No. 320P24

SUPREME COURT OF NORTH CAROLINA

****

JEFFERSON GRIFFIN, Petitioner, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, Respondent, and ALLISON RIGGS, et al., Intervenor-Respondents.	)	From the North Carolina State Board of Elections

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BRIEF OF RESPONDENT

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BRIEF FOR RESPONDENT

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ISSUES PRESENTED

I. Has Petitioner satisfied the procedural prerequisites for seeking a writ of prohibition, including a showing that no other adequate remedy exists to address his claims?

II. Does our State's version of the *Purcell* principle bar Petitioner's post-election challenge to longstanding elections rules?

III. Would granting Petitioner's requested relief to disenfranchise lawful voters and cancel votes of only some identically situated voters violate the Fourteenth Amendment, as well as this Court's precedent?

IV. Did Plaintiff adequately serve his election protests on challenged voters, where he merely sent them a postcard with a QR code?

V. On Petitioner's first election protest, did the State Board correctly conclude that Petitioner failed to establish probable cause to believe that any challenged voter registered to vote in violation of the law?

VI. On Petitioner's second election protest, did the Board correctly conclude that the General Assembly declined to require military and overseas voters to provide a copy of a photo ID alongside their absentee ballot?

VII. On Petitioner's third election protest, did the Board correctly decline to strike down as unconstitutional a state statute allowing certain citizens who have never resided in North Carolina to vote?

VIII. If this Court were to reverse the Board's legal determinations for dismissing Petitioner's protests at the initial pre-factfinding stage, should this Court remand for additional proceedings or resolve disputed facts for the first time on appeal?

INTRODUCTION

In this lawsuit, Petitioner seeks to retroactively change longstanding elections rules after an election has already taken place in the hope that disenfranchising over 65,000 voters would reverse his narrow loss in the recent contest for a seat on this Court. Petitioner does not dispute that all of these voters followed the official guidance in place at the time of the election. For his main election protests involving allegedly improper voter registrations and military and overseas voters, Petitioner has failed to identify a single voter who is not lawfully eligible to vote in North Carolina. Nor does he dispute that many of these voters have voted in North Carolina, without challenge or controversy, for decades.

Affording Petitioner this extraordinary relief would be inappropriate for several reasons. To start, the petition is procedurally improper: Under this Court's settled jurisprudence, a writ of prohibition is available only when no other adequate remedy can afford the requested relief. But here, there is a legislatively prescribed procedural path for seeking judicial review of election protests—one that Petitioner has himself followed in pending parallel proceedings in Wake County Superior Court. There is no need to circumvent that ordinary process here.

Petitioner's requested relief also violates the *Purcell* principle. This bedrock rule of judicial restraint is meant to avoid just this kind of last-minute request for courts to intervene in elections—intervention that undermines public faith in both our democracy and our judiciary. If there were ever a case to invoke the *Purcell* principle, it would be a case where this Court is asked to retroactively cancel votes in order to alter the result of an election for *a seat on this Court*.

If the Court declines to apply the *Purcell* principle, it would then have to confront the reality of what Petitioner is asking for. Petitioner requests to throw out the votes of tens of thousands of North Carolina citizens, many of whom are active-duty military, who followed official guidance from election

officials in registering to vote and casting their ballots. As federal courts, including the Fourth Circuit, have squarely held, this relief would violate the Fourteenth Amendment's Due Process Clause. This Court has likewise held that courts may not throw out votes that were cast in compliance with official guidance, even if that guidance may have been inaccurate.

Moreover, Petitioner demands relief that would clearly violate the Equal Protection Clause. On his main protests, he asks this Court to cancel certain disfavored voters, while simultaneously *not* cancelling votes from identically situated persons. Specifically, for voters whose records do not include an identification number in the Board's database, he has challenged only those voters who voted absentee or early in-person—not the tens of thousands who voted on election day. And for military and overseas absentee voters who did not provide a copy of their photo ID alongside their ballots, he has challenged only voters in four large, urban counties—while asking the Court to leave intact identically situated votes in the State's other 96 counties. He thus invites this Court to order an obvious equal protection violation of enormous magnitude.

For these and other reasons detailed below, the State Board of Elections respectfully requests that this Court deny the petition. This is the

last uncertified statewide race in the entire nation. Denying the petition would put the last election cycle behind us, and allow our electoral system to move forward without the destabilizing and delegitimizing effects associated with cancelling tens of thousands of lawful votes. Any concerns this Court might have with the substantive claims Petitioner has advanced can be resolved in the ordinary course in advance of the next election cycle.

STATEMENT OF THE CASE

Petitioner Judge Jefferson Griffin filed a petition for writ of prohibition in this Court seeking an order prohibiting Respondent the North Carolina State Board of Elections from counting certain ballots in the election for Seat 6 of this Court. Respondent removed the case to the United States District Court for the Eastern District of North Carolina, and the federal district court later issued an order remanding the case to this Court. This Court issued an order granting Petitioner's motion for a temporary stay of the certification of the election and setting an expedited briefing schedule.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Petitioner filed this petition for writ of prohibition as an original action in this Court. As explained below, the petition is procedurally

improper because it circumvents our State's established procedures for judicial review of election protests. *See infra* Part I.

STATEMENT OF THE FACTS

A. Petitioner files hundreds of election protests.

Petitioner Judge Jefferson Griffin and Intervenor Associate Justice Allison Riggs were candidates in the statewide 2024 general election for Associate Justice on the North Carolina Supreme Court. Final canvassed results show Justice Riggs prevailed by 734 votes.[1]

On November 19, 2024, Petitioner filed hundreds of election protests throughout the State challenging the election results, alleging that certain voters' ballots were invalid. (Pet. App. 39) In his protests, Petitioner challenged, among others, the following three categories of voters:

- In nearly all of the State's one hundred counties, Petitioner challenged 60,273 ballots cast by registered voters with allegedly incomplete voter registrations. However, he only challenged ballots cast by individuals who voted early or voted absentee. He did not challenge ballots cast by tens of thousands of identically situated voters who voted in-person on election day.[2]

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[1] *NC SBE Election Contest Details*, N.C. State Bd. of Elections, bit.ly/3PA7R6P (last visited Jan. 21, 2025).

