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; TANYA WEBSTER-DURHAM; SARAH SMITH; JUANITA ANDERSON, Intervenor-Respondents.	)	From the North Carolina State Board of Elections

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BRIEF OF INTERVENOR-RESPONDENT ALLISON RIGGS IN RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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BRIEF OF INTERVENOR-RESPONDENT ALLISON RIGGS IN RESPONSE TO PETITION FOR WRIT OF PROHIBITION

****

INTRODUCTION

Judge Griffin lost the race for Associate Justice in the November 2024 general election. The final vote count showed that Justice Riggs received 734 more votes than Judge Griffin. Like most disappointed candidates in a close race, Judge Griffin took full advantage of the procedures our General Assembly designed to test the integrity of the outcome. But after a machine recount, a hand recount, and individualized

evidentiary hearings in nearly every county in the State, the result was unchanged. The State Board of Elections thus certified the vote totals on December 11, 2024.

After he failed to win over the voters, Judge Griffin tried to change the election rules. Each of these rules has been applied, without controversy, for *years*. And these rules applied again in every primary and general election race in 2024. But Judge Griffin wants to change the rules for his race only. The effect of these rule changes would be to retroactively disenfranchise more than 60,000 eligible North Carolina voters who followed the rules.

It gets worse. While Judge Griffin seeks three retroactive changes to the rules, Judge Griffin now asks this Court to take up just one rule at a time, to order a new count after changing each rule, then to stop if he's won—and if not, to keep going until he does. Judge Griffin cites no precedent for this Court of final appellate review to superintend a step-by-step administrative process in this way.

Assuming this Court were to acquiesce in this peculiar and novel approach, Judge Griffin asks this Court to *start* with a change that would disenfranchise uniformed servicemembers, their families, and other overseas voters in a state with a dozen military bases, 100,000 active-duty servicepeople, and more than 21,000 reservists assigned to North Carolina bases. These North Carolinians voted absentee using a standard federal form or a secure online portal in accordance with an absentee voting regime specially created to address the unique challenges faced by our military when voting. These voters followed a plain-as-day regulation providing that they—like military and overseas voters from states across the country who vote using the

same federal forms—did not need to provide photo ID when voting from overseas. That regulation was unanimously adopted in an open process and approved by the Rules Review Commission without controversy. Yet more than a year later, Judge Griffin is seeking to throw out votes cast in compliance with, and reliance on, that regulation. The bipartisan State Board unanimously rejected that request. This Court should too.

Further, Judge Griffin carefully selected voters in this category *in only four counties that lean heavily Democratic*. He protested 1,409 voters in Guilford County before the deadline, then tried to file untimely "supplements" to his protests to include voters in Durham, Forsyth, and Buncombe Counties (for a total of 5,509 voters). This calculated challenge to voters in just four Democratic-leaning counties would pose a clear equal protection problem under the U.S. Constitution. This Court could not order the removal of votes in four counties, while leaving votes from similarly situated voters in all other counties untouched. If a retroactive rule were expanded to all military and overseas voters *in the other 96 counties in the State*, this category of protests alone would balloon to more than 30,000 votes, including those of many thousands of uniformed servicepeople and their families. This Court should not open that Pandora's box.

If his first-choice protest is not enough to win, Judge Griffin asks the Court to move on to the adult children of these military and overseas voters. These North Carolinians, though they have *lived* overseas their entire lives while their parents served in the military or worked abroad, may return to our state often for holidays or

to visit family and friends, have grandparents or other close family residing here, and feel more connected to North Carolina than the country where they live abroad. In 2011, the General Assembly enacted a statute without a single nay vote making clear that these children of North Carolinians are "residents" of North Carolina. That statute went unchallenged for 13 years and applied in 43 elections, including every primary and general election race in 2024. But Judge Griffin wants this Court to decide—for the first time and only as applied to 266 voters in *his* race—that the statute is unconstitutional. A last-minute challenge to this statute failed before the election, was appealed to this Court, and this Court took no action on it before the election. Now that the votes have been cast and counted, Judge Griffin cannot use the protest process to change the rules for just his race. Moreover, this 266-vote protest by itself comes nowhere close to the 734-vote margin between Justice Riggs and Judge Griffin, and it should be denied on that ground alone.

Finally, Judge Griffin raises a third category of protests that would disenfranchise more than 60,000 voters in one blow. These protests allege that voters were not lawfully registered because, through no fault of the voters, a state database lacks a driver's license or social security number associated with their records. Judge Griffin wants this Court to throw out these votes even though many of these voters have been lawfully registered to vote and repeatedly voted in North Carolina elections for years (or decades). State law is clear that a voter—once registered—is not subject to challenge at all (much less years later) on the grounds of an issue with the voter's registration. In addition, Judge Griffin has been unable to identify a *single voter* who

is actually ineligible to vote (*e.g.*, not a U.S. citizen, not over 18 years old, not a resident of North Carolina, or serving a felony sentence). Indeed, the news is full of stories of North Carolinians on Judge Griffin's list who are *clearly eligible* to vote, and some of those voters intervened, or filed amicus briefs, in this case in federal court. The Republican Party also tried this strategy and failed before the November 2024 election, filing a lawsuit that raised the very same issue less than 90 days before the election. A federal judge ruled in that case that he would not entertain relief that would disenfranchise votes in the 2024 general election.

The problems with Judge Griffin's petition for a writ of prohibition do not end there. To begin, Judge Griffin failed to properly serve the thousands of voters he protested in the flood-the-zone but cut-procedural-corners strategy he chose to adopt here. A junk-mail postcard with a QR code and an ambiguous warning that one's vote "may be affected" was inadequate. Next, Judge Griffin's unprecedented attempt to bypass the statutory process for appealing a Board decision to the Wake County Superior Court, by filing an extraordinary, original action in this Court is unlawful and unwarranted. Finally, each of his protests is also fatally flawed under state and federal law.

At bottom, Judge Griffin's protests were properly rejected because they pose a risk to the stability and integrity of our elections. His effort to change the rules after an election is unprecedented. And if Judge Griffin succeeds, the implications are staggering. Rather than suing *before* an election to challenge rules they do not believe are valid, candidates will have an incentive to say nothing and wait to see if they win.

Then if they lose, they will drag out elections through litigation for months, seeking to throw out votes until they win. Never again will North Carolina voters walk out of the voting booths knowing that their votes will count, and the court system will be flooded with lawsuits after every election seeking to challenge votes all over the State. That result is untenable and should be rejected by this Court not only for the sake of this race, but to avoid undermining the public's confidence in every election going forward.

* * *

To be sure, it is an unusual thing for a sitting Justice to file a brief asking her colleagues to reject what she believes to be unlawful and unconstitutional requests for relief. Justice Riggs' participation in this matter is predicated on a deeply-held belief that this Court, as an institution, can live up to its highest ideals, regardless of who its members supported in this election or their personal political leanings—that this decision has the potential to uphold the rule of law, and to increase, rather than erode, the public's confidence in the judiciary at a time when that confidence is at an all-time low. In a State where we openly celebrate that all power derives from the people, the best way to achieve these things is to leave this matter in the hands of the voters who followed the rules in place at the time of the election.

ISSUES PRESENTED

1. Whether protests that seek to change the rules after the votes have been counted are barred by this State's *Purcell* principle, laches, and due process.

2. Whether a bulk-mailed postcard with a QR code directing a voter to hundreds of linked protests satisfies the requirements of state law for service of a protest and due process.

3. Whether a writ of prohibition may issue from this Court when a protestor has a right to appeal the Board's decision directly to Wake County Superior Court.

4. Whether military and overseas voters who voted under Article 21A may have their votes invalidated for failing to provide photo ID when a state regulation instructed them they did not need to do so and Article 21A (unlike Article 20) does not include such a requirement.

5. Whether the children of North Carolinians stationed or living abroad who never lived in North Carolina may have their votes invalidated when a statute enacted by the General Assembly in 2011 extended the franchise to these voters and they voted unchallenged in all elections since, including all other races in 2024.

6. Whether the ballots of more than 60,000 eligible North Carolina voters for whom a driver's license or social security number does not appear in a database through no fault of their own may have their votes invalidated in the 2024 election.

STATEMENT OF THE FACTS

A. Judge Griffin Protests the Election Results

Jefferson Griffin lost the race for Supreme Court Associate Justice in the November 2024 general election by 734 votes. Shortly after the election, Judge Griffin filed over three hundred election protests. Judge Griffin's protests were "based on six categories of allegations that certain general election voters' ballots were invalid." App. 39. Three categories of protests—based on deaths, felony

sentences, and registrations denied or removed—were heard in evidentiary hearings in counties across the state because they were "focused on individual, fact-specific determinations of voter eligibility." App. 40–41. Those protests failed to change the outcome and are no longer the subject of litigation. Griffin Br. at 4 n.2.

At Judge Griffin's urging, the Board "voted unanimously to take jurisdiction" over the other three categories of protests. App. 41. These protests are at issue in Judge Griffin's Petition to this Court. The Board summarized the subjects of these protests as follows:

> 1. [**Military and Overseas Citizen Voters**.] Ballots cast by military or overseas citizens under Article 21A of Chapter 163, when those ballots were not accompanied by a photocopy of a photo ID or ID Exception Form—1,409 voters challenged;
>
> 2. [**U.S. Citizens Whose Parents Are N.C. Residents**.] Ballots cast by overseas citizens who have not resided in North Carolina but whose parents or legal guardians were eligible North Carolina voters before leaving the United States—266 voters challenged; [and]
>
> 3. [**Allegedly Incomplete Registrations**.] Ballots cast by registered voters whose voter registration database records contain neither a driver's license number nor the last-four digits of a social security number—60,273 voters challenged[.]

App. 40 (footnote omitted) (reordered). Each category is discussed below.

i. Military and Overseas Citizen Voters

Judge Griffin challenged 1,409 ballots allegedly "cast by military or overseas citizens under Article 21A of Chapter 163, when those ballots were not accompanied

by a photocopy of a photo ID or ID Exception Form." App. 40.[1] While the N.C. Administrative Code provides that these voters are "not required to submit a photocopy of acceptable photo identification," 8 N.C. Admin. Code 17.0109(d), Judge Griffin argued that this rule conflicts with North Carolina statutory law.

North Carolina's laws on this issue were enacted against a backdrop of a long history of efforts to address the problems that our military faces when voting while deployed, dating back to the Civil War. *See* R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 Fordham Urb. L.J. 935, 948 (2007). For decades in our country's early history, a patchwork of state laws governing military voting often created hurdles to, and sometimes intentionally sought to disenfranchise, military voters. For example, Texas banned voting by military personnel altogether, six states required military personnel to register in person, two states abolished absentee voting, and twenty states had very short windows to request and return absentee ballots. *Id.* at 959–60. These problems were compounded by the issues faced by a voting population "spread across the globe in highly inaccessible areas," from battlefields to submarines. *Id.* at 937 & n.16. With this context, Congress enacted a series of statutes to address the

[1] Judge Griffin claims this first category applies to "5,509" ballots, Griffin Br. at 3, but he filed only one timely protest in this category, challenging 1,409 voters in Guilford County, *see id*. at 66 n.15. Judge Griffin later "sought to add voters" in "supplemental filings" in Durham, Forsyth, and Buncombe Counties, but these new filings came well "after" the statutory "deadline to file an election protest." App. 40 n.2 (citing N.C. Gen. Stat. § 163-182.9(b)(4)). The Board rejected Judge Griffin's protests as "legally deficient" and thus found it unnecessary to decide "whether such supplementations are allowable under the General Statutes and Administrative Code." App. 40 n.2. Judge Griffin fails to address this timeliness issue.

