing requirements and has mounted an aggressive campaign. But because the General Assembly decided to rewrite the rulebook at the eleventh hour, Ms. Edwards will be left without her former job, and without any real possibility of winning the campaign.

In addition to the devastating personal consequences for Ms. Edwards, Senate Bill 3 undermines the State's ability to function as an open, democratic society. Qualified candidates will be far less likely to make the personal and professional sacrifices necessary to enter public service if the General Assembly can change election rules on a whim, effectively defeating certain candidates before an election even occurs. By infecting the electoral process with uncertainty and legislative game-playing, Senate Bill 3 makes it less likely that qualified candidates will decide that public service is worth the risk.

The preamble of Senate Bill 3 claims it is designed to "reduce the opportunity for voter confusion." This purported rationale is absurd. The General Assembly created the system under which Ms. Edwards filed for office in late 2017. It did so over strenuous objections that it would lead to voter confusion. *N.C. Democratic Party v. Berger*, Plaintiffs' Trial Brief at 6, No. 1:17-

cv-1113, ECF No. 90 (M.D.N.C. May 25, 2018). General Assembly leaders made public filings emphasizing that they knew the system created "the possibility of a candidate changing party affiliation on the eve of filing[.]" *N.C. Democratic Party v. Berger*, Defendants' Joint Brief in Support of Mot. for Summ. J. at 17, No. 1:17-cv-1113, ECF No. 82 (M.D.N.C. June 1, 2018).

The General Assembly then addressed that concern in June 2018 by enacting Senate Bill 584. That law mandates inclusion of a prominent disclaimer on ballots immediately before the section listing judicial races: "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 to run for office." S.L. 2018-13 Part II Section 2.(c).

The United States Supreme Court has recognized that such disclaimers are sufficient to address any potential voter confusion regarding what, exactly, is signified by a ballot party identifier. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 456 (2008) (recognizing that accurate disclaimers can "eliminate the possibility of widespread voter confusion"). Legislative leaders themselves recognized that the disclaimer they added to the bill "limit[ed] the possibility of voter confusion[.]" *N.C. Democratic Party v. Berger*, Defendants' Joint Reply in Support of Mot. for Summ. J. at 8 n.4, No. 1:17-cv-1113, ECF No. 98 (M.D.N.C. June 1, 2018). Because the General Assembly had already resolved concerns regarding "voter confusion" by including the disclaimer, it did not have a compelling interest in adopting a different approach to address the same purported problem several weeks later.

The actual intent behind Senate Bill 3 is plain. The General Assembly set the rules for the 2018 Supreme Court election in the hopes they would favor its preferred candidate – Republican incumbent Barbara Jackson. But after the filing period closed, it realized its plan had not worked. It became concerned that another Republican might receive support they preferred

Justice Jackson to receive. So it changed the rules again to strip Chris Anglin of his right to have his partisan affiliation listed on the ballot. *See* Travis Fain, *Bill Stripping GOP designation from Supreme Court candidate heads to Cooper*, WRAL.com (July 24, 2018), https://www.wral.com/bill-stripping-gop-designation-from-supreme-court-candidate-heads-to-cooper/17718505/ (including statements from floor debate from Republican Senator Jerry Tillman that Anglin was trying to "rig the race", and from Republican Senator Ralph Hise that Anglin was trying to perpetuate "a fraud on the people of the state of North Carolina.").

Ms. Edwards was simply collateral damage in the General Assembly's last-minute attempt to tilt the scales of an election. This is unconstitutional corruption at the highest level, more resembling the machinations of a sham democracy than a constitutional republic. Senate Bill 3 does not address even a legitimate government interest – let alone a compelling interest.

4. Senate Bill 3 Is Not Narrowly Tailored.

Even if the State is somehow able to establish that Senate Bill 3 advances a compelling interest, it will not be able to show that the law is narrowly tailored. For the purposes of strict scrutiny, a law is "narrowly tailored" when it "embodies the least restrictive means of advancing the State's compelling interest[.]" *State v. Bishop*, 368 N.C. 869, 878, 787 S.E.2d 814, 820 (2016). Senate Bill 3 is not the least restrictive means of advancing the State's purported interest in avoiding "voter confusion" because there were plainly less restrictive alternatives.

