No. 320P24

SUPREME COURT OF NORTH CAROLINA

****

JEFFERSON GRIFFIN,

Petitioner,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Respondent,

and

ALLISON RIGGS, NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, VOTEVETS ACTION FUND, JUANITA ANDERSON, SARAH SMITH, AND TANYA WEBSTER-DURHAM,

Intervenor-Respondents.

From the North Carolina State Board of Elections

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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, VOTEVETS ACTION FUND, JUANITA ANDERSON, SARAH SMITH, AND TANYA WEBSTER-DURHAM'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

Judge Jefferson Griffin comes to this Court with an extraordinary request for relief: a court order throwing out the ballots of over 60,000 North Carolina voters months after an election. Judge Griffin makes this demand in the hopes that doing so will reverse his loss at the ballot box and give him a seat on this very Court. His request for this unprecedented relief is all the more astonishing because he has not presented a *scrap* of evidence that a single one of the voters whose ballots he challenges is unqualified to vote in North Carolina. Further still, he does not—and cannot—dispute that these voters followed longstanding election rules and the instructions of election officials in casting their ballots. Even so, Judge Griffin demands that these voters be stripped of their fundamental right to vote, in violation of a host of federal laws.[1]

In light of the important role that federal law plays in this case, the North Carolina State Board of Elections ("the State Board" or "the Board") sought to defend themselves in a federal forum. This is consistent with the

[1] Among the qualified North Carolina voters whose ballots are being challenged by Judge Griffin are Tanya Webster-Durham, Sarah Smith, and Juanita Anderson, who—alongside the North Carolina Alliance for Retired Americans and VoteVets Action Fund (collectively "Voter Intervenors")—intervened in this case prior to remand to protect their voting rights and the voting rights of tens of thousands of other voters threatened with disenfranchisement by Judge Griffin.

commands of the Congress, which guarantees a federal forum for state defendants in cases that may require them to violate certain federal rights. *See* 28 U.S.C. § 1443(2). The federal court nevertheless remanded the matter to this Court, but the question of whether that remand was proper is currently pending before the U.S. Court of Appeals for the Fourth Circuit, which is considering the question on an expedited basis. *See Griffin v. N.C. State Board of Elections*, Case Nos. 25–1018 (lead), –1019, –1024 (4th Cir.). If it finds remand was improper, Judge Griffin may not properly proceed in this forum. The Fourth Circuit will hear argument in that expedited appeal in just six days' time. As a result, strong considerations of federalism and comity counsel in favor of briefly staying these proceedings pending the outcome of that appeal. To proceed full speed ahead would vitiate the guarantee enshrined by the Congress in federal law that such remand orders "shall be reviewable by appeal." 28 U.S.C. § 1447(d).

But even if the Court proceeds here, it should find that a broad constellation of federal rights and laws bars the widescale disenfranchisement Judge Griffin seeks. There is simply no way to retroactively disenfranchise rule-abiding voters *after* an election in a manner that comports with the guarantees of due process, equal protection, and the constitutional right to vote. Nor can such relief be squared with federal civil rights laws like the

National Voter Registration Act ("NVRA") and the Civil Rights Act ("CRA"), which Congress enacted to protect voters from such abuses.

Finally, Judge Griffin's petition is deficient on its face. For one, he waited *far* too long to challenge the longstanding election rules at issue. He offers no excuse for why he could not have challenged these rules—which have been in place for years—well-ahead of the election. Having competed and lost, Judge Griffin may not retroactively change the rules of the game. Moreover, though his case does not belong in state court, his request for a writ of prohibition is improper in any event because Judge Griffin has alternative legislatively-prescribed avenues for relief. He may not short circuit the General Assembly's chosen method for appealing election protests simply as a matter of his own preference or convenience.

ISSUES PRESENTED

I. Whether this Court should stay proceedings pending resolution of an ongoing expedited federal appeal of the district court's remand order, in view of Congress's command that such orders "shall be reviewable by appeal." 28 U.S.C. § 1447(d).

II. Whether federal constitutional and statutory law—along with analogous provisions of the North Carolina constitution—preclude granting Judge Griffin the relief he seeks, which includes invaliding the ballots of over 60,000 North Carolina voters.

III. Whether Judge Griffin is otherwise entitled to an extraordinary writ of prohibition given his unreasonable delay in challenging longstanding election rules and procedures, as well as the availability of an alternative—and statutorily-prescribed—process for appealing orders of the State Board.

STATEMENT OF THE FACTS

I. Judge Griffin seeks to disenfranchise tens of thousands of voters after losing the election for Supreme Court Justice.

In the 2024 general election, millions of North Carolinians cast ballots under well-established voting rules and settled instructions. After voting ended and the ballots were counted, it became clear that incumbent Justice Allison Riggs prevailed over Judge Griffin in the race for a seat as an Associate Justice on this Court. Dissatisfied with this result, Judge Griffin filed over 300 election protests across the state.

Judge Griffin's protests fall into six categories. The first and largest targets 60,273 absentee and early voters, including Intervenors Tanya Webster-Durham, Sarah Smith, and Juanita Anderson, based on information allegedly missing in their registration file ("HAVA Challenge"). *See* NCSBE Order at 3 (Appendix ("App.") 40). Under the Help America Vote Act ("HAVA"), when a person registers to vote, states attempt to collect the applicant's driver's license number or the last four digits of their social security number. 52 U.S.C. § 21083(a)(5)(A). While North Carolina law implements HAVA's

requirements, *see* N.C.G.S. § 163-82.4(a), (b), for many years the state registration form did not require provision of these identification numbers, and the state accepted registrants' otherwise complete applications. *See* NCSBE Order at 24–27 & n.16 (App.61–64). Many of these voters, including some intervenors, have been registered and voted without incident for decades. *See infra* Argument Section II.A.1. Judge Griffin now seeks to retroactively invalidate their votes if their registration files lack a driver's license number or social security information.

Judge Griffin's second challenge—the "Overseas Voter Challenge"—takes aim at 266 citizens living abroad, NCSBE Order at 3 (App.40), who are expressly entitled to vote under the Uniform Military and Overseas Voters Act ("UMOVA"), as enacted by the General Assembly over 13 years ago. N.C.G.S. § 163-258.1, *et seq*. This category of voters similarly has participated in dozens of elections without issue for more than a decade. But Judge Griffin now believes these citizens should be disenfranchised because, in his view, they are not residents of North Carolina. *See* Pet. Writ of Prohibition ("Pet.") 6–7.

The third category of challenges targets 1,409 overseas voters who voted under the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), complying with all relevant federal and state laws for returning

their absentee ballot. *Id.* at 40–47; NCSBE Order at 3 (App.40).[2] Judge Griffin argues these voters should have provided a copy of their photo identification with their ballot, Pet.7, notwithstanding that the Board has prescribed rules that exempt UOCAVA voters from this requirement ("UOCAVA ID Challenge"). 8 N.C. Admin. Code 17.0109. The Board's rules have exempted covered UOCAVA voters from such a requirement since at least 2020. *Id.*

The remaining three categories of protests challenge: (1) voters allegedly ineligible to vote due to felony conviction; (2) voters allegedly dead as of election day; and (3) voters allegedly not registered to vote in North Carolina at all. NCSBE Order at 3 (App.40).

II. Judge Griffin did not adequately notify the voters he seeks to disenfranchise.

Under the State Board's rules for election protests, Judge Griffin was expressly required to "serve copies of all filings on every person with a direct stake in the outcome of this protest," including "all such voters" Judge Griffin seeks to disenfranchise. 8 N.C. Admin. Code 2.0111. Judge Griffin purported to notify each challenged voter by sending them a postcard. The card—which

[2] Though Judge Griffin's petition purports to challenge 5,509 UOCAVA ballots unaccompanied by copies of IDs or ID exception forms, Pet.65, he timely challenged just 1,409 of those ballots. *See* NCSBE Order at 3 (App.40). As the State Board noted, Griffin sought to add challenges in supplemental filings "submitted after the deadline to file an election protest," and the State Board did not determine "whether such supplementations [were] allowable." *Id.* n.2. (citing G.S. § 163-182.9(b)(4)).

was addressed to the voter "or current resident"—contained a QR code that mobile smartphone users could scan to be redirected to the North Carolina Republican Party webpage. Griffin Postcard (App.175). This meant that, even if a voter did receive a postcard, recipients without internet access, smartphones, or familiarity with QR code technology could not access any additional information. If a voter received the notice and was able to navigate through the QR code, they were led to a website containing over *three hundred* links to Judge Griffin's various protests.