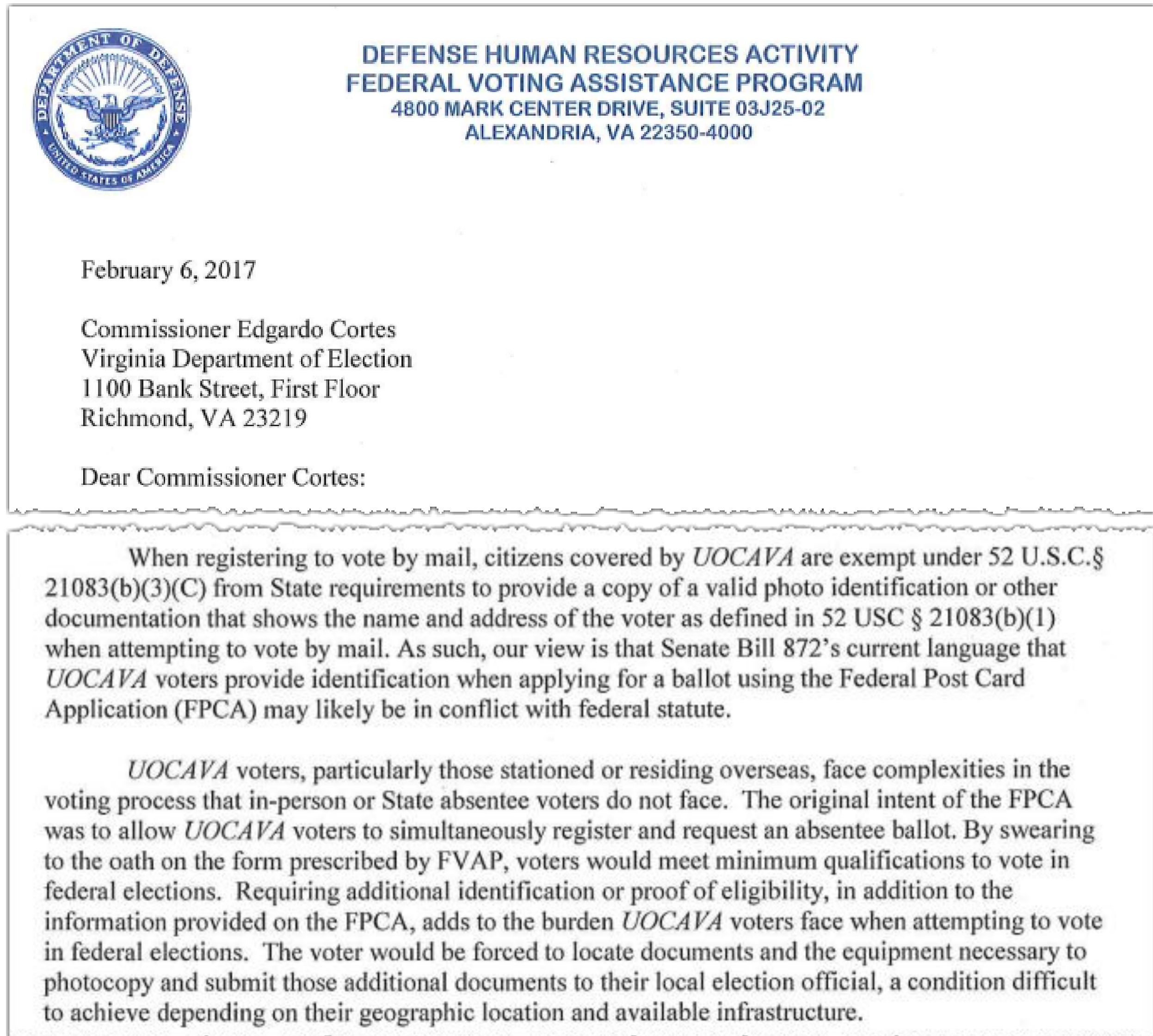
concern that "our soldiers and sailors and merchant marines must make a special effort to retain their right to vote." S. Rep. No. 84-580, at 3 (1955).

In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Pub. L. No. 99-410, 100 Stat. 924 (1986). The Act consolidated various federal laws governing overseas voting and established a uniform regime for active-duty military and their families and for civilian voters living overseas. The Act added new safeguards for these voters. For registration, it created a Federal Postcard Application (the "FPCA postcard"), to serve simultaneously as a voter registration and absentee ballot application for groups covered by the Act. *Id.* §§ 101, 104, 100 Stat. at 926.

In 2001, Congress declared that military personnel must "receive[] the utmost consideration and cooperation when voting" and amended UOCAVA to *require* states to accept the FPCA postcard. Pub. L. No. 107-107, § 1601, 115 Stat. 1012, 1274 (2001). UOCAVA requires states to allow active-duty military and overseas voters to register, request a ballot, and vote by mail in federal elections using prescribed federal forms, including the FPCA postcard and the federal write-in absentee ballot (FWAB). 52 U.S.C. § 20302(a).

These federally prescribed forms and their instructions do not include a requirement for covered voters to include a photocopy of their photo ID. Further, the Federal Voting Assistance Program (FVAP), an agency of the U.S. Department of Defense responsible for administering UOCAVA, has taken the position that states *may not* apply a photo ID requirement. The Director of the FVAP explained that,

"[w]hen registering to vote by mail, citizens covered by UOCAVA are *exempt* under 52 U.S.C. § 21083(b)(3)(C) from State requirements to provide a copy of a valid photo identification":



DEFENSE HUMAN RESOURCES ACTIVITY
FEDERAL VOTING ASSISTANCE PROGRAM
4800 MARK CENTER DRIVE, SUITE 03J25-02
ALEXANDRIA, VA 22350-4000

February 6, 2017

Commissioner Edgardo Cortes
Virginia Department of Election
1100 Bank Street, First Floor
Richmond, VA 23219

Dear Commissioner Cortes:

When registering to vote by mail, citizens covered by *UOCAVA* are exempt under 52 U.S.C.§ 21083(b)(3)(C) from State requirements to provide a copy of a valid photo identification or other documentation that shows the name and address of the voter as defined in 52 USC § 21083(b)(1) when attempting to vote by mail. As such, our view is that Senate Bill 872's current language that *UOCAVA* voters provide identification when applying for a ballot using the Federal Post Card Application (FPCA) may likely be in conflict with federal statute.

UOCAVA voters, particularly those stationed or residing overseas, face complexities in the voting process that in-person or State absentee voters do not face. The original intent of the FPCA was to allow *UOCAVA* voters to simultaneously register and request an absentee ballot. By swearing to the oath on the form prescribed by FVAP, voters would meet minimum qualifications to vote in federal elections. Requiring additional identification or proof of eligibility, in addition to the information provided on the FPCA, adds to the burden *UOCAVA* voters face when attempting to vote in federal elections. The voter would be forced to locate documents and the equipment necessary to photocopy and submit those additional documents to their local election official, a condition difficult to achieve depending on their geographic location and available infrastructure.

Letter from Director Beirne to Commissioner Cortes, Virginia Department of Election (Feb. 6, 2017) (cited in Board's Order at App. 76 n.26), available at fvap.gov and archived at https://perma.cc/2BSZ-VUJ4; Letter from Director Beirne to Director

Robert A. Brehm and Director Todd Valentine, New York State Board of Elections (Mar. 1, 2017), available at fvap.gov and archived at https://perma.cc/K4XU-44V6.

The FVAP also publishes a comprehensive Voting Assistance Guide to provide uniformed servicemembers, their families, and overseas citizens with a "reference guide for everything you need to know about absentee voting in all 55 States, territories and the District of Columbia." FVAP, Voting Assistance Guide, https://www.fvap.gov/guide (last visited Jan. 20, 2025), archived at https://perma.cc/QVF3-3UTK. This Voting Assistance Guide includes "state-specific election dates, deadlines, guidance, and contact information required to vote absentee," but there is *no instruction for any U.S. state* that its UOCAVA voters must comply with a photo ID requirement when requesting or voting their ballot. 2024–25 Voting Assistance Guide at 3 (rev. Aug. 2023) (cited in Board's Order at App. 75), available at fvap.gov and archived at https://perma.cc/B4M4-L8QE. Indeed, as the Board recognized, there are only two references in the Guide to photo ID.[2] Neither reference addresses the submission or counting of a UOCAVA voter's ballot.

Against this federal backdrop for military and overseas voters, the General Assembly decided in 2011 to allow military and overseas voters to vote in *state elections* using the same method. It enacted the Uniform Military and Overseas

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[2] Indiana permits voters to provide a copy of their photo identification instead of writing their identification or social security number on their ballot request form. 2024–25 Voting Assistance Guide at 128. Wisconsin instructs "temporary overseas voters" to include a copy of their photo identification with their ballot because Wisconsin does not consider temporary overseas voters to be in the same class as "permanent overseas voters" such as uniformed servicemembers and their families, who may vote without a photo ID. *Id.* at 427–28.

Voters Act (UMOVA) and established a comprehensive regime for absentee voting, with an entirely separate set of requirements codified in Article 21A of Chapter 163. (Article 20 governs absentee voting for domestic civilian voters). Article 21A entitled covered voters to cast a "military-overseas ballot," defined as:

> (1) a federal write-in absentee ballot under UOCAVA,
>
> (2) ballots specifically prepared or distributed for use by a covered voter in accordance with UMOVA, or
>
> (3) a ballot cast by a covered voter in accordance with UMOVA.

N.C. Gen. Stat. § 163-258.2(1), (3), (4), (7).

Article 21A, like UOCAVA, included no photo ID requirement. The General Assembly delegated the power to implement Article 21A to the Board, including the power to adopt "standardized absentee-voting materials, including privacy and transmission envelopes and their electronic equivalents, authentication materials, and voting instructions, to be used with the military-overseas ballot." N.C. Gen. Stat. § 163-258.4(d). By this Authority, the Board adopted the regulation Judge Griffin now challenges here, which provides that military-overseas voters are "*not* required to submit a photocopy of acceptable photo identification." 8 N.C. Admin. Code 17.0109(d) (emphasis added).

ii. U.S. Citizens Whose Parents Are N.C. Residents

Judge Griffin next challenged 266 ballots of children of overseas voters who checked a box indicating that they "never lived in the United States" because he claims that someone who has never lived in the United States cannot be a "resident"

of North Carolina in accordance with Article VI of the North Carolina Constitution. App. 66. For reasons discussed below, that is not North Carolina law.

In June 2011, the General Assembly unanimously adopted N.C. Gen. Stat. § 163-258.2(1)(e), which permitted covered voters—including those who have never lived in this state but whose parents were eligible North Carolina voters before moving abroad—to vote in North Carolina elections. These voters have routinely voted in every North Carolina election since (43 elections in all).

In October 2024, barely 30 days before the election, the North Carolina Republican Party filed suit and sought an emergency injunction alleging, for the first time, that the Board "allows and has allowed persons to register to vote under N.C. Gen. Stat. § 163-258.2(1)(e), including persons who were never and are not presently residents of North Carolina." Compl. ¶ 78, *Kivett v. N.C. State Bd. of Elections*, No. 24CV031557-910 (N.C. Super Ct. filed Oct. 2, 2024).

The Wake County Superior Court denied the plaintiffs' request for a preliminary injunction, finding that they had "failed to make a threshold showing that they are likely to succeed on the merits." Order Denying Pls.' Mot. at 4 ¶ 2, *Kivett*, No. 24CV031557-910 (N.C. Super. Ct. Oct. 21, 2024). The plaintiffs immediately appealed, and the Court of Appeals unanimously denied their Petition. Order, *Kivett v. N.C. State Bd. of Elections*, No. P24-735 (N.C. Ct. App. Oct. 29, 2024). Then, four days before the election, the plaintiffs filed in this Court a Petition for Writ of Supersedeas and for Discretionary Review, but this Court declined to intervene before the election. *See* Pls.' Pet. Writ Supersedeas & Discret. Rev., *Kivett v. N.C.*

State Bd. of Elections, No. 281P24 (N.C. filed Nov. 1, 2024). The November 2024 general election thus proceeded under the current rules.

Now, Judge Griffin argues that overseas voters who were eligible to vote under N.C. Gen. Stat. § 163-258.2(1)(e), some of whom may have voted in dozens of North Carolina elections, should have their votes thrown out (*only for his race* and *post-election*) because that statute is unconstitutional under N.C. Const. art. VI, § 2(1).

iii. Allegedly Incomplete Registrations

The final category of protests challenged 60,273 ballots allegedly "cast by registered voters whose voter registration database records contain neither a driver's license number nor the last-four digits of a social security number." App. 40. These challenges re-litigate an issue rejected by the Board back in 2023 and then rejected by a federal court for the 2024 election in *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, No. 5:24-cv-00547-M-RJ, ECF No. 73 ("Plaintiffs in this action are not going to obtain any relief in connection with the most recent election.").

The genesis of the issue traces back to an administrative complaint filed with the Board by Carol Snow in October 2023. Snow complained that while the Help America Vote Act (HAVA) requires states to collect the voter's driver's license number or, if they do not have one, the last four digits of their social security number, the North Carolina voter registration form did not make clear that a voter is *required* to provide one of those numbers if they have one. The Board resolved Snow's complaint by implementing "recommended changes to the voter registration application form." Minutes of Meeting at 4 (State Bd. Elecs. Nov. 28, 2023), archived at https://perma.cc/CCW2-YX7R. The Board "did not approve the requested remedy to

contact all existing registered voters whose electronic records do not show a driver's license number or last four digits of a Social Security number." App. 165. The Board explained that "the law's purpose of identifying the registrant upon initial registration is already accomplished because any voter who did not provide a driver's license number or the last four digits of a Social Security number would have had to provide additional documentation to prove their identity before being allowed to vote." *Id.* at 165–66.

Nearly a year later, in August 2024, the Republican Party sued on the same grounds, alleging "that 225,000 people, including 'possible non-citizens' and other ineligible voters, registered to vote using the previous form." *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 399 (4th Cir. 2024). The plaintiffs did not seek a temporary restraining order or preliminary injunction despite the short window before the election. The November 2024 election thus proceeded with those 225,000 people on the voter rolls. These votes counted in every state and local race in 2024, just as they had for years or decades before.