The General Assembly could have simply maintained the electoral rules as they existed in June 2018. Those rules had already been amended by Senate Bill 584 to address any concerns regarding voter confusion through the inclusion of a disclaimer precisely explaining the meaning of candidates' partisan labels.

The General Assembly could have imposed a comparable 90-day affiliation requirement in 2017 or early 2018, ensuring candidates' associational rights were not severely restricted by giving them a real opportunity to comply with whatever requirements it elected to impose.

Or the General Assembly could have imposed the requirement in July 2018, but only done so prospectively to ensure that that the association rights of 2018 candidates would not be burdened. *See, e.g.*, *Bailey v. State*, 348 N.C. 130, 152, 500 S.E.2d 54, 67 (1998) (recognizing that the "method chosen was not necessary to achieve the state interest asserted" in part because the statute could have only applied "prospectively").

Because the State chose none of these less restrictive alternatives, Senate Bill 3 fails the strict scrutiny test.

5. Senate Bill 3 is Unconstitutional Even if a Lower Level of Scrutiny Applies.

If a law does not severely burden an associational right, the State interests must be "sufficiently weighty to justify the limitation imposed on the party's rights." *Libertarian Party*, 365 N.C. at 47, 707 S.E.2d at 203-04. Here, the burden on Ms. Edwards' rights, if not severe, is at least highly significant. *See* Section I.B.2, *supra*. And the State had no legitimate interest for enacting Senate Bill 3. *See* Section I.B.3, *supra*. Senate Bill 3 therefore fails even if the court elects to apply a lower level of scrutiny. *See also Rosen*, 970 F.2d at 175-78 (declining to apply strict scrutiny but still holding that a restriction on ballot partisan identifiers was unconstitutional).

Because Senate Bill 3 severely burdens Ms. Edwards' rights to free speech, association, and equal protection, and does not advance any legitimate state interest, let alone a compelling one, Ms. Edwards is likely to prevail on her claim.

II. Ms. Edwards Will Suffer Immediate, Irreparable Harm If Preliminary Relief Is Not Granted.

Ms. Edwards requires preliminary relief because she will suffer immediate, irreparable harm if relief is not granted. N.C. R. Civ. P. 65. Candidates have until August 8, 2018, to withdraw from the election. Plaintiff believes the State intends to begin the process of printing ballots on or about August 9, 2018. If ballots are printed without Ms. Edwards' partisan identifier, the violation of her constitutional rights will likely be complete and irreversible.

Injury to freedoms of speech and association constitute *per se* irreparable harm. *See Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 569 (2007) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). This principle applies with special force here, where denying preliminary relief would irreparably injure not just Ms. Edwards, but the entire democratic process.

Running for office requires tremendous personal sacrifice. When deciding whether to enter public service, citizens must know that they will be competing on a level playing field. They must know that the State will not undermine their candidacies by changing electoral rules in the middle of a contest. And they must know that if the General Assembly is so brazen as to attempt to corrupt the electoral process, the judiciary will immediately intervene to protect their rights. Absent an assurance that the judiciary will protect the integrity of our elections, fewer qualified citizens may be willing to take the personal and professional risks required to run for office, to the detriment of us all.

Because disputes such as this one require immediate intervention and strike at the heart of our democratic norms, courts recognize that they require preliminary relief. *See, e.g.*,

Libertarian Party of Ohio v. Husted, No. 2:13-CV-953, 2014 WL 11515569, at *11 (S.D. Ohio Jan. 7, 2014) (issuing a preliminary injunction barring the retroactive application of a ballot access statute); *Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) (recognizing that the district court originally granted a preliminary injunction requiring that certain candidates be listed on the ballot with their partisan identifiers); *Griffin v. Burns*, 431 F. Supp. 1361, 1366 (D.R.I. 1977) (addressing a dispute in which a temporary restraining order had prevented a retroactive change in policy to influence an election).

If ballots are printed without Ms. Edwards' partisan identifier, a subsequent ruling in her favor will do nothing to remedy her constitutional injury, and it will do nothing to cure the damage done to our State's democratic foundations. Preliminary injunctive relief is therefore required.