Neither the postcard nor webpage informed the voter about the basis upon which their ballot was being challenged—voters were left to guess. *See id*. The postcard itself merely informed voters that the website could tell them "what protest *may* relate to you," *id.* (emphasis added), without providing any further details, including failing to clearly state that a voter *was* challenged, or explaining that the voter may be disenfranchised. Instead of providing the required notice to challenged voters, Judge Griffin put the burden on *voters* to determine—weeks after they cast their ballots—whether and how their votes were being challenged.

III. The State Board rejected Judge Griffin's first three challenges.

The Board agreed to take jurisdiction over three of the six categories of challenges—the HAVA Challenge, Overseas Voter Challenge, and UOCAVA ID Challenge—pursuant to N.C.G.S. § 163-182.12, concluding that the

remaining three categories of challenges were best left to the counties to adjudicate in the first instance.[3]

On 13 December, the Board issued a written opinion rejecting Judge Griffin's protests over which it had taken immediate jurisdiction. On the threshold issue of service, the Board determined that Judge Griffin had not properly served notice to each challenged voter "in a manner that would comply with the North Carolina Administrative Code and be consistent with the requirements of constitutional due process." NCSBE Order at 6 (App.43).

The Board then rejected each of the three protests on the merits. First, the Board rejected the HAVA Challenge and emphasized the fundamental unfairness—rising to the level of a violation of due process and federal law—of retroactively disenfranchising voters who have been told for years that they are lawfully registered to vote. *Id.* at 18–29 (App.55-66) (citing, among other things, HAVA, the NVRA, and state and federal case law). Second, the Board rejected Judge Griffin's Overseas Voters Challenge, concluding that the

[3] On December 20, the Board separately considered appeals that had been filed by Judge Griffin to review county-level determinations about whether to count votes identified in his remaining three categories of protests. Because of the small number of ballots at issue, the Board voted to dismiss the appeals because they could not be outcome determinative. On December 27, the Board issued its written decision on these challenges. *See* Decision & Order, N.C. State Bd. of Elections (Dec. 27, 2024), *available at* dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Protest%20Appeals/Griffin-Adams-McGinn-Sossamon%20II_2024.pdf.

General Assembly authorized these individuals to vote in state elections, and emphasizing that such voters had previously been permitted to vote for 13 years and in 43 elections. *Id.* at 29–31 (App.66-68). Finally, the Board unanimously rejected Judge Griffin's UOCAVA ID Challenge, concluding state law and relevant regulations explicitly exempt military and overseas voters from providing identification when returning their absentee ballot. *Id.* at 32–37 (App.69-74). For both the Overseas Voters Challenge and the UOCAVA ID Challenge, the Board again concluded that granting Judge Griffin relief would amount to a federal due process violation. *Id.* at 32, 39 (App.69, 76).

IV. Judge Griffin filed the instant petition for a writ of prohibition and several protest appeals concerning the same issues.

On 18 December, Judge Griffin filed a petition for a writ of prohibition before this Court. *See generally* Pet. In his petition, Judge Griffin asked the Court to immediately issue a temporary stay of both the Board's certification of his election contest and the filing deadline for Judge Griffin to file an appeal of the Board's decision. *Id.* at 32, 39 (App.69, 76). The Board removed the action to federal court the next day. *See* Notice of Removal, *Griffin v. N.C. State Bd. of Elections*, Case No. 5:24-cv-00724 (E.D.N.C. Dec. 19, 2024) ("*Griffin I*"), ECF No. 1.

Two days later, Judge Griffin filed three separate petitions for judicial review of the State Board's December 13 order in Wake County Superior Court.

See Griffin v. N.C. State Bd. of Elections, Case No. 24CV040619-910, Index #1 (Wake Cnty. Super. Court); *Griffin v. N.C. State Bd. of Elections*, Case No. 24CV040620-910, Index #1 (Wake Cnty. Super. Court); *Griffin v. N.C. State Bd. of Elections*, Case No. 24CV040622-910, Index #1 (Wake Cnty. Super. Court). Each petition challenges one of the three categories of election protests dismissed by the Board and seeks the same relief as Judge Griffin's petition here. *See generally id.* Accordingly, the Board again removed the action to federal court and noticed the case as related to the earlier removed action concerning Judge Griffin's writ of prohibition. *See Griffin v. N.C. State Bd. of Elections*, Case No. 5:24-cv-00731-BO (E.D.N.C. Dec. 20, 2024) ("*Griffin II*"), ECF Nos. 1, 2.

The North Carolina Alliance for Retired Americans ("Alliance"), VoteVets Action Fund ("VoteVets"), and individual Alliance members Webster-Durhan, Smith, and Anderson, moved to intervene in both actions. The Alliance and VoteVets—organizations that represent communities disproportionately impacted by Judge Griffin's challenges—seek to protect the fundamental right to vote of their members and constituents, as well as the organizations' own interests in supporting and engaging voters for the election. Webster-Durham, Smith, and Anderson—individual Alliance members whose ballots are being challenged by Judge Griffin—intervened to protect their own fundamental right to the franchise. The district court granted the motion to

intervene in *Griffin I*. *See* Text Order, *Griffin I* (Dec. 26, 2024) (further granting intervention to Justice Allison Riggs). Judge Griffin then filed a motion in *Griffin I* seeking a preliminary injunction to prevent the Board from certifying the 2024 election results for Associate Justice of the North Carolina Supreme Court. *See* Mem. in Supp. of Mot. for Prelim. Inj., *Griffin I* (Dec. 23, 2024), ECF No. 32. That motion argued, among other things, that the case should be remanded to this Court. *See id.* at 10.

V. *Griffin I* is remanded to this Court and *Griffin II* is remanded to Wake County Superior Court.

On 6 January, the district court remanded *Griffin I* back to this Court. Remand Order, *Griffin I,* ECF No. 50 ("*Griffin I* Remand Order"). The district court concluded that removal of the action to federal court was appropriate under 28 U.S.C. § 1443(2)'s "refusal clause" because the State Board "refused to 'act on the ground that [action] would be inconsistent with [federal civil rights] law.'" *Id.* at 19 (quoting 28 U.S.C. § 1443(2)). Notwithstanding the presence of federal subject-matter jurisdiction, the district court found abstention appropriate under *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) and *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25 (1959). *Griffin I* Remand Order at 20–29. Concluding that Judge Griffin's petitions for judicial review presented issues "substantially identical" to those in *Griffin I*, the

district court also remanded *Griffin II* back to the Superior Court for Wake County as well. *See* Remand Order, *Griffin II*, ECF No. 24.

Each Defendant filed timely notices of appeal of the district court's remand order in *Griffin I* and *Griffin II*. *See Griffin v. N.C. State Bd. of Elections*, Case Nos. 25-1018 (lead), –1019, –1024 (4th Cir.) (concerning *Griffin I*); *Griffin v. N.C. State Bd. of Elections*, Case No. 25-1020 (4th Cir.) (concerning *Griffin II*). On 10 January, the U.S. Court of Appeals for the Fourth Circuit set an expedited briefing schedule in *Griffin I* and calendared oral argument for 27 January. *See* Case No. 25-1018 (4th Cir.), ECF Nos. 33, 34. The State Board also moved for a stay of the district court's order on 7 January. *See id.*, ECF No. 7. Judge Griffin filed his response to that motion—which remains pending—on 14 January. *See id.*, ECF No. 18.

Meanwhile, also on 7 January, Judge Griffin filed a Motion for Temporary Restraining Order, Preliminary Injunction, and/or Stay in Wake County Superior Court in the remanded *Griffin II* case to stay certification of the Associate Justice race. Although the Wake County Superior Court initially granted Judge Griffin's motion, the judge promptly withdrew the order, noting that "the Court became concerned that neither the [State Board] nor [the State Board's] attorneys received appropriate notice of the Motion, as required by Local Rules and Rule 65 of the Rules of Civil Procedure." Order, *Griffin v. N.C. State Bd. of Elections*, Case No. 24CV040620-910 (Wake Cnty. Super. Ct. Jan.

7, 2025). That same day this Court issued a stay of the certification deadline of the contested North Carolina Supreme Court race and set a briefing schedule for Judge Griffin's petition for a writ of prohibition.

LEGAL STANDARD

A writ of prohibition is the "converse of mandamus," *State v. Whitaker*, 114 N.C. 818, 19 S.E. 376, 376 (1894), and while "recognized in this jurisdiction," it "is considered discretionary and has been uniformly denied where there is other remedy." *State v. Inman*, 224 N.C. 531, 542, 31 S.E.2d 641, 646–47 (1944). It can be issued only in cases "of extreme necessity," *Holly Shelter R. Co. v. Newton*, 133 N.C. 132, 45 S.E. 549, 550 (1903) (quoting 23 Am. & Eng. Enc. (2d Ed.) 212), and where "necessary to restrain the action of the lower courts proceeding outside of their powers." *Id.* at 132, 45 S.E. at 550. It "does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal, or by recordari or certiorari in lieu of an appeal." *Whitaker*, 114 N.C. at 818, 19 S.E. at 376.