But after the results were tallied, Judge Griffin filed protests raising this same HAVA issue again. He claimed to have identified 60,273 ballots that were cast (a) before Election Day and (b) by voters whose registration records with the State Board "do not contain data in one or more of the following data fields: (1) Driver's License Number; or (2) Last Four Digits of Social Security Number." App. 52. By limiting his challenges to ballots cast "before election day," Judge Griffin excluded voters who cast their ballots on election day but whose registration records lack either number.

B. The State Board Dismisses Judge Griffin's Protests

On December 13, 2024, the State Board served its Decision and Order on the three categories of protests at issue here. The Board dismissed those protests on several overlapping grounds.

First, the Board dismissed all three protests because Judge Griffin "failed to serve the registered voters [he] seek[s] to challenge in [his] protests in a manner that would comply with the North Carolina Administrative Code and be consistent with the requirements of constitutional due process." App. 43. The Board's regulations required Judge Griffin "to 'serve' the voters with 'copies of all filings.'" App. 44 (quoting N.C. Admin. Code 2.0111). Judge Griffin instead mailed postcards with a QR code link to a N.C. Republican Party website. And that "postcard never states clearly that the recipient's right to vote is being challenged." App. 48. This attempt at service "does not comport with the plain text of the rule or the constitutional due-process requirements to serve an affected party." App. 47.

Second, the Board held that "substantive due process protections under the U.S. Constitution" bar all of Judge Griffin's protests. App. 60. For each of the three categories of protests, Judge Griffin is seeking to throw out ballots cast by eligible voters who followed the rules. Even if those rules were later found to be improper, "it would violate the federal constitution's guarantee of substantive due process to apply such a newly announced rule of law to remove voters' ballots after an election, when those voters participated in the election in reliance on the established law at the time of the election to properly cast their ballots." App. 76.

Third, the Board found that each of the three categories of protests lacked merit for reasons specific to that category. The Board found that the allegedly incomplete registration protests must be dismissed for five more reasons:

(1) they "include insufficient allegations and evidence to establish probable cause to believe that their challenged voters failed to provide one of these identification numbers on their voter registration application," App. 52;

(2) the State "Board and a federal court, examining this very issue prior to and during this election, determined that any previous failure to implement this federal requirement cannot be held against already-registered voters casting ballots in this election," App. 55;

(3) "North Carolina law forbid[s] this type of election protest" because "an error by election officials in the processing of voter registration cannot be used to discount a voter's ballot," App. 59–60;

(4) granting "the relief they request in these protests . . . would violate state and federal voter registration laws," App. 62; and

(5) the protests are "also unlawful under state law because [they] would undermine the clear intent of the legislature with regard to how a voter may have their eligibility to vote challenged in an election," App. 64.

As for the protests targeting the children of North Carolina residents, the Board concluded that it could not "ignore a statute of the General Assembly under the theory that the State Board should deem that statute unconstitutional." App. 66.

Finally, the Board concluded that the military and overseas citizens protests must be dismissed because Judge Griffin's arguments (1) go against the statutory scheme, which "includes no requirement for covered voters to include a photocopy of their photo ID," App. 73; (2) contradict the State Board's rule, promulgated through "permanent rulemaking," which "makes it clear that the county boards of elections may not impose the photo ID requirement on such voters," *id.*; and (3) "may likely be

in conflict with" the federal Uniformed and Overseas Citizens Absentee Voting Act, App. 76.

C. Judge Griffin Bypasses the Superior Court and Court of Appeals to File an Unprecedented Petition

North Carolina law provides that any person seeking review of a State Board decision must file a petition for review in Wake County Superior Court. *See* N.C. Gen. Stat. §§ 163-22(*l*), 163-182.14(b). Rather than file in Wake County, Judge Griffin took the unprecedented step of petitioning for a writ of prohibition directly in this Court. He asked this Court to reject the Board's rulings on the merits under state law as well as to reject "[a]ll arguments under the [National Voting Rights Act], HAVA, the [Voting Rights Act], and the Civil Rights Act against the relief requested by Judge Griffin," "[a]ll arguments under the state or federal constitution that affected persons who cast ballots were improperly served or are due additional process," and "[a]ll other arguments that the ballots cannot be discounted without violating the federal or state constitution." Petition at 70–71.

On December 19, 2024, the State Board filed a Notice of Removal under 28 U.S.C. § 1441 (federal question jurisdiction) and 28 U.S.C. § 1443(2) (refusal to do an act that would violate a civil rights statute).[3]

On Monday, January 6, 2025, the district court issued an order holding that it had jurisdiction under 28 U.S.C. § 1443(2), but the district court abstained under

[3] Justice Riggs moved to intervene in the lawsuit that same day. The federal court granted intervention in the suit "as of right." *Griffin v. N.C. State Bd. of Elections*, No. 5:24-cv-00724-M-RN (E.D.N.C. Dec. 26, 2024) (text order).

Burford v. Sun Oil Co., 319 U.S. 315 (1943), and remanded the case to this Court. *See* Griffin Br. Add. The Board filed a notice of appeal to the Fourth Circuit that same evening. *Griffin*, No. 5:24-cv-00724-M-RN, ECF No. 52.

The next morning, this Court issued an order granting Judge Griffin's motion for a temporary stay of the certification of the election and setting an expedited briefing schedule, with briefing to conclude on January 24, 2025.

The Board requested a stay from the Fourth Circuit of the remand order. The Fourth Circuit deferred the motion to stay to oral argument but set an expedited briefing schedule for the appeal—with briefing to close two days before briefing closes in this court, on January 22, 2025—and scheduled oral argument to be heard in Richmond on Monday, January 27, 2025.

SUMMARY OF ARGUMENT

All three of Judge Griffin's protests are fatally flawed under North Carolina law. The Petition should be rejected at the threshold, however, for three separate and independent reasons.

First, the Petition should be denied because these arguments come too late. Judge Griffin's protests attempt to change the rules in effect at the time of the election that North Carolina voters relied upon in casting their votes. Therefore, they fail on the grounds of this State's *Purcell* principle, laches, and substantive due process.

Second, the Petition should be denied for lack of proper service of Griffin's protests. A bulk-mailed postcard with a QR code directing a voter to hundreds of

linked protests does not satisfy the requirements of state law for service of an election protest or procedural due process.

Third, the Petition should be dismissed because a writ of prohibition cannot issue from this Court when a protestor has a statutory right to appeal in a different forum.

If the Court does not dismiss the Petition on one of the three grounds above, it should reject each protest on the merits.

Military and overseas voters who voted under Article 21A cannot have their votes invalidated for failing to provide photo ID when state law did not require it and a state regulation specifically instructed them they did not need to do so.

The children of North Carolinians stationed or living abroad who never lived in North Carolina may not have their votes invalidated when a statute enacted by the General Assembly in 2011 extended the franchise to these voters and North Carolina law recognizes these individuals as "residents" on multiple grounds.

Finally, the ballots of more than 60,000 eligible North Carolina voters for whom a driver's license or social security number does not appear in a database through no fault of their own may not have their votes invalidated in the 2024 election because clearly established principles of state and federal law prohibit systematic, retroactive removal of registered voters who have voted for decades in North Carolina elections.

ARGUMENT

I. The Protests Are an Unlawful Attempt to Change the Election Rules After the Votes Have Been Cast and Counted

The Board correctly denied each of Judge Griffin's protests on the ground that the runner-up in an election cannot attempt to change the outcome by striking voters from the voting rolls or changing established voting requirements after the election.

This principle is reflected in state law and mandated by the U.S. Constitution. Accordingly, whatever the merit to Judge Griffin's protests under state law (and there is none, as set forth below in Part IV), it is ultimately unnecessary for this Court *even to reach* the merits of his claims in the context of this expedited election protest proceeding in order to reject Judge Griffin's petition.

A. Judge Griffin's Attempts to Change the Rules Post-Election Are Barred by the *Purcell* Principle and Laches

As Justice Dietz explained in a well-reasoned dissent from the Court's order granting Judge Griffin's motion for temporary stay, Judge Griffin's petition is, "in effect, post-election litigation that seeks to remove the legal right to vote from people who lawfully voted under the laws and regulations that existed during the voting process." *Griffin v. N.C. State Bd. of Elections*, No. 320P24, Amended Order (Jan. 7, 2025) (Dietz, J., dissenting, at 1). That is not the purpose of an election protest. As this Court articulated in *Bouvier v. Porter*, 386 N.C. 1, 16, 900 S.E.2d 838, 850 (2024), "election protests proceed rapidly" and "the process does not lend itself to exhaustive discovery and absolute precision." Nor does this expedited process lend itself to post-election litigation over the rules to be applied—challenges that would overturn settled regulations, invalidate laws enacted by the General Assembly, or engage in

bulk removal of registered voters. Such a use of the protest process will inevitably embroil this Court in weighty matters of constitutionality of statutes enacted by the General Assembly or difficult questions of statutory and regulatory interpretation *in every election cycle*, all on an urgent timeline driven by the need for finality in our elections. As Justice Dietz explained, any "potential legal errors" to the extent Judge Griffin asserts there were errors made by the Board "could have been—and should have been—addressed in litigation long before people went to the polls in November." *Griffin* (Dietz, J., dissenting, at 4).

While Justice Dietz articulated his position in dissent, Justice Allen wrote separately to emphasize that the majority's decision to grant the temporary stay "should not be taken to mean that Judge Griffin will ultimately prevail on the merits" notwithstanding the dissenting decisions that "could give the opposite impression to readers unfamiliar with the intricacies of appellate procedure." *Id.* (Allen, J., concurring, at 1). With that point in mind, a majority of this Court should now adopt the principles from the dissent in rejecting Judge Griffin's claims on the merits.

As Justice Dietz recognized, North Carolina law recognizes a corollary to the federal election doctrine known as the "*Purcell* principle" set forth in *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). The *Purcell* principle "recognizes that, as elections draw near, judicial intervention becomes inappropriate because it can damage the integrity of the election process." *Griffin* (Dietz, J., dissenting, at 1); *see also Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (mem) (Kavanaugh, J., concurring) (collecting cases). To be sure, parties may bring challenges to the State's

electoral regulations *between elections*, and these challenges are important to ensuring election integrity. North Carolina "has been flooded with dozens" of such challenges to its election laws in recent years. *Sharma v. Hirsch*, 121 F.4th 1033, 1043 (4th Cir. 2024).

But there is another side to this coin that is equally important to ensuring election integrity. As an election draws near, the candidates, parties, and courts must eventually go "pencils down" and run an election with the rules in place. *See Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) ("Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible."). As Justice Kavanaugh observed, when "an election is close at hand the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28 31 (2020) (Mem.) (Kavanaugh, J., concurring). Knowing that these rules are fixed and will not change is essential to "giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Id.*

The alternative is a constantly changing landscape of election laws, a flood of post-election litigation, and the threat that a voter will never know—even after leaving the voting booth—whether their vote will count. In such a system of electoral bedlam, post-election litigation could *always* threaten to invalidate the rules under which they cast their votes. The prospect of the resulting "chaos" that could "emerge from repeated court-compelled changes to how we administer elections" requires that

"at some point the rules governing an election must be locked in." *Griffin* (Dietz, J., dissenting, at 4).

Accordingly, candidates such as Judge Griffin who seek to bring "grievances based on election laws" have a "duty" to "bring their complaints forward for pre-election adjudication." *Hendon*, 710 F.2d at 182 (cleaned up). They cannot "gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Id.* (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)).

As Justice Dietz recognized, this Court has acknowledged a state version of this *Purcell* doctrine in past cases (though not always by name). *See, e.g.*, *Pender Cty. v. Bartlett*, 361 N.C. 491, 510 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009); *see also Holmes v. Moore*, 382 N.C. 690, 691 (2022) (Mem.) (Newby, C.J., dissenting); *Harper v. Hall*, 382 N.C. 314, 318-319 (2022) (Barringer, J., dissenting). The *Purcell* principle is a "necessary part of our state law doctrine for the same reasons it is incorporated into federal law." *Griffin* (Dietz, J., dissenting, at 5). "Permitting post-election litigation that seeks to rewrite our state's election rules—and, as a result, remove the right to vote in an election from people who already lawfully voted under the existing rules—invites incredible mischief." *Id.* It will "lead to doubts about the finality of vote counts following an election"; it will "encourage novel legal challenges that greatly delay certification of the results"; and it will "fuel an already troubling decline in public faith in our elections." *Id.*

Judge Griffin is wrong to argue that no principle of state law prohibits post-election attempts to litigate the rules post-election. For example, he claims that applying *Purcell* here would require the Court to overrule *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). Griffin Br. 43–44. But he gets that case precisely backwards. He does so by ignoring an entire section of the *James* court's decision that addressed the "timeliness" arguments made by both sides. *James*, 359 N.C. at 265, 607 S.E.2d at 641.