[2] (*See* Pet. App. 368-411, 428-63, 480-94, 511-79, 596-634, 651-95, 722-41, 758-87, 804-35, 852-87, 904-1007, 1024-45, 1062-103, 1120-77, 1204-19, 1236-76, 1293-309, 1326-45, 1362-448, 1475-95, 1512-84, 1595-617, 1634-728, 1745-830,

- In four of North Carolina's counties (Buncombe, Durham, Forsyth, and Guilford), Petitioner challenged absentee ballots cast by both military and overseas voters who did not include a photocopy of a photo identification (or an ID exception form) with their ballots. Petitioner's protests, however, only identified specific voters whose votes he was challenging in Guilford County. In that county, he challenged 1,409 votes.[3]

- In fifty-three of North Carolina's counties, Petitioner challenged 266 ballots cast by overseas citizens who voted absentee and who have never resided in the United States.[4]

B. The Board takes jurisdiction over three categories of protests.

When an election protest is filed with a county board, the State Board may take jurisdiction over the protest and resolve it in the first instance.

1895-915, 1932-78, 1995-2065, 2082-107, 2124-42, 2159-210, 2227-44, 2261-82, 2299-335, 2352-401, 2418-580, 2597-615, 2632-58, 2675-721, 2732-47, 2764-95, 2812-87, 2904-40, 2957-73, 2990-3039, 3056-96, 3113-89, 3206-44, 3261-332, 3349-95, 3412-85, 3518-691, 3708-38, 3755-830, 3847-902)

[3] (*See* Pet. App. 696-705, 1178-87, 1449-58, 1585-94, 1831-78, 2722-31) Petitioner initially challenged voters in Cumberland and New Hanover counties as well, but declined to pursue these challenges.

[4] (*See* Pet. App. 352-67, 412-27, 464-79, 495-510, 580-95, 635-50, 706-21, 742-57, 788-803, 836-51, 888-903, 1008-23, 1046-61, 1104-19, 1188-203, 1220-35, 1277-92, 1310-25, 1346-61, 1459-74, 1496-511, 1618-33, 1729-44, 1879-94, 1916-31, 1979-94, 2066-81, 2108-23, 2143-58, 2211-26, 2245-60, 2283-98, 2336-51, 2402-17, 2581-96, 2616-31, 2659-74, 2748-63, 2796-811, 2888-903, 2941-56, 2974-89, 3040-55, 3097-112, 3190-205, 3245-60, 3333-48, 3396-411, 3486-517, 3692-707, 3739-54, 3831-46)

N.C. Gen. Stat. § 163-182.12. On November 20, the Board voted unanimously to take jurisdiction over the three categories of protests listed above, which "presented legal questions of statewide significance." (Pet. App. 41) The Board instructed county boards to consider Petitioner's other protests, "which were focused on individual, fact-specific determinations of voter eligibility."[5] (Pet. App. 41)

After this meeting, Petitioner filed additional untimely protests after the statutory deadline. *See* N.C. Gen. Stat. § 163-182.9(b)(4). These protests sought to add additional ballots to Petitioner's challenges with respect to the second and third categories listed above.

With respect to the third category, Petitioner tried to update his protests by newly challenging the votes of 4,100 military and overseas voters

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[5] The remaining three categories of protests challenged ballots cast by voters (1) who were serving a felony sentence; (2) who were deceased; and (3) whose registrations were denied or removed. (Pet. App. 41) On December 27, 2024, the Board dismissed these protests for failure to substantially comply with service requirements and because they challenged an inadequate number of votes to change the outcome of the contest. N.C. State Bd. of Elections, Decision and Order at 1-2 (Dec. 27, 2024). Petitioner declined to appeal that decision to Wake County Superior Court by the January 9, 2025 statutory deadline. *See* N.C. Gen. Stat. § 163-182.14(b). As a result, the Board was required by statute to certify the election by January 10, 2025 absent a court order. *See id*. On January 7, 2025, this Court issued a stay of the statutory certification deadline. Am. Order at 2.

in Buncombe, Durham, and Forsyth counties. (Pet. App. 177-343) He did not, however, seek to challenge the more than 25,000 identically situated voters across the State.[6]

C. The Board dismisses the protests.

When the Board takes jurisdiction over protests initially filed with a county board, the Board follows the same procedures for resolving the protests as the county boards. *See* N.C. Gen. Stat. §§ 163-182.10, -182.11(b), -182.12. Those procedures first require the Board to give the protest "preliminary consideration." N.C. Gen. Stat. § 163-182.10(a). At this preliminary-consideration stage, the Board must answer two questions. First, did the protest comply with the protest-filing requirements in N.C. Gen. Stat. § 163-182.9? *Id.* Second, did the protest "establish[] probable cause to believe that a violation of election law or irregularity or misconduct has occurred"? *Id.* For a protest to proceed beyond the preliminary-consideration stage, the Board must answer both questions in the affirmative. *Id.* ("If the board determines that one or both requirements are not met, the board shall dismiss the protest.").

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[6] Petitioner did not include in the appendix to his petition the protests for seven additional counties that he filed on the second category.

Protests that meet these preliminary requirements then proceed to an evidentiary hearing. *Id.* § 163-182.10(a), (c)-(d). Following this hearing, the Board must issue a "written decision" with findings of fact and conclusions of law. *Id.* § 163-182.10(d). The findings of fact must be "based exclusively on the evidence" presented at the hearing "and on matters officially noticed." *Id.* § 163-182.10(d)(1). The conclusions of law must be based on whether there is "substantial evidence of a violation, irregularity or misconduct sufficient to cast doubt on the results of the election." *See id.* §§ 163-182.10(d)(2)(a)-(e).

If the Board finds substantial evidence of a violation, the Board may correct vote totals, order a recount, or take "[a]ny other action within [its] authority." *See id.* § 163-182.10(d)(2)(e); *see also id.* § 163-182.12. In addition, under certain circumstances, the Board may order a new election. *Id.* § 163-182.13. Decisions of the State Board may be appealed to Wake County Superior Court. *Id.* § 163-182.14.