ARGUMENT

I. This Court should stay proceedings pending appeal of the district court's remand order.

This case raises important questions of federal constitutional and statutory law. Judge Griffin concedes as much, asking this Court to resolve a host of federal grounds on which the State Board denied him relief. *See, e.g.*, Pet.54–61, 70–71 (requesting rulings and relief (f)–(h)). In light of these federal

issues, the State Board removed Judge Griffin's petition to federal court under both 28 U.S.C § 1441 and § 1443. *See* Notice of Removal, *Griffin I*. The federal district court *agreed* that such removal was proper under § 1443. *See Griffin I* Remand Order at 17–20. But it nonetheless remanded the case to this Court based on *Burford and Thibodaux* abstention. *See id.* at 20–29. While the district court's finding of federal jurisdiction was correct, its choice to abstain was legal error. The U.S. Court of Appeals for the Fourth Circuit has expedited the matter for consideration and will hear argument in just six days' time on 27 January.

This Court should briefly stay this case pending resolution of the appeal for two reasons. *First*, there is no dispute that the federal appellants, including Voter Intervenors, are legally entitled to appeal the district court's remand order under federal law. Congress has directed that such orders "shall be reviewable by appeal." 28 U.S.C. § 1443. *Second*, the federal appellants are very likely to succeed in showing that the district court's abstention order was erroneous. Indeed, so far as the Voter Intervenors are aware, no federal court has *ever* abstained after finding it has jurisdiction under 28 U.S.C. § 1443.

Principles of federalism and comity therefore strongly support a stay here while the federal appeal proceeds. If Judge Griffin is correct that this case belongs in North Carolina court, such a stay will only briefly delay those proceedings, while still vindicating the federal appellants' statutory right to an

appeal. In contrast, if the federal appellants are correct that this case should have remained in federal court, declining to stay proceedings here may interfere with their right of appeal and the "guarantee[] [of] a federal forum for certain federal civil rights claims" legislated by Congress. *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1536 (2021) (describing purpose of 28 U.S.C. § 1443). A brief stay is thus appropriate to preserve the "delicate balancing of sometimes-competing state and federal concerns." *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999) (noting "[c]omity is a two-way street").

A. The federal appellants have a legal right to appeal the district court's remand order.

There is no question that the Voter Intervenors and the other federal appellants are entitled to appeal the district court's remand order. There exist two independently sufficient grounds. First, orders abstaining from federal jurisdiction constitute final orders for purposes of 28 U.S.C. § 1291 under the collateral order doctrine. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712–13 (1996) (concluding order granting *Burford* abstention could be immediately appealed). The Supreme Court has stressed that a district court's choice to refuse its own jurisdiction is an issue "too important to be denied review." *Id.* at 714 (cleaned up). Second, Congress determined that—unlike in most diversity and general federal question cases—cases removed under § 1443 "shall be reviewable by appeal." 28 U.S.C. § 1447(d). Congress therefore

granted not only the "guarantee[] of a federal forum," in § 1443 cases, *BP P.L.C.*, 141 S. Ct. at 1537, but also the right of *federal appellate review*, *see id.* at 1538 (explaining § 1447(d) "permits appellate review of the district court's remand order . . . without any further qualification").

The district court's hasty remand of the matter to this Court does not alter federal appellants' right to federal appellate review. Congress's "strong pronouncement" of reviewability in § 1447(d) "suggests [Congress] would not countenance a district court evading review by immediately transmitting its remand order to the state court." *Acad. of Country Music v. Cont'l Cas. Co.*, 991 F.3d 1059, 1063 (9th Cir. 2021). Such an outcome would be "troubling," permitting individual district courts to foreclose appeals mandated by Congress simply by "transmitting its remand order to a state court[.]" *Id.* Even where such premature transmittal occurs, however, federal appeals courts retain jurisdiction to review such orders. *See id.* at 1070 (holding "that the transmittal of the remand order to the state court did not deprive us of jurisdiction"). The First Circuit reached the same conclusion in a recent case that also concerned an improper application of *Burford* abstention. *See Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 79 (1st Cir. 2021). It emphasized that district courts may not "render the permitted appeal . . . nugatory by prematurely returning the case to the state court." *Id*. That "would defeat the very purpose of permitting an appeal and leave a defendant who

prevails on appeal holding an empty bag." *Id.* (confirming federal appellate jurisdiction).

In view of the federal appellants' clear right to appeal the district court's remand order—and the Fourth Circuit's clear jurisdiction over the appeal—this Court should await resolution of the federal appeal before proceeding. To move ahead while the federal appeal is pending would both undermine Congress's command that orders like the district court's "shall be reviewable by appeal," 28 U.S.C. § 1447(d), and create a perverse incentive for litigants seeking to evade such review. And such a brief stay is consistent with the "long and storied history of comity and cooperation between state and federal courts." *Forty Six Hundred LLC*, 15 F.4th at 81. Indeed, "as a matter of comity and discretion," North Carolina courts often "stay [their] proceedings pending the outcome of related federal litigation[.]" *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 202, 476 S.E.2d 440, 443 (1996). Such a course is particularly appropriate here given Congress's clear directive to permit federal appeals. *Cf. Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481 (1955) (explaining a "state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance").

B. The Fourth Circuit is very likely to find the district court erred, strengthening the case for a stay here.

The case for a stay in this Court is further strengthened by the fact that the federal appellants are not merely *entitled* to an appeal—they are also extremely likely to *prevail* in their appeal. The many reasons for this are set forth more fully in the briefing already before the Fourth Circuit. *See* Intervenor-Appellants' Br., *Griffin v. N.C. State Bd. of Elections*, Case No. 25-1018 (4th Cir. Jan. 15, 2025), ECF No. 53.[4] But it bears emphasizing that no party in this case—including Judge Griffin—has yet identified a *single* instance whether a federal court has voluntarily surrendered its own jurisdiction despite finding 28 U.S.C. § 1443 satisfied. The district court's unprecedented abstention order flies in the face of the very purpose of that jurisdictional statute—to "guarantee" a federal forum for a certain class of federal civil rights issues. *BP P.L.C.*, 141 S. Ct. at 1536; *see also State of Ga. v. Rachel*, 384 U.S. 780, 788 (1966) (holding § 1443 "entitles" certain parties to remove case to federal court if statute is satisfied). It is therefore likely the Fourth Circuit will reverse its order and instruct the district court to reclaim jurisdiction.

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[4] *See also* Intervenor-Appellant's Br., *Griffin v. N.C. State Bd. of Elections*, Case No. 25-1018 (4th Cir. Jan. 15, 2025), ECF No. 50 (Justice Riggs's brief); Defendant-Appellant's Br., *Griffin v. N.C. State Bd. of Elections*, Case No. 25-1018 (4th Cir. Jan. 15, 2025), ECF No. 52 (State Board's brief).

The district court based its choice to abstain on *Burford* abstention, which is an "extraordinary and narrow exception to the duty of [federal courts to] adjudicate a controversy properly before it." *Quackenbush*, 517 U.S. at 728 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). But *Burford* abstention is simply not appropriate where the requirements of § 1443 are satisfied, which the district court acknowledged to be the case here. *Griffin I* Remand Order at 20. The usual abstention case—including in cases like *Burford*, *Quackenbush*, and *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350 (1989) ("*NOPSI*")—comes to federal court through diversity or federal question jurisdiction. In contrast to those more capacious grants of jurisdiction, § 1443 reflects Congress' determination that the *federal forum* plays a paramount role in protecting a distinct class of federal rights. "The legislative history of the 1866 Act" from which § 1443 descends "clearly indicates that Congress intended to protect" a specific class of rights "in terms of racial equality." *Georgia v. Rachel*, 384 U.S. 780, 791 (1966). Congress "believed it necessary to provide a *federal forum* for cases which from the nature of the issues involved stir local passions." *Greenberg v. Veteran*, 889 F.2d 418, 421–22 (2d Cir. 1989) (emphasis added).