In *James*, this Court addressed an election protest and required out-of-precinct ballots to be excluded from the final tally. *Id.* Different from this case, however—where Judge Griffin had years to challenge the laws and regulation he now wants this Court to take up and overturn—the election challenger in *James* specifically inquired of the Board *before the General Election* whether out-of-precinct ballots would be counted. *James*, 359 N.C. at 265, 607 S.E.2d at 641. The Board vaguely replied that "North Carolina law is clear on this issue. We have and will continue to enforce and administer the provisions as to provisional voting as set out in North Carolina law." *Id.* James interpreted that response to mean that those votes would not be counted, and so did not seek to challenge that decision before the election. *Id.*

When James later filed suit to challenge the ultimate counting of those ballots, the Board argued that James' challenge was untimely because it was not made before the election. *Id.* The *James* court disagreed, but not because a protester has the right to challenge any election rule as part of an election protest (as Judge Griffin suggests here). *Id.* Instead, the *James* court held that the Board's "response, coupled with the

absence of any clear statutory or regulatory directive that such action would be taken, failed to provide plaintiffs with adequate notice that election officials would count the 11,310 ballots now at issue." *Id.* The *James* court accordingly found that James' post-election challenge was timely filed. *Id.*; *see also Hendon*, 710 F.2d at 182 (recognizing there are "exceptions" to the rule that one cannot seek to undo ballot results with court action arising from a "lack of opportunity for one reason or another to seek pre-election relief").

That is decidedly not the case here. The rules and regulations Judge Griffin is challenging have been in place for years. Therefore, his complaints about the rules "could have been—and should have been—addressed in litigation long before people went to the polls in November." *Griffin* (Dietz, J., dissenting, at 4). Judge Griffin never asked the Board about the rules before the election, and never received a contradictory or confusing communication from the Board before the election that caused him to forestall a challenge. Instead, Judge Griffin simply *waited* to challenge these rules until after he lost. Accordingly, not only does *James* fail to support Judge Griffin's position, it underscores the *Purcell* principle articulated by Justice Dietz. In short, *James* stands for the proposition that if a challenger has notice that certain rules will be applied to count (or exclude) certain ballots yet fails to challenge those laws and regulations before the election, any challenge to those rules post-election will be rejected as untimely.

This does not in any way "invalidate" the protest statute, as Judge Griffin claims. Griffin Br. 42. An election protest is designed to address any "irregularity"

or "misconduct" in an election process, including the "counting" of "ballots cast by ineligible voters." *Bouvier*, 386 N.C. at 4, 900 S.E.2d at 843; N.C. Gen. Stat. § 163-182.12. But there is nothing "irregular" about counting the votes of those whom North Carolina law instructed would be "eligible" before the 2024 election, and who complied with the rules in place for that election—particularly when the votes of those same voters were counted in every other North Carolina election in 2024.

In any event, the *Purcell* principle is just another moniker for the equitable doctrine of laches, which can be applied in equity to bar relief on *any claim*, whether statutory or otherwise. Laches is an "affirmative defense" that "bars a claim" where the "lapse of time has resulted in some change" in "the relations of the parties which would make it unjust to permit" the claim. *Town of Cameron v. Woodell*, 150 N.C. App. 174, 176, 563 S.E.2d 198, 200-201 (2022) (applying laches to prohibit town from enforcing zoning ordinance). Laches applies when the (1) claimant knew of the existence of the grounds for a claim, (2) unreasonably delayed to the prejudice of the party asserting the defense, and the (3) delay changes the parties' relationship. *Id.* Those requirements are all easily met here. Judge Griffin knew about and could have raised the legal challenges he raises here before the election—but elected not to do so. As a result, voters exercised their constitutional rights to vote *in reliance upon the rules in place for this election*. To toss out their votes after the fact (when they cannot now correct any issue with their registration, provide a photo ID with their absentee ballot, or change their place of residence), would inevitably prejudice voters by retroactively invalidating tens of thousands of their votes. Judge Griffin is barred

by the doctrine of laches, therefore, in pressing his after-the-fact challenges to the rules.

For similar reasons, Judge Griffin's claim that *Purcell*-like reasoning has not been applied in any other court after an "election has already occurred," but applies only when a federal court is refusing to intervene in state election procedures pre-election, is wrong. Griffin Br. 45–47. Judge Griffin places inappropriate emphasis on the wrong terminology. *See, e.g.*, *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."). Courts across the country have taken this well-recognized approach of refusing to change election rules post-election. They have simply referred to it by other terms, including substantive due process (as discussed in the next section) or laches, in addition to *Purcell*. *See, e.g.*, *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020) ("The same imperative of timing [reflected in *Purcell*] and the exercise of judicial review applies with much more force on the back end of elections."); *Hendon*, 710 F.2d at 182 (holding that the Fourth Circuit has "imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible"); *Soules v. Kauaians for Nukoli Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (rejecting attempt to "invalidate" election, citing laches, when plaintiff could have sued before election because to hold otherwise would "encourage sandbagging on the part of wily plaintiffs"); *Waldrep v. Gaston Cty. Bd. of Elections*, 575 F. Supp. 759, 760 (W.D.N.C.

1983) (denying relief to losing candidate who challenged established practice for counting votes when he made no showing he was "unable" to bring challenge before the election).

More to the point, this Court has itself recognized the potential defense to protests like Judge Griffin's under the heading of "timeliness" in *James*. 359 N.C. at 265, 607 S.E.2d at 641.

There is thus ample state law authority warranting rejection of Judge Griffin's attempts to change the rules of the game after it has already been played.

B. The Board Correctly Held That Judge Griffin's Protests Are Barred by Substantive Due Process Under the U.S. Constitution

As the Board held, not only does North Carolina law forbid this type of election protest, federal law also forbids it because it would violate substantive due process protections under the U.S. Constitution. App. 60–61, 69, 76.

Judge Griffin seeks to brush aside the U.S. Constitution as irrelevant to a North Carolina election, but "the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). As a matter of federal constitutional law, it "is settled that if the election process reaches the point of 'patent and fundamental unfairness,' the due process clause may be violated." *Hendon*, 710 F.2d at 182 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)). That level of unfairness exists—and "a court will strike down an election on substantive due process grounds"—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). Those elements are satisfied when, for example, "the losing candidate contest[s] the validity of the absentee ballots" cast in accordance with officially sponsored election procedure. *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 917 (E.D. Va. 2018). Even if that procedure turns out to have been flawed in hindsight, a "state's retroactive invalidation" of those absentee ballots "violate[s] the voters' rights under the fourteenth amendment." *Griffin*, 570 F.2d at 1070.

All three of Judge Griffin's protests seek that sort of retroactive invalidation. In each case, these voters did everything asked of them to vote. But now, Judge Griffin argues that they should have done more—ensure that county boards updated their records, affirmatively established residency in North Carolina, and submitted photo identification—even though official guidance made clear that none of these steps was necessary. It would therefore be a gross violation of due process to penalize these voters for "state actions" that "induce[d]" them to take steps that Griffin now claims caused them to "miscast their votes." *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

II. The Board Correctly Dismissed All Protests Because Judge Griffin Failed to Provide Voters with Due Process

North Carolina voters have a due process right to notice that their ballots are being challenged. *See, e.g.*, *Voto Latino v. Hirsch*, 712 F. Supp. 3d 637, 674 (M.D.N.C. 2024); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 228

(M.D.N.C. 2020); *see also* N.C. Gen. Stat. § 163-182.10(b) (requiring that all affected voters be given a copy of the protest or a summary of its allegations).

At a minimum, the method of service must amount to "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The same standard applies under the North Carolina Constitution's due process clause. *See Horton v. Gulledge*, 277 N.C. 353, 359 (1970) (North Carolina's state due process clause has the same meaning as "due process of law" under the Federal Constitution). And "when notice is a person's due, process which is a mere gesture is not due process" at all. *Mullane*, 339 U.S. at 315.

North Carolina ensures that voters receive this notice by requiring protestors to "*serve copies of all filings* on every person with a direct stake in the outcome of [the] protest," *including the targeted or affected voter*. 8 N.C. Admin. Code 2.0111 (emphasis added). This requirement appears on the face of the Board's election protest form itself, a form issued in accordance with an express direction from the General Assembly. *See* N.C. Gen. Stat. § 163-182.9(c).

> AFFECTED PARTIES & SERVICE
>
> You must *serve copies of all filings* on every person with a direct stake in the outcome of this protest ("Affected Parties"). Affected Parties include every candidate seeking nomination or election in the protested contest(s) listed under Prompt 4, not only the apparent winner and runner-up. *If a protest concerns the eligibility or ineligibility of particular voters, all such voters are Affected Parties and must be served.*

8 N.C. Admin. Code 2.0111 (emphasis added).

Service requires delivery of the protests in-person or by U.S. Mail to the mailing address on file with the county board of elections, or by "other means *affirmatively authorized* by the Affected Party." *Id.* (emphasis added) Delivery by mail is complete upon deposit of a "postage-paid *parcel*" with the U.S. Mail. It is the responsibility of the *protestor* "to ensure service is made on all Affected Parties." *Id.* Election protests that do not "substantially comply" with this requirement are properly dismissed. N.C. Gen. Stat. §§ 163-182.9, 163-182.10.

Judge Griffin affirmed that he both read and understood his obligation to serve affected voters with copies of his protest filings:

PROTESTOR CERTIFICATION

15. By signing this protest application, you affirm the following:
I, Jefferson Griffin *(full name)*, swear, under penalty of perjury, that the information provided in this protest filing is true and accurate to the best of my knowledge, and that I have read and understand the following:

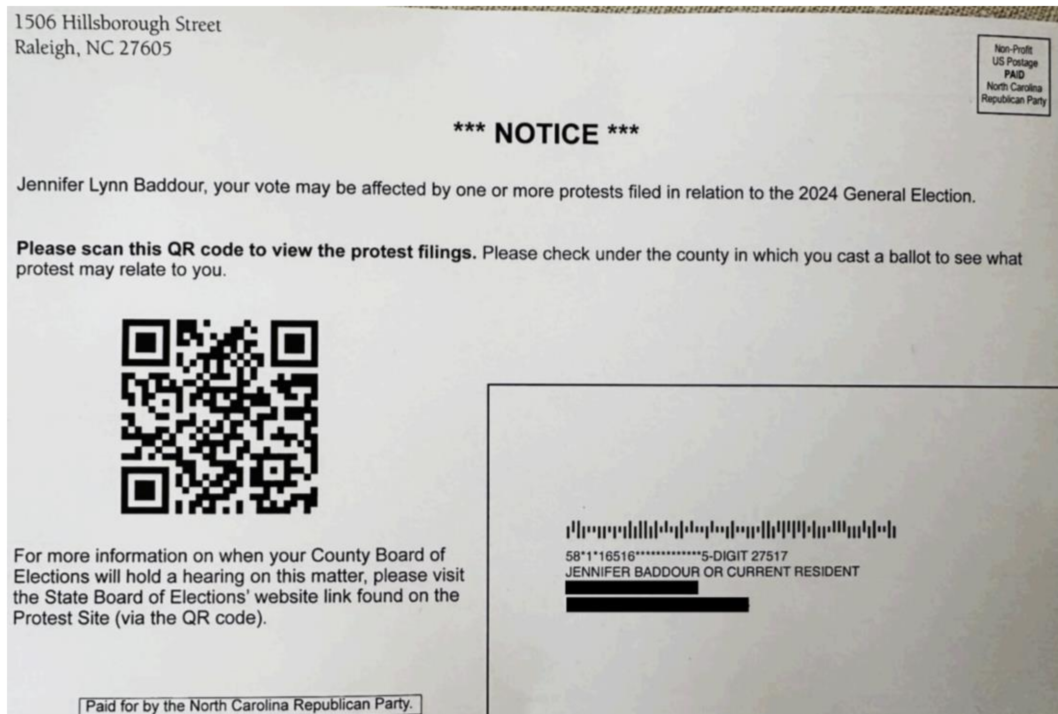
(initial)

I have reviewed the statutes and administrative rules governing election protests, including all deadlines.
My protest must originate with a filing at the county board of elections.
I must timely serve all Affected Parties.
I must prove by *substantial evidence* either the existence of a defect in the manner by which votes were counted or results tabulated or the occurrence of a violation of election law, irregularity, or misconduct, either of which were sufficient to cast doubt on the apparent results of the election.
It is a crime to interfere unlawfully with the conduct and certification of an election.
It is a crime to interfere unlawfully with the ability of a qualified individual to vote and to have that vote counted in the election.
The facts I allege in connection with this protest are true and accurate to the best of my knowledge, and I have a good faith basis to protest the conduct and results of the election.

App. 355.

Despite affirming his obligation to do so, Judge Griffin did not "serve" affected voters with actual "copies" of his election protest "filings" or any other legal document. Had he done so, each voter would have received an official-looking *document* that would have alerted them to something *serious* taking place: a formal challenge that could deprive them of their right to vote.