III. This Court Has Authority to Issue Preliminary Relief Under Rule 65.

This Court has the authority to issue a preliminary injunction under Rule 65 to protect Ms. Edwards' rights. This action is an as-applied challenge to the constitutionality of Senate Bill 3. Transferring this case to a three-judge panel pursuant to Rule 42(b)(4) and N.C. Gen. Stat. § 1-267.1 is therefore inappropriate.

A challenge to a statute is facial when there is "no set of circumstances under which the act would be valid." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1988). "An as-applied challenge contests whether the statute can be constitutionally applied to a particular [party], even if the statute is otherwise generally enforceable. A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (internal citation omitted), *rev'd and remanded on other grounds*, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (U.S. 2017); *see also*

Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, __ N.C. __, 814 S.E.2d 43, 47 (2018) (considering constitutional challenge to be as-applied where allegations and evidence focused on application of statute only to plaintiff).

If Senate Bill 3 is applied to Ms. Edwards, she will have no party affiliation listed on a partisan ballot, denying her fundamental right to express her political beliefs. The ballot will provide the party or unaffiliated status of her four opponents. This retroactive application of Senate Bill 3 to Ms. Edwards will place in her a distinct disadvantage with respect to her four opponents, strongly damaging her chances of winning the election despite her merits. This will also lead to voter confusion, as voters will be misled about Ms. Edwards' true party affiliation.

Senate Bill 3 does not inflict the same constitutional injury on other judicial candidates, either because the candidates did not change their registration within 90 days of registering, or because they are running unopposed. For example, in the race for District Court judge for District 19C, seat 2, Judge Kevin Eddinger is the sole candidate. (Compl. ¶ 47(c).) Judge Eddinger changed his registration from "Democrat" to Unaffiliated on May 14, 2018, within 90 days of filing for office. Judge Eddinger will be represented on the ballot without party affiliation, which is compatible with his unaffiliated status and will not have an impact on his chances for reelection, as he has no challenger. Because Senate Bill 3 could validly apply to Mr. Eddinger and other judicial candidates, Ms. Edwards' claims are not facial challenges.

And even if this case did present a facial challenge, N.C. Gen. Stat. § 1-267.1 still permits this Court to issue preliminary relief to maintain the status quo until a three-judge panel can be convened. The three-judge panel statute limits the authority of this Court as follows: "No order or judgment shall be entered . . . [that] finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by

a three-judge panel[.]" N.C. Gen. Stat. § 1-267.1(c). An order granting a preliminary injunction is not one that finds a statute "facially invalid" because it is not an order deciding the merits of the constitutional claims. *See State v. School*, 299 N.C. 351, 357-58, 261 S.E.2d 908, 913 (1980) (holding that preliminary injunction order "bears no precedent to guide the final determination of the rights of the parties"); *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578, 561 S.E.2d 276, 282 (2002) ("[T]he findings of fact and other proceedings of the trial court which hears the application for a preliminary injunction are not binding at a trial on the merits.").

Since the creation of the three-judge panel system for facial constitutional challenges, Superior Court judges have regularly issued preliminary relief before transferring the case to the three-judge panel. *See, e.g., N.C. State Bd. of Educ. v. State*, __ N.C. __, 814 S.E.2d 67, 69 (2018) (addressing a case in which a single Superior Court judge enjoined legislation from going into effect and then transferred the dispute to a three-judge panel for resolution on the merits). A preliminary injunction is necessary to preserve the status quo so that the three-judge panel has a live controversy to decide. Otherwise, the passage of time would render the three-judge proceeding a hollow formality.

Therefore, because Ms. Edwards is likely to prevail on the merits, this Court should issue a preliminary injunction to prevent irreparable harm to Ms. Edwards that would otherwise ensue within days of this Court's hearing.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter a preliminary injunction enjoining Defendants from applying the 90-day pre-registration requirement to Plaintiff; enjoining Defendants from approving language for ballots to be used in the 10th Judicial District that states the 90-day pre-registration requirement; and staying the

effect of the August 8, 2018 deadline for withdrawal from the election for Wake County District Court judge until disposition of Plaintiff's claim on the merits.

Respectfully submitted, this the 6th day of August, 2018.

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CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff hereby certifies that a copy of Plaintiff's Brief was sent to Defendants' counsel via email, addressed as follows:

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This the 6th day of August, 2018.

Colin Shive