Section 1443 cases like this one are thus uniquely unsuitable for *Burford* abstention, which seeks to "balance" the "strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal

court," with "the State's interests in maintaining 'uniformity in the treatment of an 'essentially local problem.'" *Quackenbush,* 517 U.S. at 728 (citation omitted). In § 1443 cases, however, Congress has already resolved the balance of these competing interests in favor of "provid[ing] a federal forum." *Greenberg*, 889 F.2d at 421–22. Accordingly, "abstention" is fundamentally "inconsistent with the purpose of [§ 1443]." *Id.* at 422.

The district court thus erred by "abstain[ing] from the exercise of jurisdiction that has been conferred" to it by § 1443's refusal clause. *NOPSI*, 491 U.S. at 358. The court further glossed over the paramount importance of the federal civil rights laws at issue and Congress's assurance of a federal forum where state officers may violate those rights. *See, e.g.*, *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 407 (4th Cir. 2024) ("*RNC*") (describing importance of the NVRA); *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 126 (3d Cir. 2024) (describing importance of the materiality provision of the Civil Rights Act).

With the passage of these civil rights laws and § 1443, Congress (1) created substantive federal rights protecting voters from disenfranchisement by states and (2) guaranteed a federal forum to adjudicate those rights, including the right to appeal. *RNC*, 120 F.4th at 405–08. The district court's choice to abstain contravenes these clear commands from Congress. It abused its discretion by "refus[ing]" to adjudicate important federal civil rights "in

deference to the States," despite the express conferral of jurisdiction from Congress. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (quoting *NOPSI*, 491 U.S. at 368); *see Quackenbush*, 517 U.S. at 728 (recognizing "the strong *federal interest* in having certain . . . *federal rights*, adjudicated in *federal court*" (emphasis added)).[5]

II. Judge Griffin's post-election effort to change North Carolina's election rules is barred by federal law.

Even if this Court reaches the substance of Judge Griffin's petition, it must deny relief because a host of federal rights and statutes preclude the widescale voter disenfranchisement Judge Griffin demands. Due process and the constitutional right to vote categorically prohibit granting *any* relief on the petition. Equal protection independently bars his HAVA and UOCAVA ID Challenges because they target subsets of voters for arbitrary and disfavored treatment. The NVRA bars his HAVA and Overseas Voter Challenges because

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[5] For reasons set forth more fully in the Voter Intervenors' Fourth Circuit briefing, *Burford* and *Thibodaux* abstention would not apply here even absent § 1443 jurisdiction. *See* Intervenor-Appellants' Br. at 12–16, *Griffin* No. 25-1018 (4th Cir. Jan. 15, 2025), ECF No. 53. On top of that, the district court further neglected that "voting rights cases are particularly inappropriate for abstention." *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965) (finding abstention inappropriate given "the nature of the constitutional deprivation," a denial of the "fundamental" right to vote); *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981) (same); *League of Women Voters of Fla., Inc. v. Detzner*, 354 F. Supp. 3d 1280, 1283 (N.D. Fla. 2018) (recognizing that abstention in voting rights cases "fl[ies] in the face of decades of binding law").

they each seek to disenfranchise voters based on purported registration deficiencies. Finally, the materiality provision of the Civil Rights Act separately bars relief on his broadest protest, the HAVA Challenge. These fundamental federal guarantees bar the petition.

A. Judge Griffin's requested relief would violate the constitutional rights of thousands of North Carolina voters.

1. Substantive Due Process

There is no dispute that each of the challenged voters in this case cast their ballot under longstanding rules and settled expectations for voting. Indeed, nowhere in his Petition does Judge Griffin dispute that each of the challenged voters followed election rules and instructions as provided by election officials. Yet Judge Griffin now seeks to disenfranchise these voters after the election has passed based on his own self-serving reading of North Carolina law. This post-election effort to disenfranchise rule-abiding voters is barred by the federal constitutional guarantee of substantive due process under the Fourteenth Amendment, as well as the synonymous "law of the land" clause of the North Carolina Constitution. *See In re Moore*, 289 N.C. 95, 97–98, 221 S.E.2d 307, 309 (1976).

This case resembles *Griffin v. Burns*, where the First Circuit held it was unconstitutional to discard votes after an election where the challenged ballots were cast in accordance with procedures established prior to the election and

reasonably relied upon by voters. *See* 570 F.2d 1065, 1067, 1074 (1st Cir. 1978). In that case, election officials distributed absentee ballots to those who requested them in a primary election for a city council seat in Rhode Island. *Id.* at 1067. A losing primary candidate subsequently challenged the validity of these ballots on the theory that Rhode Island law did not permit absentee voting in primary elections, notwithstanding years of contrary practice. *See id.* at 1067–68. After a divided state supreme court agreed with the losing candidate's interpretation of state law and invalidated the ballots, several individual voters sued in federal court to enjoin the invalidation of their ballots. *See id.* at 1068.

The First Circuit ruled in favor of the voters, finding that "Rhode Island could not, constitutionally, invalidate the absentee and shut-in ballots that state officials had offered to the voters in this primary, where the effect of the state's action had been to induce the voters to vote by this means rather than in person." *Id.* at 1074. The Court recognized that while ballots could sometimes be invalidated after an election, such as in cases of fraud, doing so where voters simply followed the rules presented to them would be a "fundamental unfairness," resulting in a "flawed [electoral] process." *Id.* at 1076–77. As here, because voters "were doing no more than following the instructions of the officials charged with running the election," it was unreasonable to expect individual voters to "at their peril, somehow . . . foresee"

a future interpretation of state law that would invalidate their ballots after the fact. *Id.* at 1075–76. To disenfranchise law-abiding, good faith voters in such circumstances would "present[] a due process violation." *Id.* at 1078.

Adopting the same reasoning as the court in *Griffin*, several federal courts have since agreed that due process prohibits rejecting ballots where "state actions . . . induce[d] voters to miscast their votes." *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (citing *Griffin*, 570 F.2d at 1074, 1078–79); *see also Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2005) (citing *Griffin*, 570 F.2d at 1077) (affirming order to enjoin officials from tossing out ballots cast by voters mistakenly sent absentee ballots). And the principles set forth in *Griffin* are now "settled" law within the Fourth Circuit. *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (citing *Griffin*, 570 F.2d at 1077).

Distilling *Griffin* and its progeny, the Ninth Circuit has explained that a substantive due process violation occurs "if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Bennett v. Yoshina*, 140 F.3d 1218, 1226–27 (9th Cir. 1998) (further explaining *Griffin*'s concern with "the massive *ex post*

disenfranchisement" who would have no reason to suspect any infirmity with their vote), *as amended on denial of reh'g and reh'g en banc* (June 23, 1998).

This case satisfies both elements to a tee. Start with the HAVA Challenge. Intervenors Webster-Durham, Smith, and Anderson, like thousands of other voters, had no reason to foresee that their registrations would be called into doubt after the election. *Griffin I*, ECF No. 24-2 ¶¶ 6–8; ECF No. 24-3 ¶¶ 5–7; ECF No. 24-4 ¶¶ 5–7.[6] Indeed, some of these voters have relied upon their existing registrations, long accepted by election officials, to vote for decades across dozens of elections. *E.g.*, *Griffin I*, ECF No. 24-3 ¶ 4. And many others have been registered since before any requirement existed to provide the information that Judge Griffin insists is missing from their registrations. *Griffin I*, ECF No. 24-1 ¶ 8. Yet Judge Griffin now seeks to retroactively disenfranchise these voters *en masse*.

The same goes for voters subject to the Overseas Voters and UOCAVA ID Challenges. As to the former, North Carolina has permitted these voters to cast ballots under UMOVA for the past 13 years—nearly twice as long as the "long-standing practice" at issue in *Griffin*. *Compare* NCSBE Order at 31

[6] This Court "may take judicial notice of documents filed in federal courts." *State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 395 (2018). These affidavits were all filed by Intervenors "retrievable in the form provided by the State from Public Access to Court Electronic Records ("PACER") and . . . all bear file stamps from the Clerk of the U.S. District Court for the Eastern District of North Carolina." *Id.*

(App.68), *with Griffin*, 570 F.2d at 1075, 1079. These voters had no reason to think that, after such sustained and unchallenged practice under the plain text of UMOVA, their ballots would suddenly be called into doubt. *See Griffin I*, ECF No. 24-5 ¶¶ 12–13. Similarly, it is undisputed that voters subject to the UOCAVA ID Challenge voted in compliance with procedures that have been in place since at least 2020. 8 N.C. Admin. Code 17.0109(d) (eff. Jan. 1, 2020) (exempting "covered voter[s]" casting ballots "pursuant to G.S. 163, Article 21A" from photo ID requirements). It would be a gross injustice to punish these voters—many of them servicemembers—for "state actions" that "induce[d]" them to, in Judge Griffin's misguided view, "miscast their votes." *Husted*, 696 F.3d at 597.