Instead, Judge Griffin caused postcards to be sent by non-forwardable bulk mail with this equivocal message: "your vote *may be affected by one or more protests* filed in relation to the 2024 General Election." App. 45–46; *see* App. 175 (postcard). These postcards looked like the following[4]:



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[4] Judge Griffin includes a generic sample in the Appendix at 175. This image of an actual postcard was attached to an amicus brief filed by Individual Voters and the League of Women Voters in the removed federal action. *See Griffin v. N.C. State Bd. of Elections*, E.D.N.C. No. 5:24-cv-724-M, ECF 41-1 at 42. The amici requested the Court take "judicial notice" of six letters from amici to the Board ahead of the December 11 hearing concerning Griffin's protests of their votes. These letters from affected voters are relevant, part of the administrative record before the Board, and the accuracy of the letters is not reasonably subject to dispute. *See* Fed. R. Evid. 201. The federal court accepted the filing and noted that it "aided" in "its decisional process," as part of this action. E.D.N.C. No. 5:24-cv-00724-M-RN, ECF 50 at 6. This Court may also take independent judicial notice of the voters' letters to the Board. *See State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 396 (2018) (an appellate court may take judicial notice of federal court filings, data published by state agencies, or other facts and documents "capable of demonstration by reference to a readily accessible source of indisputable accuracy") (quoting *West v. G.D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981)).

The postcards included a QR code that led to a N.C. Republican Party website with links to *hundreds* of protests filed by four candidates. Recipients who did not discard the postcard as election season junk-mail and were able to navigate the QR code to access the website, would then have to sift through spreadsheet printouts, not organized alphabetically, to determine whether and why their votes "may be affected" by the various protests. App. 46. The Board's decision includes screenshots of what those voters would have seen when they accessed the link. *See* App. 78–79.

The Board correctly determined that the postcard failed to satisfy 8 N.C. Admin. Code. 2.0111. In arguing otherwise, Judge Griffin starts not by explaining how he complied with the rule, but by arguing that the rule itself is flawed, permitting him to disregard its requirements. He argues that N.C. Gen. Stat. § 163-182.10(b) burdens county boards of elections, not protestors, with serving copies of protests on affected parties. *See* Griffin Br. 50. That argument misreads the law. Section 163-182.10(b) requires county boards to "give notice of the *protest hearing* to . . . those persons likely to have a significant interest in the resolution of the protest" (emphasis added), not to serve the protest documents on the voter. Indeed, a separate sentence of N.C. Gen. Stat. § 163-182.10(b) states that "[e]ach person given notice shall also be given a copy of the protest or a summary of its allegations." The General Assembly could have drafted the statute to state that county boards must provide notice of the hearing *and* serve the protests, but it chose not to—presumably because the protester must serve his protest on the affected parties.

Rather than requiring county boards to serve copies of protest filings, N.C. Gen. Stat. § 163-182.10(e) mandates that the State Board "promulgate rules providing for adequate notice to parties," and N.C. Gen. Stat. § 163-182.9(c) mandates that the Board "prescribe forms for filing protests." Consistent with this express statutory authority—and the general authority for rulemaking under N.C. Gen. Stat. § 163-22(a)—the Board properly established rules requiring protestors such as Judge Griffin to serve affected parties with copies of their protests. This requirement was approved in turn by the Rules Review Commission—a legislatively appointed body tasked with ensuring that rules adopted are "within the authority delegated to the agency by the General Assembly." *Id.* §§ 143B-30.1(a), 150B-21.9(a)(1).

This framework is not unique. Under the North Carolina Administrative Procedure Act, "the party that files the petition [commencing a contested case] shall serve a copy of the petition on all other parties," but the "Office of Administrative Hearings" must give "notice of [the] hearing" to the parties. N.C. Gen. Stat. § 150B-23(a); *see also* N.C. R. Civ. P. 3–4 (requiring plaintiffs filing a complaint to serve the complaint in accordance with the Rules of Civil Procedure).

Judge Griffin argues in the alternative that the postcards satisfied 8 N.C. Admin Code 2.0111's service requirements because the Board uses similar mailers in other contexts. Griffin Br. 51. But Judge Griffin relies on two statutes that expressly discuss the issuance of "cards," neither of which implicates a voter's right to have their ballot counted and neither of which uses the word "serve" or "service" with respect to the Board's responsibilities. *See* N.C. Gen. Stat. § 163-82.8(c) (discussing

a "voter registration card" containing certain information); N.C. Gen. Stat. § 163-82.14(d)(2) (discussing a confirmation mailing in the form of a "preaddressed return card"). Here, in contrast, challenged voters must be served with "copies of all [protest] filings," 8 N.C. Admin. Code 2.0111. Judge Griffin failed to do so. Accordingly, his protests were properly dismissed for lack of proper service.

Judge Griffin next contends he met the due process requirements outlined in *Mullane*, protesting that the "standard does not demand perfection." Griffin Br. 51. But *Mullane* dealt with notice to a class of *potential* beneficiaries of a trust, many of whom were either "unknown, "nonresidents" of the state, or had interests that were "conjectural or future," and many of their "addresses [were] unknown to the trustee." 339 U.S. at 317, 318. Here, in contrast, all the challenged voters are North Carolina voters who have a "direct stake in the outcome of [Judge Griffin's] protest[s]." 8 N.C. Admin. Code 2.0111. And there is no suggestion that Judge Griffin could not locate the challenged voters.

Similarly, Judge Griffin claims that voters can be treated "as a class" and so notice to *some* was just as good as notice to all, because those who received notice can "safeguard the interests" of the rest. Griffin Br. 52. But that claim is also wrong. A right to vote is an individualized right entitling a voter to "individualized notice and opportunity to be heard." *Voto Latino*, 712 F. Supp. 3d at 653. Generalized "notice" that a "vote may not be counted" is not sufficient. *Id.*

* * *

By failing to serve the voters he challenged, Judge Griffin left countless North Carolina voters without any notice *at all*, including voters who (i) mistook his postcard as just political junk mail from the "North Carolina Republican Party"—not a serious legal document warning of a loss of a constitutional right—and threw it away; (ii) never *received* the postcard because they moved and Judge Griffin chose to send the notice by non-forwardable bulk mail; (iii) lack a cellphone to scan the QR code; (iv) distrust QR codes from unknown sources; (v) could not find their names amid hundreds of links with spreadsheets listing names out of alphabetical order, and (vi) did not understand that the notice that their right to vote "may" be affected meant that Judge Griffin had specifically identified them *by name* in a specific protest challenging their individual right to vote. *See, e.g.*, E.D.N.C. No. 5:24-cv-00724-M-RN, ECF No. 41-1 at 4–6 (amicus brief including statements from voters that they had received no correspondence from Judge Griffin alerting them to the challenge to their votes); ECF No. 24-2, 24-3, 24-4 (attaching declarations of voters permitted to intervene here who do not have smartphones necessary to access QR codes and are unfamiliar with QR codes and how they work).

III. A Writ of Prohibition Is an Improper Remedy

North Carolina law provides that any person seeking review of a State Board of Elections decision must file a petition for review in Wake County Superior Court. *See* N.C. Gen. Stat. §§ 163-22(*l*), 163-182.14(b). But rather than starting in Superior Court, Judge Griffin hopscotched over that court and the Court of Appeals and asked this Court for the "extraordinary" writ of prohibition, *see Perry v. Shepherd*, 78 N.C.

83, 84 (1878). And yet, *Judge Griffin does not actually seek to prohibit the Board from doing anything*. Nor can he. The canvassed vote count in this race was certified on December 11, 2024, and the Board already rejected Judge Griffin's protests to that vote count on December 13, 2024.

In truth, Judge Griffin seeks to *appeal* directly to this Court. But the relief he seeks is nothing like any appeal heard in this Court. He wants the Court to reopen the Board's proceedings and then to superintend that reopened proceeding by requiring it to do a long list of things in the name of "correct[ing] the vote count"—his euphemism for throwing out the votes of thousands of North Carolinians. Griffin Br. at 74–75. This list includes proactively making at least eight different legal rulings on substantive election law issues. But Judge Griffin does not just want this Court to declare what the law is, he also wants this Court's cooperation to "phase its handling" of the protests—taking "one at a time" and ordering "a re-tabulation of votes" on a "single set of protests." Griffin Br. 71–72.

Judge Griffin even proffers to the Court his *preferred order* for the Court to proceed, asking the Court to start with our military and overseas voters who did not provide a photo ID. "Judge Griffin anticipates that, if these unlawful ballots are

excluded, he will win the election." Griffin Br. 4.[5] Of course, Judge Griffin elides the fact that he selectively filed protests on this theory only in Durham, Forsyth, Buncombe, and Guilford Counties.

If re-tabulation gives Judge Griffin the win on this protest, then he wants the Court to stop because he somehow knows that his "other protests" would "not change the outcome back in favor of Justice Riggs." *Id.* at 73. But if the first protest is not enough for Judge Griffin to overturn the election results by "chang[ing] the outcome," then Judge Griffin wants the Court to move on to "consider the merits" of his "other protests." *Id.* Judge Griffin claims the purpose of this unprecedented procedure is "simply to determine the lawful winner." *Id.* But the one-sided process he proposes is a thinly veiled request for this Court to cooperate in handing him an election win by superintending a process that continues, step-by-step, only so long as necessary for him to prevail.

None of this is the province of a writ of prohibition. The United States Supreme Court has stated that the "object of a writ of prohibition is to prevent a court of peculiar, limited, or inferior jurisdiction from assuming jurisdiction of a matter

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[5] Judge Griffin anticipates victory here because his protests challenge an unrepresentative subset of North Carolina voters. Across all three categories, "Republican voters are underrepresented in the group of challenged voters, younger voters are overrepresented, and people with unidentified race, ethnicity and gender are overrepresented." Christopher A. Cooper, Analysis of UOCAVA Voters Who Did Not Supply Voter ID and "Never Resident" Voters Challenged in the 2024 North Carolina State Supreme Court Election at 7 (Jan. 20, 2025), archived at https://perma.cc/VE8M-HEDR. "Racial and ethnic minorities are overrepresented in the largest group of challenged voters (the 'incomplete registration' group), but not others." *Id.*

beyond its legal cognizance." *Smith v. Whitney*, 116 U.S. 167, 176 (1886). Our State courts similarly recognize that prohibition "is the remedy afforded by the common law against the encroachment of jurisdiction by inferior courts." *State v. Whitaker*, 114 N.C. 818, 820, 19 S.E. 376, 376 (1894). Such a writ is issued "only to restrain judicial action where the latter would be a usurpation and cannot be adequately remedied by an appeal." *Id.* at 822, 19 S.E. at 377.

Judge Griffin makes no argument that the Board has assumed jurisdiction beyond its reach. He merely argues that the Board got it wrong, which our courts have consistently said does not warrant prohibition. "It is settled that this writ does not lie for grievances which may be addressed, in the ordinary course of judicial proceedings, by appeal." *Whitaker*, 114 N.C. at 820, 19 S.E. at 376. Prohibition "has been uniformly denied where there is other remedy," such as an appeal. *State v. Inman*, 224 N.C. 531, 542, 32 S.E.2d 641, 646–47 (1944). Rather than seek the conventional remedies through a petition for judicial review and then, if necessary, appeal, Judge Griffin asks this Court to establish an unprecedented process in which it changes the election rules one at a time until a preferred candidate wins.

This use of the writ of prohibition is unprecedented in this Court's history, would violate this Court's precedent regarding the proper scope of the "extraordinary" writ of prohibition, and should be rejected.

IV. Each of Judge Griffin's Protests Lacks Factual and Legal Merit

For the reasons discussed above, the Court should deny Judge Griffin's Petition without considering the substance of the three protests he is attempting to pursue

here. If the Court considers Judge Griffin's arguments in support of those protests, it should hold that each fails under settled North Carolina law.

A. Military and Overseas Voters Were Not Required to Provide Photo ID When Casting Their Ballots

Judge Griffin seeks to invalidate 1,409 votes of military and overseas voters by creating a new, post-election photo identification requirement that simply is not part of Article 21A of Chapter 163 and does not apply to them.

Judge Griffin cannot dispute the following: an open-and-shut regulation promulgated by the Board states that a voter casting a ballot under Article 21A "is not required to submit a photocopy of acceptable photo identification" or to claim an exception. 8 N.C. Admin. Code 17.0109(d). Instead, he argues that (i) the General Assembly intended to impose a photo ID requirement in Article 21A (governing military and overseas voting), when it added that requirement to *Article 20* (governing domestic absentee voting), and (ii) the Board never had the authority to issue the regulation that dooms his claim in the first place. Both arguments lack merit. In addition, as set forth below, it would violate Equal Protection to permit Judge Griffin to challenge *only* the military and overseas ballots cast in one (or a handful of counties) that *he has determined* will be sufficient for him to win—while leaving the "old rules" in place for the voters in 96 of the other 100 counties in the State.

i. Article 21A Does Not Incorporate the Photo ID Requirement Found in Article 20

As discussed above (in Part A.i), the General Assembly enacted the UMOVA (Article 21A) against a federal backdrop regulating voting by military and overseas

voters in federal elections. In the 1980's, Congress enacted the UOCAVA, which established a detailed regime for voting by uniformed military, their family, and overseas voters, including federally prescribed forms (the FPCA and FWAB). These federally prescribed forms and their instructions do not require covered voters to include a photocopy of their photo ID. And the FVAP, an agency of the Department Defense charged with administering the law, has taken the position that states *may not* apply a photo ID requirement to a UOCAVA voter using an FPCA because these voters are "exempt" from providing a copy of a photo ID when attempting to vote by mail. Also, in the FVAP's comprehensive Voting Assistance Guide there is no instruction *for any U.S. state* that its UOCAVA voters must comply with a photo ID requirement when requesting or voting their ballot. *See* App. 75.