In line with this procedure, on December 11, the Board held a public meeting to consider the protests over which it had retained jurisdiction. (Pet. App. 38) Two days later, the Board dismissed the protests at the "preliminary consideration" stage—concluding both that Petitioner had

failed to comply with procedural filing requirements, and that he had failed to establish "probable cause" of a violation of law. (Pet. App. 38-80)

With respect to all three categories of protests, the Board held that Petitioner "failed to serve" affected voters, in violation of the North Carolina Administrative Code and "the requirements of constitutional due process." (Pet. App. 43) The Board reasoned that Petitioner's chosen method of service—a postcard with a QR code—did not provide affected voters adequate notice that their vote was being challenged. (Pet. App. 48-51)

The Board also recognized that the additional protests that Petitioner filed after the deadline "may not have been timely filed under [section] 163-182.9(b)(4)," but did not decide whether these protests were timely since it "dismiss[ed] these protests for other reasons." (Pet. App. 43 n.4)

The Board then examined each category of protests individually, outlining the reasons why each protest was "legally invalid." (Pet. App. 77) On the first category of protests about alleged incomplete voter registrations, the Board held that the federal Help America Vote Act (HAVA) foreclosed Petitioner's requested relief to cancel the votes of affected voters. (Pet. App. 54-57) The Board further held that, "to the extent there is a potential violation of HAVA involved in registration of voters in the past, it

was remedied consistent with a separate provision of HAVA." (Pet. App. 57) That "separate provision . . . states that a new voter registration applicant must provide an alternative form of identification before or upon voting for the first time, if the state did not have a system complying with the requirement to collect a driver's license number or last four digits of a social security number." Pet. App. 56 (citing 52 U.S.C. § 21083(b)(1)–(3)).

The Board also noted the recent decision of the U.S. District Court for the Eastern District of North Carolina in *Republican National Committee v. North Carolina State Board of Elections*, No. 5:24-cv-00547, slip op. at 4 (E.D.N.C. Nov. 22, 2024)—a case in which the federal court denied the plaintiffs in that case relief similar to what Petitioner seeks here. (Pet. App. 57). Acknowledging the federal court's reasoning that "there had been no meaningful opportunity for the voters at issue to address any potential deficiency far enough in advance of the election to comply with the law," the Board similarly concluded that votes cannot be invalidated *after* an election when eligible voters complied with all the instructions they had been given when they registered and voted. (Pet. App. 57-59) Doing so, the Board held, would violate "substantive due process protections under the U.S. Constitution." (Pet. App. 60-62)

The Board also rejected Petitioner's protests as to the votes of military and overseas voters who did not include a copy of their photo identification with their ballots. (Pet App. 69) One of its administrative rules, the Board explained, expressly provides that these voters were "not required to submit a photocopy of acceptable photo identification" with their absentee ballots. (Pet. App. 73-74 (citing 08 N.C. Admin. Code 17 .0109(d))).

The Board further explained that absentee voting by military and overseas voters is governed by the Uniform Military and Overseas Voters Act (UMOVA), a law unanimously passed by the General Assembly in 2011, which allows these voters to use special procedures to register to vote, request an absentee ballot, and submit an absentee ballot. *See* N.C. Gen. Stat. §§ 163-258.6 to -258.15. These procedures, the Board noted, do not require military and overseas voters to include a copy of their photo identification when submitting their absentee ballot. (Pet. App. 69-71) Moreover, because these procedures originate under the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which UMOVA applies to state elections, the Board concluded that imposing an identification requirement on voters covered by UOCAVA that is

inconsistent with federal law would likely violate the Supremacy Clause of the U.S. Constitution. (Pet. App. 74-76)

The Board also rejected Petitioner's protests as to overseas voters who have never resided in the United States but whose parents had been North Carolina residents. (Pet. App. 66) In dismissing this category of protests, the Board noted that UMOVA "specifically authorized 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." (Pet. App. 66-67) The Board elected not to "ignore" this state statute. (Pet. App. 66)

D. Petitioner files an original action in this Court, and the Board removes to federal court.

On December 18, 2024, Petitioner filed an original action, framed as a petition for writ of prohibition, in this Court challenging the Board's final decision and requesting that ballots in the three categories of protests not be counted. The petition seeks declaratory rulings that this requested relief would *not* violate a variety of state and federal laws—including the Board's service rules for election protests; HAVA, 52 U.S.C. § 20901, *et seq.*; the National Voter Registration Act (NVRA), 52 U.S.C. § 20501, *et seq.*; the Voting Rights Act (VRA), 52 U.S.C. § 10307; the Civil Rights Act, 52 U.S.C.

§ 10101; and the Fourteenth Amendment to the United States Constitution. (Pet. 70-71)

The Board removed this matter to the U.S. District Court for the Eastern District of North Carolina on December 19, 2024. *Griffin v. N.C. State Bd. of Elections*, No. 5:24-cv-00724, D.E. 1 (E.D.N.C.).

The next day, Petitioner separately filed three petitions for judicial review in Wake County Superior Court of the three categories of protests over which the Board took jurisdiction. *See Griffin v. N.C. State Bd. of Elections*, No. 24CV040622-910 (Wake Cnty. Sup. Ct.); *Griffin v. N.C. State Bd. of Elections*, No. 24CV040619-910 (Wake Cnty. Sup. Ct.); *Griffin v. N.C. State Bd. of Elections*, No. 24CV040620-910 (Wake Cnty. Sup. Ct.). The Board again removed those petitions to federal court. *See Griffin v. N.C. State Bd. of Elections* (*Griffin II*), No. 5:24-cv-00731, D.E. 1 (E.D.N.C.).

On January 3, 2025, Petitioner filed a motion to remand this case back to this Court. *Griffin*, D.E. 48. Three days later, the district court granted the motion and remanded the case to this Court. *Griffin*, D.E. 50. That same evening, the district court *sua sponte* remanded the three petitions for judicial review to Wake County Superior Court as well. *Griffin II*, D.E. 24, 25.

Respondent appealed the district court's remand decisions to the U.S. Court of Appeals for the Fourth Circuit. *Griffin*, D.E. 52; *Griffin II*, D.E. 26. The Board moved in the Fourth Circuit for a temporary administrative stay and stay pending appeal, on which the Fourth Circuit has yet to rule. No. 25-1018 (4th Cir.) D.E. 10. The Fourth Circuit granted Intervenor Justice Riggs' motion for expedited review, setting a schedule that will have the appeal briefed and argued by January 27, 2025. *See* No. 25-1018 (4th Cir.), D.E. 18, 33.

On January 7, 2025, this Court issued an order granting Petitioner's motion for a temporary stay of the certification of the election and setting an expedited briefing schedule. Am. Order (Jan. 7, 2025). This Court noted that this case is simultaneously pending in the Fourth Circuit, and concluded that "in the absence of a stay from federal court, this matter should be addressed expeditiously because it concerns certification of an election." *Id.* at 1.

Justice Allen wrote a separate concurrence, emphasizing that this Court's order granting a stay "should not be taken to mean that [Petitioner] will ultimately prevail on the merits." *Id*. at 1 (Allen, J., concurring).