The State Board extensively discussed *Griffin* and its progeny in denying Judge Griffin's protests here. NCSBE Order at 23–25 (App.60–62). Yet Judge Griffin's petition fails to even acknowledge the case, never mind explain how the relief he seeks comports with it. The reason why is clear: the federal constitution's substantive due process protections prohibit Judge Griffin's after-the-fact effort to disenfranchise voters who followed the rules everyone reasonably believed governed the 2024 election.

2. Procedural Due Process

Granting Judge Griffin's petition would also violate the procedural due process guarantees of the federal and North Carolina constitutions.[7] A due process analysis requires weighing "(1) [voters'] liberty interest; (2) the risk of an erroneous deprivation of that interest under current procedures; and (3) the government's interest and burden of providing any additional procedure that would be required." *United States v. White*, 927 F.3d 257, 263 (4th Cir. 2019) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Voters suffer a procedural due process violation "if election officials reject their ballots" without being "notified or afforded any opportunity to respond." *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 226 (M.D.N.C. 2020) (citation omitted).[8]

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[7] The guarantee of due process under the North Carolina Constitution is substantially similar to its federal analog. *See, e.g.*, *State v. Bryant*, 359 N.C. 554, 563, 614 S.E.2d 479, 485 (2005). Moreover, "[f]ederal court interpretations . . . of due process under the Fourteenth Amendment of the United States Constitution" are "highly persuasive" in construing the analogous provision of the North Carolina Constitution. *State v. Guice*, 141 N.C. App. 177, 187, 541 S.E.2d 474, 481 (2000).

[8] There is some disagreement among federal courts as to what standard governs procedural due process claims in the election context. *Compare Democracy N.C.*, 476 F. Supp. 3d at 226 (applying *Eldridge*), *with Voto Latino v. Hirsch*, 712 F. Supp. 3d 637, 666 (M.D.N.C. 2024) (applying the *Anderson-Burdick* standard). The Voter Intervenors urge application of the *Eldridge* standard here because this case is more analogous to *Democracy N.C.*, in that voters had no opportunity to be heard before their possible

The more than 60,000 voters targeted by Judge Griffin's challenges did not receive adequate notice. Among other deficiencies, Judge Griffin failed to "serve copies of all filings on every person with a direct stake in the outcome of this protest," including "all such voters" challenged. 8 N.C. Admin. Code 2.0111. As a result, the voters challenged by Judge Griffin were effectively deprived of any meaningful opportunity to be heard before the local boards of election and the State Board. Discarding any of these challenged votes would unconstitutionally strip these voters of their liberty interest in having their votes counted. *Democracy N.C.*, 476 F. Supp. 3d at 227–28 (holding the "protected liberty interest" in the counting of votes is deprived when a ballot is rejected without giving the voter "notice or an opportunity to be heard").

Judge Griffin's insistence that he provided voters with adequate notice rings hollow. None of the steps he took—a postcard addressed to the voter or "current resident" with a QR code that (if a voter was even able to access it) led to the North Carolina Republican Party website containing over 300 links to various protest filings—were sufficient to provide actual, or even constructive, notice to voters that their eligibility was being challenged. *Supra* Background § II. In fact, Judge Griffin's paltry effort to notify voters of his challenges stated

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disenfranchisement. Regardless, Judge Griffin's protests cannot survive under either standard. *See Voto Latino v. Hirsch*, 712 F. Supp. 3d 637, 652–53 (M.D.N.C. 2024) (enjoining deficient notice provision under *Anderson-Burdick* standard); *see also infra* Argument § II.A.3.

only that a voter's vote "may be affected" by "one or more protests" without any further detail, putting the burden on voters to determine—weeks after they cast their ballots—whether and how their votes are being challenged. Griffin Postcard (App.175). Judge Griffin offered challenged voters the first clue on a scavenger hunt to investigate whether and on what grounds their ballots were being challenged, even though state law required him to provide *each* voter with "all filings" about their challenge. 8 N.C. Admin. Code 2.0111.

The Voters Intervenors' experiences illustrate the insufficiency of Judge Griffin's postcard—not one individual recalls receiving such a postcard and, even if they had, none of them had the technology or ability to use the QR code provided. *Griffin I*, ECF No. 24-2 ¶¶ 8, 9; ECF No. 24-3 ¶¶ 7, 8; ECF No. 24-4 ¶¶ 7, 8. They only learned of their imminent risk of disenfranchisement through their membership in the Alliance. *Griffin I*, ECF No. 24-2 ¶ 8; ECF No. 24-3 ¶ 7; ECF No. 24-4 ¶ 7. Undoubtedly, countless other voters remain unaware that Judge Griffin has placed their votes on the veritable chopping block.

Courts have rejected similarly lax efforts to provide notice as contrary to procedural due process. In *Voto Latino v. Hirsch*, plaintiffs challenged North Carolina's same day registration address verification process, which called for removing the applicant's ballot from the count if a single-card address verification is returned as undeliverable. 712 F. Supp. 3d at 652–53. Following

an analysis of voting-related due process challenges across the country, the court struck down the verification process, which would result in "the removal of a cast ballot without any notice or possibility of cure" and imposed "a substantial burden" on voters. *Id.* at 670–73, 678–79 (applying *Anderson-Burdick* test). So too here—voters like Webster-Durham, Smith, and Anderson never received notice their ballot was being challenged and stand to be disenfranchised through no fault of their own. The threat of mass rejection of ballots without giving voters adequate notice or an opportunity to be heard flouts the U.S. Constitution's due process protections and should be rejected. *See id.* at 667, 670 (holding plaintiffs were likely to prevail on a challenge to the adequacy of notice afforded to certain same-day registrants); *see also Democracy N.C.*, 476 F. Supp. 3d at 225–29 (applying *Eldridge* and finding plaintiffs likely to succeed on procedural due process claim where state did not afford mail-in absentee voters notice or opportunity to cure ballot defects).

3. Constitutional Right to Vote

Any post-election changes to the state's election laws and practices that result in the disenfranchisement of tens of thousands of voters would also severely burden the right to vote in violation of the federal and state

constitutions.[9] Under the applicable *Anderson-Burdick* test, the Court must "weigh[] the severity of the burden the challenged [practice] imposes on a person's constitutional rights against the importance of the state's interests supporting that law." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 713 (4th Cir. 2016) (first citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); then citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Where a challenged process severely burdens voters' rights, it can only survive if it is narrowly drawn to advance a compelling state interest. *See Fusaro v. Cogan*, 930 F.3d 241, 257–58 (4th Cir. 2019).

Judge Griffin's attempts to reconcile his desired relief with the strictures of *Anderson-Burdick* are unavailing. Despite seeking to throw out 60,000 votes, Judge Griffin maintains that he "is not asking" for relief that would "severely burden voting." Pet.57. But it is unquestionable that rejecting these voters' ballots after they have already been cast in accordance with law and practice would not just substantially burden their right to vote—it would revoke it entirely.

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[9] "The right to vote is . . . enshrined in both [the] Federal and State Constitutions." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009) (citing U.S. Const. amend. XV; N.C. Const. art. I, §§ 9, 10, 11).

On the other side of the scale, there is no state interest, let alone a compelling one, in disenfranchising thousands of voters after they have already voted. The only purported "interest" Judge Griffin cites is "restricting voting to only those who are eligible to vote." Pet.60. But Judge Griffin offers no reason to believe any one of these voters was ineligible to vote. To be an eligible voter, North Carolina requires only that an individual is a United States citizen who is over the age of 18 and meets the state's residency requirement. *See* N.C. Const. art. VI, §§ 1, 2; N.C.G.S. § 163-55. As for his HAVA Challenge, Judge Griffin does not provide any evidence—or even suggest—that any of the more than 60,000 voters in question were not eligible to vote. Similarly, Judge Griffin does not claim that any of the voters subject to his UOCAVA ID Challenge is not a qualified voter. Indeed, the Voter Intervenors stand as living proof that the voters Judge Griffin seeks to disenfranchise are clearly qualified to vote. *Griffin I*, ECF No. 24-2 ¶¶ 1–2, 4–6; ECF No. 24-3 ¶¶ 1–2, 4–5; ECF No. 24-4 ¶¶ 1–2, 4–5. It is Judge Griffin's burden to show otherwise and he wholly fails to do so. And Judge Griffin's disagreement with UMOVA cannot override the General Assembly's determination that dependents and children of North Carolinians living overseas have the right to vote in the State.