Against this federal backdrop, in 2011, the General Assembly decided to allow military and overseas voters to vote in *state elections* using the same method when it enacted the UMOVA and codified it in Article 21A.

As the Board explained, Article 20 and Article 21A of Chapter 163 establish two regimes for absentee voting. Article 21A "comprehensively addresses the requirements for voting by absentee ballot for 'covered persons'" (*i.e.*, uniformed military, their family, and overseas voters). App. 69. By contrast, the "provisions of Article 20 comprehensively address" the requirements for domestic absentee voting. *Id.* There are some areas where both types of absentee ballots are expressly subject to the same requirement, but the "requirements of one article do not apply to the class of individuals subject to the other article, unless otherwise stated in the statute." *Id.*

This is confirmed by the express terms of both Article 20 and Article 21A. For example, at the end of Article 20, the last section expressly states that the provisions in Article 21A *do not apply* to absentee voting under Article 20:

> **§ 163-239. Article 21A relating to absentee voting by military and overseas voters *not applicable***
>
> Except as otherwise provided therein, Article 21A of this Chapter shall not apply to or modify the provisions of this Article.

N.C. Gen. Stat. § 163-239 (emphasis added).

As the Board correctly stated in its Decision and Order, the "clear intent" of this language "and especially the title of the statute" is that Article 21A does not "apply to or modify" Article 20, meaning that UMOVA's *separate* voting procedures are inapplicable to absentee voting covered by Article 20. App. 72–73; *see also Myers v. Myers*, 269 N.C. App. 237, 241, 837 S.E.2d 443, 448 (2020) (holding a statute's meaning can be derived from "the title" of the statute).

On the other hand, UMOVA provides that its voters can "apply for a military-overseas ballot using *either* the regular application provided by Article 20 of this Chapter *or* the federal postcard application," and are not prohibited "from voting an absentee ballot under Article 20." N.C. Gen. Stat. § 163-258.7(a), (f) (emphasis added). Thus, military and overseas voters are expressly authorized to apply for and cast a ballot under the methods set forth *either* in Article 21A *or* Article 20. But the requirement that UMOVA voters must choose between these unique methods confirms the clear distinction between the two regimes. Simply put:

> by setting forth two distinct sets of comprehensive regulations for requesting and casting absentee ballots for two distinct classes of voters, and separating those comprehensive regulations in different statutory

> articles, the General Assembly clearly did not intend for the State Board to pick and choose laws from one article and apply those laws to persons subject to the other article.

App. 72.

All of this is directly relevant to Judge Griffin's protest because when it came time for the General Assembly to implement photo ID requirements for absentee voting, it *specifically modified* Article 20 to include a photo ID requirement, *see* N.C. Gen. Stat. § 163-230.1(a)(4), (b)(4), (f1) (requiring voted ballots "*under this section*" to be "accompanied by a photocopy of identification"). At the same time, the General Assembly *did not amend* Article 21A's separate absentee voting regime to impose a photo ID requirement for military and overseas voters. Of course, given the history of military and overseas voting, and the fact that no other state has adopted a comprehensive photo ID requirement for UOCAVA voters, the General Assembly's choice is hardly surprising.

This exclusion of military and overseas voters from the photo ID requirement is also fully consistent with Article VI of the North Carolina Constitution. Article VI requires photo ID for voters "offering to vote in person." It *does not require* photo ID for absentee voting at all (even though the General Assembly later imposed that requirement in Article 20). And even for in-person voting, Article VI permits the General Assembly to enact laws that "include exceptions." N.C. Const. art. VI, §§ 2(4), 3(2).

Trying to avoid this conclusion, Judge Griffin maintains that Article 21A should be read to "incorporate" Article 20's photo identification requirement because "[i]f our legislature intended to exempt overseas absentee voters from the photo

identification requirement, it would have said so explicitly." Griffin Br. 17. But that gets the statutory construction backwards. If the General Assembly imposes a requirement in one Article of the statutes, *but does not include it* in another, the conclusion to be drawn is that it did not intend to include it where it was omitted. It is "not reasonable to assume that the legislature would leave an important matter . . . open to inference or speculation"; therefore, "the judiciary should avoid ingrafting upon a law something that has been omitted." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008).

The timing of the enactment of these statutes is also consistent with this analysis. The UMOVA was passed in 2011 and became effective in January 2012. The very first photo identification law, applicable to in-person voting, was signed in August 2013. *Compare* N.C. Sess. Law 2011-182 (H.B. 514), *with* N.C. Sess. Law 2013-381 (H.B. 589). The General Assembly *later* added legislation to amend Article 20 to include a photo identification requirement for domestic absentee ballots. *See* N.C. Sess. Law 2019-239 (S.B. 683). No such amendment was made to Article 21A at the time. If the General Assembly had intended to impose a photo identification requirement on voters covered by Article 21A, it would have amended Article 21A to "explicitly" include such a requirement—just as it did with respect to Article 20 in 2019.

Judge Griffin argues that Article 20's photo identification requirement nevertheless *must be* incorporated into Article 21A because absentee ballots cast under Article 20 and Article 21A are "generally treated alike and are all considered

absentee ballots." Griffin Br. 18. But that results-oriented approach is not the way this Court typically conducts statutory interpretation. *See, e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws."). In any event, to support his argument that Article 20 and Article 21A should just be "treated alike," Judge Griffin cites statutes that, while they apply a uniform rule to Article 20 and Article 21A absentee ballots for one purpose or another, *specifically* distinguish between the two types of ballots. *See, e.g.*, N.C. Gen. Stat. § 163-132.5G(a1)(4) (requiring reporting of early vote ballots separate from "absentee ballots cast under Article 20 *or* 21A of this Chapter"); *id.* § 163-234 (setting different deadline for counting of absentee ballots "issued under Article 21A"); *id.* § 163-231(b) ("All ballots issued under the provisions of [Article 20] *and* Article 21A of this Chapter shall be transmitted by one of the following means …") (all emphases added).

At the same time, Judge Griffin ignores the many other distinctions between the two types of absentee ballots, underscoring that they are distinct absentee voting regimes for different types of absentee ballots. *See Insulation Sys., Inc. v. Fisher*, 197 N.C. App. 386, 391, 678 S.E.2d 357, 360 (2009) (articulating basic principle that "[b]y enacting two separate statutes, the legislature clearly intended that two distinct standards be applied."). For example, ballots cast under Article 21A, unlike absentee ballots cast under Article 20, can be submitted electronically. N.C. Gen. Stat. §§ 163-231(b)(1)(c), 163-258.4(d). In addition, unlike the declaration required to authenticate

an Article 21A ballot, an absentee ballot under Article 20 must be authenticated by two witnesses or a notary. N.C. Gen. Stat. § 163-231(a)(6). A voter covered by Article 21A, unlike an absentee ballot under Article 20, can request a ballot under "the federal postcard application." N.C. Gen. Stat. § 163-258.7(a); *compare with* N.C. Gen. Stat. § 163-230.2(a) (providing a ballot under Article 20 can be requested only through completion of a form created by the State Board). And all ballots under Article 20 must be submitted no later than 7:30 p.m. of the date of election, while Article 21A ballots are counted so long as they are received before the county canvass. *Compare* N.C. Gen. Stat. § 163-231(b)(2), *with* N.C. Gen. Stat. § 163-258.12. These distinctions in the methods and deadlines for submitting absentee domestic ballots under Article 20 and Article 21A underscore that the methods for voting absentee under the two Articles are distinct, and do not have the same requirements (unless stated expressly in the statutes).

Notably, there is no provision in either Article that provides that *photo ID* applies to *all absentee ballots*, whether cast under Article 20 or Article 21A. Instead, as set forth above, the photo ID requirement is applied only to Article 20 for "voted ballots *under this section*." N.C. Gen. Stat. § 163-230.1(f1) (emphasis added).

Nor is it correct to conclude that there would be no "rational basis" for this difference in treatment or that it "would make no sense to require photo identification for voters presented in the United States but not for overseas voters" including our uniformed military. Griffin Br. 22, 23. While there may be policy arguments for extending photo ID to military and overseas voters, the General Assembly has not

yet decided to impose such a requirement. That legislative choice is not only consistent with the law for UOCAVA voters in *other states across the country*, but also with the historical recognition in federal and state law that it is simply harder for overseas citizens to exercise their right to vote—from uniformed military on the battlefield or in submarines, to missionaries and nonprofit workers in remote locations. Indeed, the Department of Defense disagrees with Judge Griffin's argument that it "makes no sense" to permit military and overseas voters to access the ballot without a photo ID and has explained why these voters *should* be treated differently.[6] (As the Board recognized, an exception from photo ID requirements for these votes may also ultimately be required by federal law and the Supremacy Clause of the U.S. Constitution).

There are still multiple checks designed to ensure the integrity of the overseas vote. A voter must confirm their identity when submitting the standard federal forms. *See* App 70 (federal forms require information such as the voter's "name, birthdate, and their driver's license number or social security number" for the purpose of "confirm[ing] the voter's identity."). And each Article 21A ballot includes a declaration swearing to the voter's eligibility and identity. *See* N.C. Gen. Stat. §§ 163-258.4(e); 163-258.13. A military or overseas voter submitting a ballot under Article 21A must provide "a declaration signed by the voter declaring that a material misstatement of fact in completing the document may be grounds for a conviction of

[6] *See, e.g.*, Letter from Director Beirne to Commissioner Cortes (Feb. 6, 2017) (cited in Board's Order at App. 76 n.26).

perjury under the laws of the United States or this State." N.C. Gen. Stat. § 163-258.13. A separate section sets out specific facts to which a covered voter must "swear or affirm" including "specific representations pertaining to the voter's identity, eligibility to vote, [and] status as a covered voter." N.C. Gen. Stat. § 163-258.4(e).[7]

Accordingly, Judge Griffin's attempt to change settled law and disenfranchise military servicemembers, their families, and other North Carolinians overseas should be rejected.

ii. The Board Properly Exercised Its Authority in Issuing the Rule Providing That a Photo ID Is Not Required for a Ballot Voted Under Article 21A

Judge Griffin argues that the Photo ID Exemption Rule is unenforceable because "[t]here is no textual indication that the General Assembly ever intended for the State Board to decide whether to require photo identification for any kind of voter." Griffin Br. 21. Judge Griffin is wrong. As an initial matter, the Board did not exceed the scope of its authority because the *General Assembly* made the policy choice to impose a photo ID requirement for an absentee ballot under Article 20 without at the same time imposing such a requirement for casting a ballot under Article 21A. In addition, the General Assembly *did* direct the Board to develop "standardized absentee-voting materials . . . in coordination with other states." N.C. Gen. Stat. §

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[7] As the Board points out (App. 70), these are the *only authentications* that may be required to cast an Article 21A ballot: "An authentication, other than the declaration specified in G.S. 163-258.13 or the declaration on the federal postcard application and federal write-in absentee ballot, is not required for execution of a document under this Article. The declaration and any information in the declaration may be compared against information on file to ascertain the validity of the document." N.C. Gen. Stat. § 163-258.17(a).

163-258.4(d). And the identification exception found in 8 N.C. Admin. Code 17.0109(d) aligns with this directive. As noted, the FVAP's Voting Assistance Guide "reveals no instruction from any state to its UOCAVA voters stating that they must comply with a photo ID requirement when requesting or voting their ballot." App. 75. The regulation was thus clearly within the General Assembly's express direction to the Board to develop "standardized absentee-voting materials" for Article 21A voters, including "authentication materials, and voting instructions." N.C. Gen. Stat. § 163-258.4(d).

Importantly, this regulation was adopted during an *open process*, with a specific check designed to ensure the Board does not exceed its statutory authority. The Rule was in effect for more than 15 months before the election, beginning in August 2023, first as a temporary rule, then as a permanent rule. App. 74. During the rulemaking process Judge Griffin submitted no comments on the Rule objecting to it. The North Carolina Republican Party submitted "thorough comments on the Rule" but "did *not* object to this aspect of the Rule" or seek to invalidate it through administrative or judicial process. *Id.* The Rule was approved unanimously by the Rules Review Commission, an agency appointed by the leadership of the General Assembly that is required to object to rules proposed by an agency "if those rules exceed the authority of the agency to adopt them." *Id.* (citing N.C. Gen. Stat. § 150B-21.9(a)(1)).