Justice Earls and Justice Dietz dissented from the grant of a temporary stay. Justice Earls concluded that Petitioner's motion was "procedurally improper" because "his rights can be vindicated through existing legal

channels." *Id.* at 1-2 (Earls, J., dissenting). Justice Earls also concluded that Petitioner had failed to show a likelihood of success on the merits of each of his challenges and that "the public interest requires that the Court not interfere with the ordinary course of democratic processes as set by statute and the State Constitution." *Id.* at 1, 4-6.

Justice Dietz dissented on different grounds. Justice Dietz expressed that he "would deny the petition and dismiss the stay request" under our State's version of the *Purcell* principle, which provides that, "as elections draw near, judicial intervention becomes inappropriate because it can damage the integrity of the election process." *Id.* at 1 (Dietz, J., dissenting) (citations omitted). He explained that the petition presents "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." *Id*. Justice Dietz emphasized "[t]he harm this type of post-election legal challenge could inflict on the integrity of our elections." *Id*. Though he expressed that some of Petitioner's legal challenges might be valid, Justice Dietz noted that "these potential legal errors by the Board could have been—and should have been—addressed in litigation long before" the election at issue. *Id.* at 1, 4. But he explained that "once people are actually *voting* in

the election, it is far too late to challenge the laws and rules used to administer that election." *Id*. at 5.

SUMMARY OF THE ARGUMENT

The petition should be denied for four threshold reasons.

First, Petitioner does not even claim to have satisfied the procedural prerequisites to seeking a writ of prohibition. For well over a century, this Court has strictly enforced the rule that a writ of prohibition is available only when "no other adequate remedy exists to address" the claimed injury. Scherer & Leerberg, *North Carolina Appellate Practice and Procedure* § 22.02 (2022). Thus, this Court has long held that prohibition is unavailable whenever "ordinary remedies provided by law" are available to redress a petitioner's claim. *State v. Whitaker*, 114 N.C. 818, 19 S.E. 376, 376-77 (1894).

Here, of course, Petitioner has a readily available mechanism for seeking the relief he requests: the statutory process for judicial review of election protests. Indeed, Petitioner currently has, in Wake County Superior Court, pending petitions seeking the exact same relief he seeks here. In addition, the writ of prohibition allows this Court to issue commands to *other courts*. Here, however, Petitioner seeks a writ directed to the State

Board, an executive agency. Tellingly, Petitioner cites no case in history where this Court has ever issued a writ of prohibition to an executive agency.

Second, Petitioner's request that this Court retroactively change election rules to alter the result in his recent election violates this Court's version of the *Purcell* principle. As several Justices of this Court have emphasized, the *Purcell* principle serves as an important tool of judicial restraint, to prevent last-minute judicial changes to election rules. Strict, dispassionate adherence to this doctrine "protects the State's interest in running an orderly, efficient election" and preserves the public's "confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

The circumstances of this case scream out for application of the *Purcell* principle. Petitioner here delayed bringing his claims until *after* the election results showed that he had lost. He now seeks to change longstanding election rules with novel legal claims—including claims that would require courts to strike down state statutes passed by the General Assembly. And the result would be to retroactively disenfranchise more than 65,000 voters, many of whom have been voting in North Carolina elections without controversy for *decades*. Under *Purcell*, these claims can and should be

litigated on a going-forward basis. But it is far too late to alter the rules of an election that has already taken place.

Third, Petitioner's requested remedy would violate the Fourteenth Amendment as well as this Court's precedent. As several federal courts have held, it is flatly unconstitutional for a court to retroactively cancel votes that were cast in compliance with official guidance from election officials. *See, e.g.*, *Griffin v. Burns*, 570 F.2d 1065, 1075-76 (1st Cir. 1978). This is true even when that guidance turned out to be inaccurate. *See id*. When voters have cast ballots in accordance with "the instructions of the officials charged with running the election," it violates due process to cancel their votes. *Id.*

This Court's precedent is even more directly on point. This Court has twice specifically held that that it is unlawful to discount votes based on alleged noncompliance by election officials during the registration process. *See Woodall v. Western Wake Highway Comm'n*, 176 N.C. 377, 388-89, 97 S.E. 226, 231-32 (1918); *Overton v. Mayor of Hendersonville*, 253 N.C. 306, 315-16, 116 S.E.2d 808, 815 (1960). These precedents recognize that when a lawful voter casts a ballot after being duly registered, it would be "hostile to the free exercise of the right of franchise" to cancel their ballot merely because "the

voter may not actually have complied entirely with the requirements of the registration law." *Woodall*, 176 N.C. at 388-89, 97 S.E. at 231-32.

Petitioner's requested remedy is unconstitutional for another reason as well. As the U.S. Supreme Court has held, it violates the Equal Protection Clause to arbitrarily "value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam). But Petitioner asks this Court to do just that. He specifically seeks to cancel votes of people who he claims are improperly registered, but *only* those who voted absentee or early in-person—leaving intact the votes of identically situated persons who voted on election day. Likewise, Petitioner seeks to cancel the votes of military and overseas voters who did not submit a copy of their photo ID (or an exception form) along with the federal UOCAVA form. But he asks that only voters from four large, urban counties have their votes cancelled. All the other identically situated voters in the State's other 96 counties, according to Petitioner, should continue to have their ballots counted. Granting this arbitrary request would blatantly violate the Equal Protection Clause.

Fourth, Petitioner's protests should be denied because he failed to provide voters with constitutionally adequate notice that he was challenging their votes. To comply with procedural due process, notice must be

"reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [a matter] and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr., Co.*, 339 U.S. 306, 314 (1950). Petitioner failed to do so here. Challenged voters were mailed a postcard stating that their votes *may* be subject to a protest, along with a QR code that, when scanned with a smartphone, linked to a list of *hundreds* of protests, many of which contained *thousands* of names, out of alphabetical order, on *hundreds* of pages. This form of notice quite obviously would guarantee that a "significant number" of voters would not understand their votes were being challenged, and therefore violates procedural due process. *Greene v. Lindsey*, 456 U.S. 444, 453 (1982).

For each of these independent reasons, the petition should be denied at the threshold. Petitioner's claims can and should be resolved on a prospective basis, through ordinary litigation processes, not through an unprecedented writ that seeks to overturn the results of an election.

But even if this Court were inclined to consider Petitioner's claims in this posture, they would each fail on the merits.