Judge Griffin's only arguments to the contrary suggest voters have a "duty" to provide certain information in registering to vote. *See* Pet.59. But even if the State has a valid interest in collecting the information allegedly

missing from these registrations, Judge Griffin fails to explain what interest the State has in *disenfranchising* these voters *after an election* for completing their registration forms as instructed by election officials *years ago*. The notion that each had a "duty" to parse federal and state statutes prior to completing their registration forms is absurd on its face. That is why this Court has repeatedly held that "[w]here a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be rejected." *Woodall v. W. Wake Highway Comm'n*, 176 N.C. 377, 389, 97 S.E. 226, 232 (1918); *see also Overton v. Mayor of Hendersonville*, 253 N.C. 306, 315, 116 S.E.2d 808, 815 (1960) ("In the absence of actual fraud participated in by an election official or officials and the voter, voters are not to be denied the right to vote by reason of ignorance, negligence or misconduct of the election officials.").

Judge Griffin's belated desire to change the rules governing an election he lost is not the sort of "compelling state interest" that warrants disenfranchising thousands of unassuming North Carolinians. *Alcorn*, 826 F.3d at 717. Accordingly, the federal constitution's guarantee of the right to

vote bars the extreme burden he seeks to have the State Board impose on thousands of North Carolina voters.[10]

4. Equal Protection

Judge Griffin's requested relief would also require the State Board to violate the equal protection guarantees of the Fourteenth Amendment and Article I, Section 19 of the North Carolina Constitution. In both the federal and state constitutions, equal protection "requires that all persons similarly situated be treated alike." *PBK Holdings, LLC v. County of Rockingham*, 233 N.C. App. 353, 356, 756 S.E.2d 821, 825 (2014) (quotation omitted) (interpreting equal protection clauses of federal and North Carolian constitutions coextensively). That right extends beyond just "initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). Once a state "grant[s] the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104–05.

In North Carolina, all voters are subject to the same eligibility requirements and registration rules. N.C.G.S. §§ 163-55, 163-57. Once an applicant has been deemed qualified to vote and had their registration

[10] Judge Griffin's relief fails scrutiny even under a more modest standard of review. Judge Griffin has identified no state interest that warrants the after-the-fact disenfranchisement of voters who followed all established voting rules.

accepted, *id.* § 163-82.7, the voter may choose how to cast their ballot, whether that is by voting in person before election day, in person on election day, by mail domestically, or by mail overseas. *Id.* § 163-166.25 (in-person voting); *id.* § 163-166.40 (early voting); *id.* § 163-226 (absentee voting); *id.* § 163-258.3 (military and overseas voting). Once voters comply with the rules governing their chosen method of voting and ballots have been cast, North Carolina law affords equal weight to all ballots and all voters, regardless of voting method or which county the voter is registered in.

Judge Griffin's HAVA Challenge seeks to disenfranchise only voters who cast ballots by mail or early in-person, while election day voters are safe. *E.g.,* Affs. of Ryan Bonifay ¶¶ 11–17 (App.378–79). In other words, Judge Griffin's HAVA Challenge treats voters—all of whom have now cast ballots and are therefore identically situated—differently based solely on the method of voting they happened to choose, violating the "fundamental" principle that "equal weight" should be "accorded to each vote and [] equal dignity owed to each voter." *Bush*, 531 U.S. at 104; *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The Court has consistently recognized that all qualified voters have a constitutionally protected right to cast their ballots and have them counted," as "the right to have one's vote counted has the same dignity as the right to put a ballot in a box." (internal quotations omitted)). The result is that voters like Webster-Durham, Smith, and Anderson will have their votes thrown out

simply because they happened to vote early and in person. *See Griffin I*, ECF No. 24-2 ¶ 7; ECF No. 24-3 ¶ 6; ECF No. 24-4 ¶ 6. Had they voted a couple of days later on election day, their ballots would be safe and unchallenged.

Likewise, Judge Griffin's UOCAVA ID Challenge seeks to disenfranchise only voters who voted in four of the state's 100 counties—Buncombe, Durham, Forsyth, and Guilford. Pet.66 n.15.[11] Like Judge Griffin's HAVA challenge, his UOCAVA ID challenge violates the Equal Protection Clause because it arbitrarily treats voters differently based on where they were registered to vote. *See Bush*, 531 U.S. at 104; *Gray*, 372 U.S. at 380. If Judge Griffin's challenge succeeds, these voters will have their votes discounted simply because they were registered to vote in the four particular counties Judge Griffin decided to target; had they been registered to vote in any other counties, the status of their votes would be uncontested. *Cf. Bush*, 531 U.S. at 107 (finding equal protection violation where standards for counting ballot "vary . . . from county to county"). Judge Griffin's selective challenges of these voters thus violate the Equal Protection Clause because North Carolina has "grant[ed] the right to vote on equal terms" to all voters, regardless of which

[11] Judge Griffin maintains that while he filed UOCAVA challenges in six counties, only these four provided voter lists. *See id.* But whether Judge Griffin's challenges targeted voters in four or six arbitrarily selected counties, they would still violate the Equal Protection Clause by arbitrarily singling out voters in just a few select counties.

county they are registered in or their chosen method of voting and it "may not, by later arbitrary and disparate treatment, value" the votes of some voters "over that of [others]." *Id*. at 104–05.

The "constitutional concern" about equal protection is particularly acute in circumstances like this one implicating post-election "discretion in areas relevant to the . . . counting of ballots." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (citations omitted). This is because the initial count of the ballots is already known. *Id.* (noting that it is "particularly 'necessary to protect the fundamental right of each voter' to have his or her vote count on equal terms" during post-election review of provisional ballots (citation omitted)). Here, the ballots at issue have been counted and repeatedly recounted. Judge Griffin has fallen short each time. To change this result, Judge Griffin seeks to violate the core constitutional principle that "equal weight" must be "accorded to each vote" and "equal dignity" must be "owed to each voter." *Bush*, 531 U.S. at 104.

B. Judge Griffin's requested relief would require the State Board to violate federal election and civil rights statutes.

1. National Voter Registration Act

The NVRA bars Judge Griffin's HAVA Challenge for two distinct reasons. First, the NVRA prohibits efforts to systematically remove voters from the voter rolls within close proximity to an election. *See* 52 U.S.C. §

20507(c)(2)(A). Systematic removals under the NVRA include attempts to remove voters *en masse* without any "individualized inquiry" into a voter's qualifications, as Judge Griffin seeks to do here. *See N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *7 (M.D.N.C. Aug. 7, 2018). Judge Griffin's contention—that he does not seek to remove voters from the rolls and instead only wants to discard their ballots, Pet.41–42—is a "distinction without a difference," *Majority Forward v. Ben Hill Cnty. Bd. of Elections*, 512 F. Supp. 3d 1354, 1368 (M.D. Ga. 2021) (rejecting this argument). After all, the entire purpose of the NVRA is to ensure that the "right to exercise the[] franchise . . . not be sacrificed." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012) (emphasis added); *see also* 52 U.S.C. § 20501(a)(1)–(2), (b)(2). That purpose is entirely defeated if a voter's ballot can be tossed out after an election based on perceived registration errors, even while nominally leaving the voter on the registration rolls. Simply put, Judge Griffin cannot make an end-run around the NVRA by seeking to divorce registration from voting: "Registration is indivisible from election." *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) (explaining states cannot circumvent NVRA protections "by separating registration from voting").

Moreover, Judge Griffin's challenges would indisputably be barred if raised during the 90-day quiet period leading up to an election, 52 U.S.C. §

20507(c)(2)(A), which exists to ensure that voters are not "removed [from the rolls] days or weeks before Election Day" because they "will likely not be able to correct" any erroneous removals "in time to vote." *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014). That congressional protection would be gutted if losing candidates could simply convert pre-election registration challenges into post-election ballot challenges. *Cf. Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 183 (2019) (explaining state law is preempted to the extent it serves as an obstacle to the accomplishment of federal legislation). Ultimately, the result to voters, including Intervenors and their constituents, is the same—they will not be able to participate in the franchise and have their vote count in the 2024 general election.

Second, the NVRA prohibits non-uniform and discriminatory systematic removals of voters from the voter rolls. 52 U.S.C. § 20507(a)(3); N.C.G.S. § 163-82.14(a1). Because, as explained, Judge Griffin's HAVA challenge targets only voters who voted by mail or in person during early voting, it discriminates against voters based on their voting method. *Cf. Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006) (concluding an Ohio law that required pre-registration, training, and affirmation requirements for only compensated voter registration workers violated NVRA's uniform and non-discriminatory provision because it imposed barriers to the registration process but only for certain groups of individuals).