Accordingly, the Rule Judge Griffin challenges here is valid as it was implemented in accordance with the authority delegated by the General Assembly to the State Board.

iii. Judge Griffin's Selective Prosecution of This Claim Violates the Equal Protection Clause of the U.S. Constitution

Not only is Judge Griffin's post-election protest too late to challenge a lawfully enacted regulation, and not only is his argument wrong on the merits, but the Equal Protection Clause of the U.S. Constitution bars his claim because of the selective means by which he seeks to enforce this claim. Even in state elections, "the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." *Kim v. Bd. of Educ. of Howard Cty.*, 93 F.4th 733, 741 (4th Cir. 2024) (quoting *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970)); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 n.78 (1973) (noting "the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population"). Accordingly, a state "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam); *see also Lecky*, 285 F. Supp. 3d at 920 ("Courts have generally found equal protection violations where a lack of uniform standards and procedures results in arbitrary and disparate treatment of different voters.").

Judge Griffin protested voters on this basis before the deadline *only in Guilford County*. *See* Griffin Br. 66 n.15 (glossing over untimely filings in other counties); App. 40 n.2 (noting late filings but dismissing on the merits). He later tried to supplement with data for three more counties (Durham, Forsyth, and Buncombe). He blames the timing of county boards in providing the requested data (without explaining why he did not request the data months earlier)—*but Judge Griffin never intended a uniform application of this change in the rules*. From the start, Judge Griffin only "requested the list of such voters from six counties." Griffin Br. 66 n.15. In other words, he does not seek to change the rules for all voters in the State. To change the rules and throw out the votes of North Carolinians in one county, or just four counties—particularly when those counties are some of the most Democratic in the State—while counting the votes of similarly situated North Carolinians of the other 96 counties in the State would run directly into constitutional guarantees of equal protection of the law. This Court should not sanction this selective disenfranchising of our military, their families, and overseas voters. Moreover, if it does so, the Court will be forced to address whether to dramatically expand the inquiry to more than 32,000 North Carolinians who voted using this method in all 100 counties in 2024.[8]

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[8] *See* Jeffrey Billman & Michael Hewlett, *Jefferson Griffin's Gambit For a State Supreme Court Seat*, The Assembly (Jan. 20, 2025), archived at https://perma.cc/QMC6-2N4F; *accord* https://s3.amazonaws.com/dl.ncsbe.gov/ENRS/2024_11_05/absentee_counts_state_20241105.csv (10,500 military and 21,534 overseas absentee ballots).

B. Judge Griffin Cannot Establish That Children of North Carolinians Stationed or Living Abroad Are Ineligible to Vote

When the General Assembly enacted UMOVA in 2011, it unanimously expanded voting rights in state elections to voters living abroad. In doing so, the General Assembly provided that various categories of "uniformed-service" and "overseas" voters could use unique procedures to register and vote absentee that are unavailable to civilian voters in the United States. *See* N.C. Gen. §§ 163-258.2–258.15. Such a "covered voter" authorized to vote under UMOVA includes an individual "born outside the United States" who "except for a State residency requirement" satisfies voter eligibility requirements, and whose "parent or legal guardian" was last eligible to vote in North Carolina "before leaving the United States." N.C. Gen. Stat. § 163-258.2(1)(e).

The most natural example of such a "covered voter" would be an individual born to a North Carolina servicemember stationed overseas who—because of their parent's service—has never "lived in" North Carolina. UMOVA "specifically authorized" these "U.S. citizens who have never lived in the United States" to vote in North Carolina elections "if they have a familial connection to this state." App. 67 (Board Order).

Nevertheless, Judge Griffin claims that such individuals who have "never lived" in North Carolina are ineligible to vote because they do not satisfy the "voter residency" requirement of Article VI of the North Carolina Constitution. Griffin Br. 23–24. This argument is meritless.

i. This Protest Should Be Rejected Because It Does Not Challenge Enough Votes to Change the Outcome of the Race

If the Court concludes that Judge Griffin's other two protests fail, then it need not address this protest at all. To succeed in an election protest, a protest must establish that any irregularities in the election were "sufficiently serious to cast doubt on the apparent results of the election." N.C. Gen. Stat. § 163-182.10(d)(2)(e). Absent such a showing, the protest must be dismissed. *Id.* § 163-182.10(d)(2)(c). In other words, a protest is not warranted only to change the "vote count." It must be sufficient to affect the outcome.

Here, Judge Griffin protested just 266 votes. App. 40. That is *hundreds* of votes shy of the 734-vote margin by which Justice Riggs won this race. Accordingly, if the Court rejects Judge Griffin's other protests—on any grounds—it should reject this protest as moot.

ii. Article VI Does Not Prohibit Overseas Citizens Who Have "Never Lived" in North Carolina from Voting

Article VI guarantees the right to vote to eligible individuals who have "resided in" North Carolina for 30 days preceding an election. N.C. Const. art. VI, § 2(1). Citing this Constitutional right, Judge Griffin argues that any voter who "never lived in the United States" is ineligible to vote in North Carolina elections because "[s]omeone who has never lived in the United States has never resided in North Carolina." Griffin Br. 23–24. This argument is wrong because "living" and "residing" in North Carolina are not synonymous under Article VI.

The term "resided" is not defined in the North Carolina Constitution. The North Carolina Supreme Court has therefore "held . . . without variation that residence within the purview of this constitutional provision [Article VI] is synonymous with domicile." *Owens v. Chaplin*, 228 N.C. 705, 708, 47 S.E.2d 12, 15 (1948) (collecting cases); *see also Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972) ("Residence as used in Article VI of the North Carolina Constitution of 1970 continues to mean domicile."). Domicile does not merely mean where someone temporarily "lives." *See Hall*, 280 N.C. at 606, 187 S.E.2d at 55 ("One who lives in a place for a temporary purpose . . . effects no change of domicile."). Rather, domicile is an individual's "permanent" home. *Id.* North Carolina law therefore recognizes "three kinds" of domicile: "domicile of origin, domicile of choice, and domicile by operation of law." *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E.2d 307, 308 (1924). It is true that someone who has never lived in North Carolina cannot make North Carolina his or her domicile *of choice*. *Id.* ("A domicile of choice is a place which a person has chosen for himself."). But an individual need not live in North Carolina for the state to be their domicile of origin or domicile by operation of law.

a. North Carolina Can Be the Domicile of Origin of Overseas Voters Who Have Never Lived in North Carolina

At birth, a person inherits their parents' or legal guardian's domicile as their "domicile of origin." *Id.* ("As a general rule the domicile of every person at his birth is the domicile of the person on whom he is legally dependent."). This is true even if the person is born away from home and, by some twist of fate, never visits their parents' or legal guardian's domicile. It is therefore "entirely logical that on occasion, a child's

domicile of origin will be in a place where the child has never been." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

Judge Griffin posits North Carolina cannot be the domicile of origin of an overseas voter who has never lived in this State by arguing—without citing to any supporting legal authority—that a child's domicile of origin expires when they turn 18. *See* Griffin Br. 30–31. Judge Griffin is wrong. Domicile of origin cannot expire upon reaching majority, suddenly leaving a U.S. citizen without a domicile anywhere in the United States. Such a result would contravene the basic principle that "[t]he law permits no individual to be without a domicile." *Hall*, 280 N.C. at 608, 187 S.E.2d at 57. Thus, domicile of origin, like any domicile, "once acquired is presumed to continue until it is shown to have been changed." *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 99 S.E.2d 240, 244 (1919); *see also Lloyd v, Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979) (holding that college students may retain their domicile of origin while living away from home).

Moreover, "[w]here a change of domicile is alleged, the burden of proving it rests upon the person making the allegation." *Reynolds*, 177 N.C. 412, 420-21, 99 S.E.2d at 244; *Hall*, 280 N.C. at 608, 187 S.E.2d at 57. Judge Griffin has made no evidentiary showing that any overseas voter has changed their domicile of origin since becoming an adult. Nor does he assert that such an evidentiary showing reasonably *could* be made.

b. North Carolina Can Be the Domicile by Operation of Law of Overseas Voters Who Have Never Lived in North Carolina

"A domicile by operation of law is one which the law determines or attributes to a person without regard to his intention or the place where he is actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308. For example, at common law, a wife obtained her husband's domicile by operation of law, without regard to where she actually lived. *Id.*; *see In re Cullinan's Est.*, 259 N.C. 626, 631, 131 S.E.2d 316, 319 (1963). The General Assembly has remedied that anachronistic voting rule by statute. N.C. Gen. Stat. § 163-57(11) (allowing a spouse to establish a separate domicile "for the purpose of voting"). But the law is that domicile may be established by operation of law, without respect to where a person is "actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308; *see also generally* N.C. Gen. Stat. § 163-57 (defining residence in various contexts by statute for purposes of voting).

The General Assembly expressed its clear intent to protect the right of children and dependents of North Carolinians living abroad to be heard in North Carolina elections when it enacted N.C. Gen. Stat. § 163-258.2(1)(e), and confirmed that a person "born outside the United States" is eligible to vote—regardless of whether he or she has ever "lived in" North Carolina—if his or her "parent or legal guardian" was eligible to vote in North Carolina "before leaving the United States." N.C. Gen. Stat. § 163-258.2(1)(e) establishes domicile by operation of law for these voters. This is reaffirmed by N.C. Gen. Stat. § 163-258.8, which specifically assigns a residence for these voters: "a voter *described by G.S. 163-258.2(1)e* . . . shall be assigned an address" which constitutes his or her *residence* "for voting purposes." This "assigned"

address for a voter covered by N.C. Gen. Stat. § 163-258.2(1)(e) is "the last place of residence in this State of the parent or legal guardian of the voter." *Id.* Thus, the "residency requirement" exception set forth in N.C. Gen. Stat. § 163-258.2(1)(e) refers exclusively to the *residence* requirement of N.C. Gen. Stat. § 163-57(1) and is consistent with the requirement that these voters be "residents" of North Carolina for purposes Article VI of the North Carolina Constitution.

This has "been the law of North Carolina for thirteen years" "faithfully implemented in 43 elections in this state since that time." App. 68. Accordingly, Judge Griffin cannot invalidate their votes in a post-election protest.

C. Judge Griffin Cannot Establish That Individuals Voted with Allegedly Incomplete Registration Information or That Any Such Individuals Should Have Their Ballots Discarded

Tellingly, Judge Griffin, in proposing a preferred order for this Court to address each of his three categories of protests saved his "Incomplete Registration" protest for last—even though it implicates the largest number of votes by far. That is because this theory for retroactively disenfranchising North Carolina voters who have been registered for decades is particularly specious—and has been tried and failed multiple times now.

HAVA requires states to collect the voter's driver's license number or, if they do not have one, the last four digits of their social security number for anyone registering to vote. 52 U.S.C. § 21083(a)(5)(A)(i). The state uses those numbers to confirm the registrant's identity. *Id.* § 21083(b)(3)(B). Eligible voters who have neither number still have a right to vote—the law just requires that the state assign a "unique identifier to an applicant." *Id.* § 21083(a)(1)(A), (5)(A)(ii). If a state

registers a voter without collecting the information, the voter lacks the information, or the information provided by the voter does not match a state database, then the voter must produce a photo ID or other identifying document when they first go to vote, called a HAVA ID. *Id.* § 21083(a)(5)(A), (b)(1)(A), (b)(1)(B), (b)(2)(A). State law incorporates these requirements and applies them to all federal, state, and local elections in North Carolina. N.C. Gen. Stat. §§ 163-82.11(c), 163-166.12(a), (b), (d).

For twenty years, from the enactment of HAVA, to this year, North Carolina's official registration form requested each voter's driver's license number or social security number but did not make clear the voter was required to provide one of these numbers if available. Some voters provided one or both numbers. For those who did not provide a number (or whose number could not be matched to a state or federal database), those voters were provided a unique identifier and required to produce a HAVA document when they first voted. App. 53.

The issue with the North Carolina form went unchallenged until an individual voter, Carol Snow, filed an administrative complaint about the form in late 2023. The Board revised the form but rejected Ms. Snow's request for retroactive relief. After a decision on the Snow complaint in late 2023, no one—including Judge Griffin—complained about the Board's resolution to the problem until August 2024. Less than 90 days before the general election, the Republican National Committee filed suit over the issue, but did not seek a preliminary injunction or any form of emergency relief. The RNC claimed that up to 225,000 voters on North Carolina's rolls were unlawfully registered because the State's database did not include a driver's license

or social security number for these voters. That lawsuit was removed to federal court, and Judge Myers ruled that "the outcome of this suit will have no bearing on the most recent election." *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, No. 5:24-cv-00547-M, ECF No. 73, Ex. B, p.4 (E.D.N.C. Nov. 22, 2024).