First, on Petitioner's protest regarding allegedly improper registrations, Petitioner has failed to establish probable cause to believe that

any challenged voter *actually* registered to vote and cast ballots in violation of HAVA or its state-law analog. HAVA and corresponding state law explicitly contemplate numerous situations in which a voter may lawfully register and vote, even though their records lack a social security or driver's license number in the Board's database. For example, some challenged voters registered *before* HAVA was even enacted, and nothing in HAVA requires previously registered voters to provide an identification number to remain on the rolls. As another example, HAVA and state law explicitly allow voters to register by mail without providing an identification number, so long as they provide a HAVA-qualifying ID when they first vote. And yet another example: HAVA and state law recognize that, due to database-matching errors, many voters who *did*, in fact, provide an identification number at registration may not have that number reflected in the Board's database. HAVA and state law therefore provide that these voters also may vote if they show a HAVA ID before voting for the first time.

Because Petitioner failed to satisfy his burden to show that any individual voter whose registration records lack an identification number *actually* was ineligible to register and vote, the Board correctly dismissed Petitioner's first protest.

Second, on Petitioner's protest challenging military and overseas voters who voted absentee without providing a copy of their photo ID, the Board rightly concluded that these voters cast ballots consistent with North Carolina law. The General Assembly chose to incorporate into state law a federal statute, UOCAVA, that allows military and overseas voters to cast ballots using a federal form that does not require supplying a copy of one's photo ID. This state statute is codified in a *separate article* of the General Statutes from the article that sets out voting rules for the general public. And the legislature made clear that the requirement to show a copy of an ID only applies to the general public.

Third, on Petitioner's protest directed to citizens who have never lived in North Carolina, Petitioner asks this Court to strike down as unconstitutional a statute passed by the General Assembly. As an initial matter, this is a facial challenge that must be directed to a three-judge panel. But even if this Court were to disregard the three-judge-panel statute, Petitioner has failed to meet the high bar needed to succeed on his facial challenge. Nothing in the state constitution creates a durational residency requirement to vote, and so the General Assembly's policy choice to enfranchise this small group of overseas citizens was constitutional.

For all these reasons, Petitioner's protests fail on the merits. But even if this Court were to disregard all of the above and conclude that Petitioner's protests state valid claims for relief, Petitioner is wrong that this Court can skip past factfinding and the Board's remedial process and award him the election. Below, the Board dismissed Petitioner's protests at the preliminary stage—akin to a dismissal on the pleadings. Thus, the only remedy available to Petitioner at this stage would be a remand to the Board for further proceedings, including an evidentiary hearing.

In sum, this Court should deny the petition outright as procedurally and constitutionally defective. But even if this Court were to consider Petitioner's arguments, those arguments fail on the merits. And even if this Court were to consider and agree with the merits of Petitioner's claims, the only proper relief would be a remand to the Board.

ARGUMENT

Standard of Review

All of the issues raised in the petition are questions of law that this Court reviews de novo. *State v. Wilkins*, 909 S.E.2d 215, 219 (N.C. 2024).

Discussion of Law

I. The Petition Should Be Denied Because Petitioner Has Failed to Establish the Requirements for a Writ of Prohibition.

The writ of prohibition is reserved for cases of "extreme necessity," and there are therefore stringent guardrails limiting its use. *Holly Shelter R.R. Co. v. Newton*, 133 N.C. 132, 45 S.E. 549, 550 (1903). Because the Petition here fails to meet at least two of the writ's requirements, it should be denied.

First, as Petitioner's own authorities confirm, it has been "settled" for more than a century that the writ of prohibition "does not lie" if another avenue for relief is available—including direct appeal. *State v. Whitaker*, 114 N.C. 818, 820, 19 S.E. 376, 376-77 (1894).

As this Court has long advised, a writ of prohibition is to be used "with great caution and forbearance," and only where "none of the ordinary remedies provided by law will give the desired relief." *Id.* at 820, 19 S.E. at 377. For that reason, prohibition is unavailable where a "grievance" can be addressed through "the ordinary course of judicial proceedings." *Id.* at 820, 19 S.E. at 376. As a result, "where there is *any sufficient remedy* by ordinary methods"—whether "appeal, injunction" or otherwise—prohibition "will not issue." *Holly Shelter*, 133 N.C. at 132, 45 S.E. at 550 (emphasis added); *see also State v. Inman*, 224 N.C. 531, 542, 31 S.E.2d 641, 646-47 (1944) ("prohibition

[is] uniformly denied where there is [an]other remedy"); Elizabeth B. Scherer & Matthew N. Leerberg, *North Carolina Appellate Practice and Procedure* § 22.02 (2022) (petitioner seeking a writ of prohibition must show "no other adequate remedy exists to address" the claimed injury); *White v. Willett*, 456 S.W.3d 810, 812 (Ky. 2015) (same).

Petitioner declines to cite a single case where this Court has previously granted a writ of prohibition. He cites only three cases where this Court even *considered* granting the writ—and in all three cases the Court declined to do so. *See Whitaker*, 114 N.C. at 818, 19 S.E. at 376-77; *Mountain Retreat Ass'n v. Mt. Mitchell Dev. Co.*, 183 N.C. 43, 45, 110 S.E. 524, 525 (1922); *State v. Allen*, 24 N.C. 183, 188-91 (1841). And the small handful of cases over the past century that undersigned counsel have been able to identify where the writ was granted all involve situations where, in accordance with black-letter law, "no other adequate remedy exist[ed]" to address the claimed wrong. Scherer & Leerberg, § 22.02; *e.g.*, *State v. Hunt*, 357 N.C. 454, 591 S.E.2d 502 (2003).

Here, however, Petitioner can readily seek relief through "the ordinary course of judicial proceedings." *Whitaker*, 114 N.C. at 818, 19 S.E. at 376. All final decisions by the Board are immediately appealable to Wake County Superior Court, which can "stay certification" of an election if

necessary. N.C. Gen. Stat. § 163-182.14(b). From there, direct appeal is available to the Court of Appeals and, ultimately, this Court. Election-related challenges are addressed this way every election cycle.

And of course, Petitioner has himself also followed this clear procedural pathway for judicial review: In addition to filing a petition for a writ of prohibition in this Court, Petitioner chose to *also* file petitions for judicial review in Wake County Superior Court in the ordinary course. Those protests remain pending in superior court right now. Petitioner therefore cannot make the threshold showing required for issuance of the writ—that "no other adequate remedy exists" other than prohibition to seek his requested relief. Scherer & Leerberg, § 22.02.

Second, the Board is not one of "the other courts" to which this Court may issue the writ. Our state Constitution empowers this Court to issue writs of prohibition as "necessary to give it general supervision and control over the proceedings of the other courts." N.C. Const. art. IV § 12(1). That power does not extend to executive agencies like the Board.