Judge Griffin seeks to avoid the NVRA's strictures altogether by emphasizing that he seeks state, rather than federal, office. Pet.46. But he ignores that, under state law, North Carolina can only have a "single system for storing and managing the official list of registered voters in the State," and that system "shall serve as the official voter registration list for the conduct of all elections in the State." N.C.G.S. § 163-82.11(a) (emphasis added). In the maintenance of this singular system, North Carolina is "bound by the provisions of the NVRA for the registrants at issue," *RNC*, 120 F.4th at 401, regardless of whether disenfranchisement is sought for an election for federal or state office.

2. Materiality Provision of the Civil Rights Act

Judge Griffin's HAVA challenge, if granted, would also violate the Civil Rights Act of 1964. Under that law's materiality provision, "[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Here, the purportedly missing driver's license and social security number information is immaterial in this context—North Carolina long ago deemed each of the challenged voters were qualified to vote and each voter complied with the

necessary identification requirements to cast a ballot. *E.g.*, *Griffin I*, ECF No. 24-2 ¶¶ 4–7; ECF No. 24-3 ¶¶ 4–6; ECF No. 24-4 ¶¶ 4–6.

Judge Griffin argues that the materiality provision is irrelevant here because North Carolina law implementing HAVA requires voters to provide a driver's license number or social security information. *See* Pet.55. But he ignores that each of the challenged voters already had their voter registration applications approved by North Carolina election officials, meaning those officials "ma[d]e a tentative determination that the applicant is qualified to vote at the address given" and later confirmed the applicant's qualification after verifying their address. *See* N.C.G.S. § 163-82.7 (setting forth requirements for determining an applicant's qualification to vote). Moreover, the vast majority of these challenged voters—like Voter Intervenors—likely presented a driver's license when casting their ballots to satisfy North Carolina's voter ID requirements, rendering the alleged lack of such information even more immaterial. *Id.* § 163-166.16; *see also Griffin I*, ECF No. 24-2 ¶ 7; ECF No. 24-3 ¶ 6; ECF No. 24-4 ¶ 6. Simply put, Judge Griffin fails to explain why voters should have their right to vote denied for omitting information that North Carolina election officials did not demand of them and plainly did not need to conclusively determine that they were qualified to vote. *See, e.g.*, *In re Ga. Senate Bill 202*, No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023) (concluding the rejection of ballots based on

whether the voter provided their date of birth on absentee ballots was a violation of the materiality provision because such information is not material to determining the voter's qualifications under Georgia law).

Moreover, Judge Griffin has not even demonstrated any underlying violation of HAVA or its implementing state analog. While Judge Griffin asserts that the over 60,000 voters "ha[ve] never provided the statutorily required information to become lawful voter registrants," Pet.6, his only support is the absence of this information from a file the State Board provided to Judge Griffin that appears to be a list of registered voters in the state. *See, e.g.*, Aff. of Ryan Bonifay ¶¶ 11–14 (App.1755). Judge Griffin has not shown that these voters never provided the purportedly required information. And there are many potential explanations for why a voter's registration file may be incomplete that does not stem from the voter failing to provide the information when they registered. For instance, data entry or transcription errors may lead to an applicant's driver's license or social security number not being saved to a registration file, even where voters provided them. *See* NCSBE Order at 24–25 n.16 (App.61–62). Others may have supplied the requisite numbers in a previous application under a different registration record than the one challenged or may have registered to vote well before HAVA even asked applicants to provide such information. *See id.* And many other voters likely also provided this purportedly missing information when they voted, like

Intervenors who each supplied their driver's licenses to poll workers. *See Griffin I*, ECF No. 24-2 ¶ 7; ECF No. 243- ¶ 6; ECF No. 24-4 ¶ 6.

III. Judge Griffin is not entitled to a writ of prohibition in any event.

Judge Griffin's petition also fails on two additional independent grounds. First, because he chose to challenge the election rules at issue *after* the election occurred—and after ballots were counted—the doctrine of laches bars *any* form of relief. Second, Judge Griffin has not satisfied the basic prerequisites for a writ of prohibition under this Court's precedent.

A. Judge Griffin unreasonably delayed seeking relief, severely prejudicing Respondents and voters.

In addition to requesting relief barred by federal law, Judge Griffin's petition is also barred by the equitable doctrine of laches. Laches bars a claim where there has been (1) an unreasonable delay on the part of the party seeking relief, and (2) injury or prejudice to the person seeking to invoke the doctrine of laches. *See MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209, 558 S.E.2d 197, 198 (2001); *see also Voters Organized for the Integrity of Elections v. Balt. City Elections Bd.*, 214 F. Supp. 3d 448, 454 (D. Md. 2016) (applying same factors in federal court). Whether a delay is unreasonable "depends upon the facts and circumstances of each case," *MMR Holdings*, 148 N.C. App. at 209, 558 S.E.2d at 198, but "[w]henever the delay is mere neglect to seek a known remedy or to assert a known right, . . . and is without

reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy," *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976); *see also Save Our Schs. of Bladen Cnty., Inc. v. Bladen Cnty. Bd. of Educ.*, 140 N.C. App. 233, 237, 535 S.E.2d 906, 910 (2000) (affirming grant of laches where suit challenging bond initiative was filed after referendum was passed by voters).

Diligence in seeking relief is particularly important in the context of elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); *see also Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.").[12] Although Judge Griffin suggests post-election litigation is somehow immune from laches, "[t]he same imperative of timing and the exercise of judicial review applies with much *more* force on the back end of elections." *Trump v. Wis. Elections Comm'n*,

[12] Judge Griffin is wrong that the *Purcell* principle is inapplicable in this state court action. As Justice Dietz explained in his dissent to this Court's grant of Judge Griffin's motion to stay certification of the Supreme Court race, "this Court has long acknowledged a state version of *Purcell* (although not always by name)." Am. Order (Jan. 7, 2025) (Dietz, J., dissenting) (citing *Pender Cnty. v. Bartlett*, 361 N.C. 491, 510, 649 S.E.2d 364 (2007); *Holmes v. Moore*, 382 N.C. 690, 691, 876 S.E.2d 903 (2022) (Mem.) (Newby, C.J., dissenting); *Harper v. Hall*, 382 N.C. 314, 319, 874 S.E.2d 902 (2022) (Mem.) (Barringer, J., dissenting)).

983 F.3d 919, 925 (7th Cir. 2020) (emphasis added) (applying laches to bar post-election challenge). Indeed, courts across the country have "imposed a duty on parties having grievances based on election laws to bring their complaints forward for preelection adjudication when possible." *Hendon*, 710 F.2d at 182; *see also Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1324 (N.D. Ga.) (concluding laches barred suit that could have been filed months ahead of election rather than weeks after it), *aff'd on other grounds*, 981 F.3d 1307 (11th Cir. 2020).

Judge Griffin seeks precisely the kind of post-election relief that courts prohibit. After losing his election, Judge Griffin retroactively challenges the validity of election laws and procedures that have all been in place for years. There is thus no question that Judge Griffin could have brought his challenges well before the election. Nor does he offer any justification for his unreasonable delay. Instead, Judge Griffin gambled on the election results and now seeks to enlist the judiciary to disenfranchise tens of thousands of voters to hand him an election he lost. As Justice Dietz recognized, "[t]he harm this type of post-election legal challenge could inflict on the integrity of our elections is precisely what the *Purcell* principle is designed to avoid." Am. Order (Jan. 7, 2025) (Dietz, J., dissenting). Indeed, this case is a perfect example of a candidate's attempt to "misuse [] the judicial system to baselessly cast doubt on the electoral process in a manner that is conspicuously consistent with the

[candidate's] political ends." *Lake v. Hobbs*, 643 F. Supp. 3d 989, 1010 (D. Ariz. 2022).

Judge Griffin's unreasonable delay severely harms the Voter Intervenors and North Carolina voters. Take for example Intervenors Anderson, Smith, and Webster-Durham, whose registrations Judge Griffin now contends do not comply with federal and state requirements. Each of them has been registered in North Carolina and successfully voted for years, dating as far back as 2009. *Griffin I*, ECF No. 24-4 ¶¶ 4–5; ECF No. 24-3 ¶¶ 4–5; ECF No. 24-2 ¶¶ 4–5. But if Judge Griffin's tardy challenge to their registrations is successful, these voters would retroactively and unexpectedly have their most recent votes for state supreme court justice erased. By choosing the wait-and-see approach, Judge Griffin seeks relief that would prejudice the voting rights of thousands of ordinary voters like the Voter Intervenors. *See King v. Whitmer*, 505 F. Supp. 3d 720, 732 (E.D. Mich. 2020) ("Plaintiffs' delay prejudices [the] Defendants . . . This is especially so considering that Plaintiffs' claims for relief are not merely last-minute—they are after the fact. While Plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified."). The State Board will also be prejudiced by Judge Griffin's belated protests because it would force the Board to disenfranchise lawful voters after they have cast their ballots, violate a host of laws, and fail to carry out its nondiscretionary duty to certify the election. *See* N.C.G.S. § 163-22(a), (h).