Judge Griffin now seeks to unearth this issue *post-election*, and claims that every voter without a driver's license or social security number in a state database should not have been permitted to vote *in any race in the 2024 General Election* and should have their vote thrown out—but only as to his race. As Judge Griffin knows, he has been unable to identify a single ineligible voter in this group. And North Carolina law is clear that an error in registering a voter cannot be a basis for removing them from the rolls or discounting their votes. Federal law also bars this claim in multiple ways.

i. Judge Griffin Failed to Present Evidence That a Single Voter In this Group Is Ineligible to Vote

Judge Griffin's protest lacks basic factual information sufficient to sustain his protest because his argument relies on an "unwarranted inference" about the State Board's data. *See* App. 52–53 (Board Order describing data issues). He claims that voters "never legally registered to vote" because a driver's license or social security number is not saved in the Board's database. *See* Griffin Br. at 32. But as the Board clarified in its Decision and Order, that database does not establish that even *one* voter was not actually eligible to vote, even under Judge Griffin's flawed reading of the law. *See* App. 54.

First, the data lacks a number for some voters because those voters had no driver's license or social security number when they registered. *See id.* at 52–53. Under federal and state law, a voter who lacks one of these numbers can still register to vote. *See id.*

Second, some voters *did* include a number on their registration form, but that number was deleted from the records Judge Griffin reviewed because it failed to match to a number in an outside database. *Id.* at 52–53. When a registrant provides such a number, but the number does not match with state or federal databases, that voter will be given another way to confirm their identity by providing a HAVA ID, and that information will no longer be found in the electronic registration record (even though the voter provided the information). *See id.* If the voter provides a HAVA ID, then their vote must count, even if staff were unable to verify their voter registration or driver's license number. N.C. Gen. Stat. § 163-166.12(d).

Third, many voters have provided this *exact* information to elections officials since registering. In 2024, for example, every voter who voted absentee in this election was required to provide this information on their absentee ballot request form, regardless of whether they provided it when they registered.[9] Additionally, many voters complied with North Carolina's photo ID requirement in 2024 by producing their N.C. driver's license or non-operator *identification*. *See* N.C. Gen. Stat. § 163-166.16. Judge Griffin offers no reason why providing this information on

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[9] *See* 2024 Absentee Ballot Request Form, *available at* https://s3.amazonaws.com/dl.ncsbe.gov/Forms/2024/English-Fillable-2024-Absentee-Ballot-Request-Form.pdf (item #3) (last visited Jan. 18, 2025).

an absentee ballot request form or presenting it with a photo ID would not count as a voter furnishing such information to the county boards.

Moreover, every single voter Griffin protested was required to provide a HAVA document when they first voted. Indeed, if a county board erroneously registered voters without collecting their driver's license or social security numbers, federal and state law provide a specific remedy: voters are *required* to submit a photo ID or a document establishing their residency before they vote in their first election. *See* 52 U.S.C. § 21083(a)(5)(A), (b)(1)(A), (b)(1)(B), (b)(2)(A) (setting out rules for registration for federal elections and if county boards do not comply with HAVA registration procedures); N.C. Gen. Stat. § 163-166.12(a), (b) (applying HAVA to state elections). State law is clear: an issue with the voter's driver's license or social security number "*shall not prevent that individual from registering to vote and having that individual's vote counted*" if they present photo ID or HAVA ID when they vote. N.C. Gen. Stat. § 163-166.12(d) (emphasis added). Every voter complied with this requirement. Thus, under clear federal and state law, each voter's vote must count.

ii. State Law Prohibits Systematic, Retroactive Removal of Voter Registrations

Whether or not the allegedly incomplete voter registrations *should* have been accepted, they *were* accepted by county boards. County boards are responsible for registering eligible voters. N.C. Gen. Stat. § 163-82.1(b). Ultimately, once a voter completes a voter registration form, the *burden is on the county*, not the voter, to identify and address any errors in the registration. 52 U.S.C. § 21083(a)(5)(A)(iii); N.C. Gen. Stat. §§ 163-82.7(a), 163-82.11(d). The county boards processed

applications from these voters, added them to the official rolls, and mailed them voter registration cards to "evidence" their "registration." N.C. Gen. Stat. § 163-82.8(d). The voter rolls, rather than the voter registration application, is the official record of a voter's registration. *Id.* § 163-82.10(a).

Once a voter is on the rolls, the Board must count the votes of all eligible voters who appear on that list of eligible voters. This is true not only under federal law, 52 U.S.C. § 10307(a), but well-settled state law as well. For more than 100 years, North Carolina has been clear: "a mere irregularity in registration will not vitiate an election." *Plott v. Bd. of Comm'rs of Haywood Cty.*, 187 N.C. 125, 131, 121 S.E. 190, 193 (1924) (citing *Davis v. Bd. of Educ. of Beaufort Cty.*, 186 N.C. 227, 233, 119 S.E. 372, 375 (1923)). Once a county board registers a voter who is otherwise "entitled to register and vote," the voter "cannot be deprived of his right to vote," even if the county board "inadverten[tly]" registered the qualified voter. *Gibson v. Bd. of Comm'rs of Scotland Cty.*, 163 N.C. 510, 513, 79 S.E. 976, 977 (1913); *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 429, 26 S.E. 638, 639 (1897).

In *Woodall v. W. Wake Highway Comm'n*, 176 N.C. 377 (1918), a losing candidate argued that "the votes of electors otherwise qualified should be rejected, because the registrars failed to administer the oath to them, and they were allowed to vote without being challenged." *Id.* at 388. The Court rejected this argument, explaining that a "vote received and deposited" is "presumed to be a legal vote" even if "the voter may not have complied entirely with the requirements of the registration law." *Id.* at 389. In such a case, it "devolves upon the party contesting [the vote] to

show that it was an illegal vote, and this cannot be shown by proving merely that the registration law had not been complied with." *Id.* Put simply, "[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." *Id.* The *Woodall* decision is one of a robust line of cases prohibiting exactly what Judge Griffin seeks to do here—disenfranchise qualified voters who have legally cast ballots, by arguing that alleged technical defects in their registrations should invalidate their votes. *See, e.g.*, *Overton v. Mayor & City Comm'rs of City of Hendersonville*, 253 N.C. 306, 315, 116 S.E.2d 808, 815 (1960) (collecting cases); *see also Wilmington, O. & E.C.R. Co. v. Onslow Cty. Comm'rs*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895) ("[T]he machinery provided by law to aid in attaining the main object—the will of the voters—[] should not be used to defeat the object which they were intended to aid.").

While Judge Griffin invokes the cure provision in N.C. Gen. Stat. § 163-82.4(f), *see* Griffin Br at 39, that provision applies *before* a voter is registered, not after an application is accepted by the county boards and the applicant is officially registered. *See* N.C. Gen. Stat. §§ 163-82.1(b), 163-82.1(c), 163-82.7(a), 163-82.7(c), 163-82.7(d), 163-82.10(a). Additionally, that cure provision applies only when the voter is "notified of the omission and given the opportunity to complete" the voter registration form "at least by 5:00 P.M. on the day before the county canvass as set in G.S. 163-182.5(b)." N.C. Gen. Stat. § 163-82.4(f). Here, no notice or opportunity to cure was given to the voters Judge Griffin challenges. Judge Griffin asks the Board to invalidate votes *post facto*—votes of individuals who have been on voter rolls for

decades—without such an opportunity, and after their applications were accepted by the county boards.

Judge Griffin also argues that the Board "admitted" that it violated the law. Griffin Br. at 35. This is false and mischaracterizes the Board's December 2023 Order resolving the administrative complaint. That Order addressing the Snow complaint changed the registration form to require voters to do one of three things: (1) provide a driver's license; (2) provide a social security number; or (3) check a box affirmatively stating they have not been issued either number. *See* Order at 4 (State Bd. Elecs. Dec. 6, 2023), archived at https://perma.cc/5KPY-SQP5. This alteration, which clarified for the county boards how they should respond when a voter leaves that section blank, was consistent with the State Board's discretion under state law. But it in no way was an admission, as Judge Griffin claims, that this Board "broke the law." Griffin Br. at 35. In fact, the N.C. Republican Party made this same argument to the Fourth Circuit, which went out of its way to note that it was "not convinced that [the Board] conceded to a violation of HAVA." *See Republican Nat'l Comm.*, 120 F.4th at 402 n.3.

Regardless, the State Board expressly (and unanimously) decided that no action was necessary for previously registered voters, such as the 60,273 voters challenged here, because they have proven their identity in the manner required by HAVA. Order at 4–5 (State Bd. of Elections Dec. 6, 2023), archived at https://perma.cc/5KPY-SQP5. Thus, counting the votes cast by the 60,273 voters is authorized—not prohibited—by HAVA and corresponding state law.

iii. Federal Law Likewise Prohibits Retroactive Removal of Voter Registrations

Judge Griffin's attempts to strike thousands of votes would also violate federal law, including the National Voter Registration Act of 1993 (NVRA), and the Voting Rights Act of 1965 (VRA).

Judge Griffin argues that the NVRA is inapplicable to a state election, *see* Griffin Br. at 40–42, but he makes no real effort to distinguish the Fourth Circuit's holding that "North Carolina has a unified registration system for both state and federal elections, and thus is bound by the provision of the NVRA for the registrants at issue here." *Republican Nat'l Comm.*, 120 F.4th at 401.

Judge Griffin's protests seek to strike tens of thousands of people from the voter rolls *after* they cast their votes. That request violates the NVRA and the VRA, which expressly apply to the voter rolls at issue here. *Cf.* N.C. Gen. Stat. § 163-82.14(a1) ("List maintenance efforts under this section shall be nondiscriminatory and shall comply with the provisions of the Voting Rights Act of 1965, as amended, and with the provisions of the National Voter Registration Act."). The NVRA provides that "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" must be completed "*not later than* 90 days prior to the date" of any primary or general election. 52 U.S.C. § 20507(c)(2)(A) (emphasis added). The NVRA also prohibits the Board from removing voters from the rolls outside of narrow, enumerated circumstances that are not present here. *See* 52 U.S.C. §§ 20507(a)(3), (a)(4), (c)(1). The NVRA "prohibits systematic removal programs '90 days before an election because that is when the

risk of dis[en]franchising eligible voters is the greatest.'" *Republican Nat'l Comm*, 120 F.4th at 401 (alteration in original) (quoting *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1346 (11th Cir. 2014)); *see also id.* ("North Carolina has a unified registration system for both state and federal elections, and thus is bound by the provisions of the NVRA for the registrants at issue here."). When the election is at least 90 days away, "eligible voters who are incorrectly removed have enough time to rectify any errors." *Arcia*, 772 F.3d at 1346. But when the election is imminent, any systematic removal effort risks disenfranchisement because of the limited time remaining for voters to show that they are eligible to vote.

The mass challenges here would not just create that risk; they would all but ensure that thousands of eligible voters would be disenfranchised. That disenfranchisement would violate the NVRA's prohibition on systematic removal.

Judge Griffin makes the preposterous argument that his protests do not actually seek to *remove* any voters from the voter rolls—he just wants to challenge "the outcome of *his* election." Griffin Br. 42. That argument presents a "distinction without a difference"; the effect of having one's vote disregarded "is the same as not being eligible to vote." *Majority Forward v. Ben Hill Cty. Bd. of Elections*, 512 F. Supp. 3d 1354, 1368 (M.D. Ga. 2021). Worse, this position would inevitably lead to a "shadow" registration system—applicable only to state elections, and capable of being invoked in any election protest in the future to disenfranchise voters who lack a driver's license or social security number in the Board's database, but *only in each*

specific race where a disappointed candidate files a protest like Judge Griffin. That unworkable and absurd result is not permissible under the NVRA.

Systematic removal of these voters would also violate the VRA's separate requirement that "[n]o person acting under color of law shall fail or refuse to permit any person to vote who is. . . otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote." 52 U.S.C. § 10307(a). In North Carolina, to qualify to vote, a person must (1) be at least 18 years old; (2) be a U.S. citizen; (3) be a resident of North Carolina; (4) not have been adjudged guilty of a felony without having citizenship rights restored; and (5), for in-person voters, present photo ID or meet a qualifying exception. N.C. Const. art. VI, § 2; N.C. Gen. Stat. § 163-55. Judge Griffin has not presented evidence that *any* of the 60,273 voters at issue failed to meet these qualifications. Instead, he is asking this Court to throw out votes cast by tens of thousands of voters who were (and still are) qualified to vote.

iv. Judge Griffin's Protest Would Violate the Equal Protection Rights of Voters

Last but certainly not least, Judge Griffin's final protest presents a clear equal protection problem. His protest includes no voters who voted *on Election Day*. Inevitably tens of thousands of North Carolinians voted in this race on Election Day had the very same issue with their registrations. Throwing out the votes of those who voted early or absentee just because that data was available to Judge Griffin, while ignoring the votes of those who voted on Election Day (and whose ballots are not retrievable) would squarely present an equal protection problem. This is a separate and independent basis for rejecting this protest all on its own.

Accordingly, Judge Griffin's "Incomplete Registration" protest should be rejected, and the Court should put a stop to this threat to thousands of votes of North Carolinians who have voted in our state's elections for years without issue.

CONCLUSION

It is time for this election to end. For the reasons stated above, Judge Griffin's Petition should be denied, the temporary stay of certification should be lifted, and this action should be dismissed.

Respectfully submitted, this 21st day of January, 2025.

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N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he personally signed it.

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CERTIFICATE OF SERVICE

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