As Petitioner's own authorities again confirm, the writ of prohibition is used "only to restrain *judicial action*." *Whitaker*, 114 N.C. at 818, 19 S.E. at 377 (emphasis added); *see also Allen*, 24 N.C. (2 Ired.) at 188-89 (writ of

prohibition's "appropriate purpose is to restrain *other courts*") (emphasis added). But the Board is not aware of any case—and Petitioner cites none—in which this Court has *ever* issued a writ of prohibition directly to an administrative agency. And for good reason: Our state constitution expressly distinguishes "the judicial powers of administrative agencies" from those exercised by our "unified judicial system," the General Court of Justice. *Compare* N.C. Const. art. IV § 2 *with* §§ 3, 12. In text and in practice, agencies are categorically different from the "other courts" this Court supervises, even if agencies sometimes exercise "incident" judicial power. *Id.* §§ 3, 12.[7]

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[7] Petitioner cites *Moses v. State Highway Commission*, which recognizes that, through proper exercise of its "supervisory jurisdiction," this Court might answer questions that "aid State agencies in the performance of their duties." Pet. Br. at 5 (quoting 261 N.C. 316, 317, 134 S.E. 2d 664, 665 (1964)). True as it is, this statement hardly supports issuing the writ to administrative agencies. Indeed, in *Moses* itself, this Court took up an interlocutory appeal *from superior court*—a classic exercise of "the supervisory jurisdiction given to it" by the Constitution and the General Statutes. *Id.* Petitioner further cites *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 568 n.11, 853 S.E.2d 698, 708 n.11 (2021). *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 568 n.11, 853 S.E.2d 698, 708 n.11 (2021). But of course, that case did not involve a writ of prohibition—it was about standing. *Id.* at 558, 853 S.E.2d at 714. And although the decision contains dicta on prerogative writs to inform its standing analysis, it does not cite a single case in which this (or any other) Court has ever issued a writ of prohibition to an executive agency. *See, e.g., id.* at 569-70, 853 S.E.2d at 714.

Article IV, § 12—which authorizes use of the writ—is titled "Jurisdiction of the General Court of Justice." The subsections that follow describe the respective jurisdictions of four distinct courts: this Court, the Court of Appeals, the Superior Court, and the District Courts and Magistrates. N.C. Const. art. IV § 12(1)-(4). Agencies are not included in that list. Thus, section 12's reference to "the other courts" supervised by this Court is best understood to refer to the courts listed in the section—those comprising the General Court of Justice. *See Wynn v. Frederick*, 385 N.C. 576, 582, 895 S.E.2d 371, 377 (2023) ("general words will be interpreted to fall within the same category as those [specifically] designated").

In sum, Petitioner has improperly sought to bypass the General Assembly's established procedural pathway for seeking judicial review of election protests. Because Petitioner clearly cannot establish that a writ of prohibition is the *only* way he can obtain relief on his claims and because the writ can only be issued to other courts, the petition should be denied.

II. Petitioner's Requested Relief Violates the *Purcell* Principle.

Even if this Court were to overlook the basic procedural defects described above, the petition should be denied for an additional threshold

reason: The relief that Petitioner seeks is foreclosed by the *Purcell* principle. *See generally Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

A. *Purcell* is a neutral rule of judicial restraint that guards against late-breaking judicial changes to election rules.

The *Purcell* principle "reflects a bedrock tenant of election law: When an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring). "Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 881. A state therefore has an "extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Id*.

Given these concerns, *Purcell* serves as an "important principle of judicial restraint." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Adhering to *Purcell* "protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Id*. It "also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process." *Id.*

The way that *Purcell* discourages last-minute litigation over election rules is particularly important in a state like North Carolina, where elections are often close and contested. As Judge Wilkinson has recently explained, "[o]ver the past five years, North Carolina has been flooded with dozens of challenges to the State's electoral regulations." *Sharma v. Hirsch*, 121 F.4th 1033, 1043 (4th Cir. 2024). Although such challenges may be "reasonably grounded in the law," "the constant pull to the courtroom leaves state election officials frequently operating in a provisional state, never knowing if and when their procedures will be overturned." *Id.* "This state of affairs is not conducive to the most efficient administration of elections." *Id.*

When it applies, the *Purcell* principle may be overcome only rarely. To justify court intervention of election rules in the period surrounding an the election, a plaintiff must establish "at least" four requirements: (1) "the underlying merits are entirely clearcut in favor of the plaintiff"; (2) "the plaintiff would suffer irreparable harm absent" judicial intervention; (3) "the plaintiff has not unduly delayed bringing the complaint to court"; and (4) "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

To be sure, the *Purcell* principle is a federal rule that applies to federal courts. But "this Court has long acknowledged a state version of *Purcell* (although not always by name)." Am. Order at 5 (Jan. 7, 2025) (Dietz, J., dissenting). This Court first recognized the principle just one year after *Purcell* was decided, in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007). In that case, the Court held that a state house district was not required under the Voting Rights Act and thus had to comply with our state constitution's whole county provision. *Id.* at 510, 649 S.E.2d at 376. The Court accordingly ordered the General Assembly to redraw the district. *Id.* The Court also recognized, however, that candidates had already been preparing for the upcoming 2008 election "in reliance upon the districts as presently drawn." *Id.* As a result, "to minimize disruption to the ongoing election cycle," the Court stayed its order requiring the General Assembly to redraw the district "until after the 2008 election." *Id.*

Several Justices of this Court have since emphasized the importance of this principle. *E.g.,* Am. Order at 5 (Jan. 7, 2025) (Dietz, J., dissenting); *Holmes v. Moore*, 382 N.C. 690, 691, 876 S.E.2d 903, 904 (2022) (Newby, C.J., dissenting) (citing *Purcell* and dissenting from expedited consideration given an "impending" election); *Harper v. Hall*, 382 N.C. 314, 319, 874 S.E.2d 902,

906 (2022) (Barringer, J., dissenting) (stating that expedited consideration of challenge to state election rules "would appear to be a clear violation of the Supreme Court of the United States' 'repeated emphasis' that 'courts ordinarily should not alter state election laws in the period close to an election'" (cleaned up) (quoting *DNC*, 141 S. Ct. at 30) (Kavanaugh, J., concurring).

B. If ever there were a case that called for applying the *Purcell* principle, this case is it.

Purcell applies here. Indeed, it is difficult to imagine a case that more squarely calls for *Purcell*'s application.