To avoid the consequences of his unreasonable delay, Judge Griffin suggests that applying the *Purcell* principle here would invalidate the election protest procedures. Pet.43. But the fact that an election protest may be filed after an election does not mean it will always implicate *Purcell* or laches. Those doctrines only bar relief where, as here, a party *unreasonably* delays bringing an action without justification, and that delay prejudices the party against whom relief is sought. *See MMR Holdings*, 148 N.C. App. at 209, 558 S.E.2d at 198; *see also Trump*, 983 F.3d at 925.

The case Judge Griffin chiefly relies on illustrates this point. *See* Pet.5 (citing *James v. Bartlett*, 359 N.C. 260, 265, 607 S.E.2d 638, 641 (2005)). In *James*, plaintiffs challenged the counting of out-of-precinct ballots after the 2004 election. 359 N.C. at 265, 607 S.E.2d at 641. This Court rejected defendants' argument that the protest was untimely because (1) 2004 was the first election cycle that such ballots had been counted, and (2) the State Board refused to state before the election whether it would count them. *Id.* Thus, unlike here, the plaintiffs in *James* did not "ch[o]ose to await the outcome of the election before challenging the results." *Id.*

The opposite is true here. The ballots Judge Griffin challenges were cast under longstanding rules and practices, and Judge Griffin does not and cannot claim otherwise. In other words, because this was not a circumstance where the State Board failed to provide "clear statutory or regulatory directive[s]" for

how it would run the election, *see id.* at 265, Judge Griffin was required to assert his challenges well ahead of the election. It is indisputable that Judge Griffin's belated petition now substantially prejudices the Voter Intervenors, the State Board, and all North Carolina voters who cast their ballots in reliance on the state's longstanding election rules and practices. Judge Griffin's unreasonable delay in bringing these challenges alone precludes relief. Holding otherwise would "encourage sandbagging on the part of wily plaintiffs." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (citing *Hendon*, 710 F.2d at 182).

B. A writ of prohibition is not a proper vehicle for Judge Griffin's requested relief.

While Judge Griffin's case belongs in federal court, *supra* Argument Section I, he has also chosen an improper vehicle for any state court review. His petition for a writ of prohibition is irreconcilable with nearly two centuries of state law as expounded by this Court. Rather than seeing his way through the General Assembly's specifically prescribed statutory scheme for appealing the State Board's denials of election protests, Judge Griffin instead asks this Court for special treatment in the interests of "prevent[ing] manifest injustice." Pet.18. Judge Griffin's efforts to short circuit the proper avenues for state court review thus provide yet another reason to deny his petition.

As this Court has made clear, "prohibition is an extraordinary judicial writ." *Whitaker*, 114 N.C. at 818, 19 S.E. at 376. It "does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, [or] by appeal." *Id*. It is only used "with great caution and forbearance, . . . where none of the ordinary remedies provided by law will give the desired relief." *Id.* at 377; *see also Inman*, 224 N.C. at 542, 31 S.E.2d at 646–47 ("[T]he writ of prohibition . . . has been uniformly denied where there is other remedy.").

Here, there is very plainly an "ordinary course of judicial proceedings" for Judge Griffin to pursue his challenges. *See Whitaker*, 114 N.C. at 818, 19 S.E. at 376–77. The General Assembly has provided candidates like Judge Griffin with a specific procedure on a specific timeline for raising them. *See* N.C.G.S. § 163-182.14. By statute, a candidate for statewide judicial elections "has the right to appeal the final decision [of the State Board of Elections] to the Superior Court of Wake County within 10 days of the date of service." *Id.* § 163-182.14 (b). After rendering a final decision, the State Board will certify the result "unless an appealing party obtains a stay of the certification from the Superior Court of Wake County within 10 days after the date of service." *Id.* A stay will not issue "unless the petitioner shows the [Superior] court that the petitioner has appealed the decision of the State Board of Elections, that the petitioner is an aggrieved party, and that the petitioner is likely to prevail in the appeal." *Id.*

Judge Griffin's own conduct confirms the impropriety of the very writ he seeks because he is *simultaneously* pursuing the same prescribed statutory scheme above in Wake County Superior Court. Judge Griffin currently has three lawsuits pending before that court appealing from the State Board's final decisions. *See* Case Nos. 24CV040622-910; 24CV040619-910; 24CV040620-910. He raises the same arguments before that court as he does here. *See, e.g.*, Griffin's Notice of Appeal & Verified Pet. for Jud. Rev., No. 24CV040620-910 (Dec. 13, 2024). Judge Griffin has not explained why this statutorily prescribed appeals process is inadequate; if anything, Judge Griffin's effort to short circuit proceedings in the Superior Court by seeking an extraordinary writ has only delayed and complicated resolution of his meritless challenges.

Judge Griffin's only justification for ignoring the General Assembly's appeals process is his assertion that the State Board "has knowingly broken the law." Pet.2. Even if that were the case (and it is not), this Court has never found a writ of prohibition appropriate to "correct" purported "errors" where there is already a statutorily prescribed appeals process in place. *Id.*; *see also* 20A N.C. Index 4th Mandamus § 14 (noting, for example, that writs of mandamus are particularly inappropriate for reviewing final decisions of North Carolina's administrative agencies where the "proper procedure for review" is "by appeal or certiorari"); 1 N.C. Civil Prac. and Proc. § 95:4 (6th ed.) (a "writ of prohibition is the negative counterpart to a writ of mandamus").

Moreover, Judge Griffin's allegation that the State Board has violated the law fails to explain why the Superior Court is unable to hear his claims.

Tellingly, Judge Griffin's only support to the contrary is a court case from Kentucky, and language from an 1841 opinion of this Court discussing the writ's history "[i]n England" from "the Court of King's Bench." *See* Pet.17 (quoting *State v. Allen*, 24 N.C. 183, 188–89 (1841)). Irrespective of what the law might be in other jurisdictions, the writ of prohibition in North Carolina "only issues in cases where it is necessary to restrain the action of the lower courts *proceeding outside of their powers*," or where "the court below has no jurisdiction of its subject matter." *Holly Shelter R. Co.*, 133 N.C. at 132, 45 S.E. at 550 (emphasis added). Neither circumstance exists here.

Judge Griffin's other cited cases are of no help to him. *See* Pet.14–18. In both *Whitaker* and *Mountain Retreat Association*, this Court *denied* issuing the writ because the matter could be resolved "on appeal to the superior court," *Whitaker*, 114 N.C. at 818, 19 S.E. at 377, and relief was already "available . . . under the comprehensive provisions of [] statute," *Mountain Retreat Ass'n v. Mt. Mitchell Dev. Co.*, 183 N.C. 43, 110 S.E. 524, 525 (1922). The same is true here. *See* N.C.G.S. § 163-182.14.

Faced with these precedents, Judge Griffin relies on a hodgepodge of quotes from inapposite cases. *See State v. Ellis*, 361 N.C. 200, 639 S.E.2d 425 (2007) (criminal post-judgment motions), *Moses v. State Highway Comm'n*, 261

N.C. 316, 317, 134 S.E.2d 664, 665 (1964) (interlocutory appeals); *Park Terrace, Inc. v. Phoenix Indem. Co.*, 243 N.C. 595, 597, 91 S.E.2d 584, 586 (1956) (relief outside the motion); *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 506-07, 681 S.E.2d 278, 283 (2009) (jury charges); *Greene v. Charlotte Chem. Lab'ys, Inc.*, 254 N.C. 680, 694, 120 S.E.2d 82, 91 (1961) (motions to strike pleadings). The only remaining case touching on prohibition is irrelevant to the issues posed by Judge Griffin's petition. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 568 n.11, 2021-NCSC-6, ¶ 22 (2021) (discussing standing requirements not at issue here). This Court need not look beyond its well-developed and well-reasoned precedents on writs of prohibition to dismiss Judge Griffin's petition.

CONCLUSION

For the reasons set forth above, this Court should stay proceedings pending resolution of *Griffin v. N.C. State Board of Elections*, Case Nos. 25-1018 (lead), –1019, –1024 (4th Cir.). If the Court proceeds to consider the Petition, it should deny the Petition for the reasons above.

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*Motion for admission *pro hac vice* forthcoming

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