To begin, there can be no doubt that this case involves a challenge to election rules in a period close to the election—and that "the changes in question" are not "feasible *before* the election." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphasis added). The election concluded two months ago, followed by multiple recounts confirming the winner. To change the rules of the election now—months after millions of North Carolinians have already cast their ballots—would "fundamentally alter[] the nature of the election" and "gravely affect the integrity of the election process." *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S.

423, 424-25 (2020) (per curiam). That is exactly the intolerable outcome the *Purcell* principle seeks to avoid.

Petitioner falls far short of establishing that the *Purcell* principle can be overcome on these facts. First, Petitioner has not shown that the merits here are "entirely clearcut" in his favor. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). To the contrary, as discussed below, the opposite is true. *See infra* Part V. But even if the Court were inclined to agree with Petitioner on the merits of one or more of his challenges, Petitioner must show not only that his arguments are legally correct, but also that his arguments are "*entirely clearcut*." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphasis added). Yet all of Petitioner's challenges implicate novel and unprecedented challenges to longstanding election rules. Indeed, Petitioner cites *no case* by this Court to have *ever* accepted any of his arguments. By definition, then, the merits here cannot be "entirely clearcut" in his favor.

Second, Petitioner unduly delayed challenging the election rules. *See id.* As for Petitioner's challenge to voters who lack a driver's license or social security number in the Board's database, it is undisputed that the voter-registration form that he contests was in place long before this election—with affected voters likely casting *millions of ballots* without challenge

during that time.[8] It was not until October 2023 when a voter took issue with the form. (Pet. App. 162) In December 2023, the Board concluded that "the appropriate remedy is to implement changes recommended by staff to the voter registration application form and any related materials" only on a going-forward basis. (Pet. App. 165) Petitioner thus had almost a year before the election to challenge this decision. He did not. *Purcell* bars Petitioner from waiting until *after* the election to challenge this rule in an effort to reverse his election loss. *See Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring) (party challenging election rule "delayed unnecessarily its pursuit of relief until more than a month after the deadline for submitting signatures").

The delay is even starker with respect to the other categories of voters that Petitioner challenges. Petitioner's challenge to so-called "never residents" concerns a law that the General Assembly passed more than a decade ago. Act of June 16, 2011, S.L. No. 2011-182, sec. 1, 2011 N.C. Sess. Laws

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[8] While this case was still in federal court, intervenors filed affidavits from voters whose votes Petitioner has challenged. Those voters affirmed that they most recently registered to vote in 2009, 2014, and 2020 and had regularly voted since without issue until Petitioner challenged their votes. *See Griffin*, No. 5:24-cv-00724, D.E. 24-2, 24-3, 24-4 (E.D.N.C.).

687, 687-92. And Petitioner's challenge to the photo ID requirements for military and overseas voters concerns a Board rule promulgated through an open process long before the election, interpreting statutes that have been in place for years. 8 N.C. Admin. Code 17 .0109(d). The time to challenge these rules for the 2024 election has long since passed. In short, "these potential legal errors by the Board could have been—and should have been—addressed in litigation long before people went to the polls in November." Am. Order at 4 (Jan. 7, 2025) (Dietz, J., dissenting); *see Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (per curiam) (party unreasonably delayed challenging election map when it waited "until six years, and three general elections," after the map was adopted to bring suit).

Third, making the changes that Petitioner requests at this late date will come at "significant cost, confusion, [and] hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Accepting Petitioner's arguments would create "chaos for candidates, campaign organizations, independent groups, political parties, and voters"—in this and future elections. *Id.* at 880. "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." Am.

Order at 5 (Jan. 7, 2025) (Dietz, J., dissenting). "It will lead to doubts about the finality of vote counts following an election, encourage novel legal challenges that greatly delay certification of the results, and fuel an already troubling decline in public faith in our elections." *Id*.

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As Judge Dever recently put it in a case involving a similar effort to rewrite the State's election rules close to an election, the *Purcell* principle is a "heavy gate with flashing red lights amplified by loud sirens" calling for judicial restraint. *Pierce v. N.C. State Bd. of Elecs.*, 713 F. Supp. 3d 195, 242 (E.D.N.C. 2024), *aff'd*, 97 F.4th 194 (4th Cir. 2024). And as the U.S. Supreme Court has demonstrated, the *Purcell* principle may be applied consistently to guard against late-breaking changes to election rules—regardless of the challenger's political affiliation. *Compare, e.g.*, *DNC*, 141 S. Ct. at 30 (Kavanaugh, J., concurring), *with, e.g.*, *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring).

In sum, following *Purcell*'s neutral and evenhanded rule preserves the public's faith in the election process, and ensures against courts excessively entangling themselves in hotly disputed political contests. This Court should deny the petition under the *Purcell* principle.

C. Petitioner's *Purcell* arguments are wrong.

Petitioner disclaims the *Purcell* principle, but his arguments only underscore why adhering to *Purcell*'s neutral rule is so important here.

1. *Purcell* does not bar Petitioner—or any other party—from seeking prospective relief for future elections.

First, Petitioner claims that applying *Purcell* here would prevent anyone from ever challenging the election rules at issue. Br. 2. That is emphatically not the case.

Nothing in the Board's arguments here means that "the legal issues presented are foreclosed from further judicial scrutiny." *Trump v. Biden*, 951 N.W.2d 568, 577 n.11 (Wis. 2020). *Purcell* does *not* bar Petitioner from seeking *forward-looking* relief for future elections if he challenges the rules sufficiently in advance of the next election. *See Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (noting "the general rule that denies relief with respect to past elections," but that the "corollary to judicial reluctance to interfere with election results is the obligation to afford prospective relief"). In fact, most of the protests here are the subject of pending lawsuits, outside of the context of this particular case, that seek changes to the State's election rules for future elections. For example,

plaintiffs in a case pending before the U.S. District Court for the Eastern District of North Carolina are currently seeking prospective relief of this kind with respect to the alleged HAVA violations here. *Republican Nat'l Comm.*, slip op. at 4 (*Purcell* does not apply when a plaintiff "seek[s] prospective relief unconnected with the most recent election."). And plaintiffs in a case pending before both this Court and the Wake County Superior Court are challenging the constitutionality of the state law that permits individuals who have never resided in North Carolina to vote in state elections. *See Kivett v. N.C. State Bd. of Elections*, No. 281P24 (N.C. Nov. 1, 2024). Thus, applying *Purcell* here will not immunize these or other future election challenges from judicial review. Many are currently being litigated, and can be resolved in plenty of time before voters next go to the polls.

One of Petitioner's own cases illustrates how *Purcell* allows parties to properly challenge election rules. Petitioner cites *La Unión del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725 (W.D. Tex. 2023), as supporting his argument that *Purcell* does not apply here because the election has already concluded. Br. 44-45. But that case concerned a post-election challenge seeking *prospective* relief for *future* elections. In fact, the federal district court there granted injunctive relief in November 2023—but only for the 2024 primaries,

which were "months away" while *declining* to grant relief for the November 2023 election, which had "already occurred." *Entero*, 705 F. Supp. 3d at 767. Here, by contrast, Petitioner seeks to retroactively change election rules for an election that has already concluded.

Nor does *Purcell* foreclose challenges based on unanticipated events that take place during an election. Because the *Purcell* principle seeks to ensure clear and settled election rules, it does not apply to claims arising from unforeseen election-day errors or improprieties. When a party brings "claims . . . of improper electoral activity"—rather than "issues that arise in the administration of every election"—those claims do not face the *Purcell* bar because the party lacked advance notice of the alleged impropriety. *See Trump*, 951 N.W.2d at 577 (drawing this distinction for purposes of evaluating undue delay).

For this reason, Petitioner's reliance on this Court's decision in *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005), is misplaced. Br. 43-44. In *James*, two candidates challenged whether the Board could lawfully count provisional ballots cast on election day at a precinct other than the voter's correct precinct. 359 N.C. at 263, 607 S.E.2d at 640. The defendants argued

that the challengers had waited too long to contest the Board's counting such out-of-precinct provisional ballots. *Id.* at 265, 607 S.E.2d at 641.

The Court rejected this delay argument, observing that "[t]he facts do not support defendants' allegations." *Id.* The Court explained that the election marked "the first time in North Carolina history that State election officials counted out-of-precinct provisional ballots." *Id.* What is more, when one of the challengers had asked the Board *before* the election whether the Board intended to count such votes, the Board's General Counsel "failed to indicate that [it] would count out-of-precinct provisional ballots." *Id.* "This 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 ballots. *Id.* The challengers therefore did not unreasonably delay in bringing their claims.

Given these facts, the Court's decision in *James* hardly stands for the proposition that this Court has rejected the *Purcell* principle, as Petitioner claims. Br. 43. Unlike the challengers in *James*—candidates who had no prior notice that the Board would take certain action before the election—Petitioner was on notice long before the election of the rules that he now challenges. Petitioner is therefore incorrect that applying *Purcell* here would

require this Court to overturn its precedent or otherwise insulate election rules from legal challenges.[9]

All told, *Purcell* does not apply when a party seeks forward-looking relief well in advance of an election, or when a party challenges unanticipated election-day developments. But the *Purcell* principle is at its zenith when, as here, a party seeks backward-looking relief in the context of an election that has already taken place. Changing election rules mid-stream—or, even worse, after the fact—"fundamentally alters the nature of the election" and "gravely affect[s] the integrity of the election process." *Republican Nat'l Comm.*, 589 U.S. at 424-25; *see also, e.g.*, *Pierce*, 97 F.4th at 226 *Pierce v. N.C. State Bd. of Elecs.*, 97 F.4th 194, 226 (4th Cir. (*Purcell* applies when an election "is well underway"); Am. Order at 5 (Jan. 7, 2025) (Dietz, J., dissenting) ("[O]nce people are actually *voting* in the election, it is far too late to challenge the laws and rules used to administer that election."); *Trump*, 951 N.W.2d at 577 (laches barred candidate who "waited

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[9] Petitioner's reliance on *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011), is misplaced for similar reasons. Br. 45. That case involves alleged errors committed by poll workers. *Hunter*, 635 F.3d at 222. The challenger in *Hunter* therefore could not possibly have brought a pre-election suit to contest the poll-worker error. *See id.* at 244-45.

until after the election to raise selective challenges that could have been raised long before the election"); *Liddy v. Lamone*, 919 A.2d 1276, 1291 (Md. 2007) ("Allowing challenges to be brought at such a late date would call into question the value and the quality of our entire elections process and would only serve as a catalyst for future challenges. Such delayed challenges go to the core of our democratic system and cannot be tolerated.").

For this reason, the Supreme Court has repeatedly invoked the *Purcell* principle *during* an election cycle—after some votes have already been cast. In so doing, the Court has made clear that any votes that were cast that complied with the election rules in place at the time *may not be thrown out*. *See Andino v. Middleton*, 141 S. Ct. 9, 9-10 (2020) (invoking *Purcell* to stay an injunction that had been entered against a state election rule, but expressly ordering that ballots cast before the stay "may not be rejected for failing to comply" with the reinstated election rule).

As this decision recognizes, *Purcell* continues to apply even if the challenger's underlying claims may have merit. Under *Purcell*, the proper posture for litigating election claims is prospectively, not retrospectively. Thus, in many cases, courts have applied *Purcell* even while "recogniz[ing] and respect[ing] the seriousness of the [challenger's] claim." *Liddy*, 919 A.2d

at 1290; *compare also, e.g.*, *Merrill*, 142 S. Ct. at 882 (Kavanaugh, J., concurring) (applying *Purcell* while emphasizing that any change to election rules "can take effect for congressional elections that occur after [the election]"), *with Allen v. Milligan*, 599 U.S. 1, 42 (2023) (later affirming change to election rules and permitting it to take place for future elections).

In sum, the *Purcell* principle applies here, regardless of this Court's views on the merits of Petitioner's arguments. Those arguments can be considered in due course before the next election cycle.

2. Applying *Purcell* would not "invalidate" the election-protest statutes.

Second, Petitioner argues that *Purcell* does not apply in cases under the election-protest statutes. Br. 42-43. Specifically, he reasons that applying *Purcell* in this fashion would "invalidate" the "statutory remedy" for election protests "that was lawfully enacted by the legislature." Br. 42. As an initial matter, it is hard to take this concern seriously from Petitioner—it is *Petitioner* who has refused to follow the statutory procedures for seeking judicial review of election protests.

Even if Petitioner were following the election-protest statutes, moreover, applying *Purcell* in this context would do nothing to "invalidate"

those statutes, as Petitioner claims. Br. 43. *Purcell* is simply an election-law analog to laches. *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (Sutton, J.) ("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."); *DeVisser v. Sec'y of State*, 981 N.W.2d 30, 35 (Mich. 2022) (Welch, J., concurring) (*Purcell* is, "in essence, the equitable doctrine of laches applied in a unique way to election matters"). Courts routinely apply laches to bar claims for equitable relief, without fear that doing so would somehow "invalidate" a statute. *See, e.g.*, *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976) (delay giving rise to laches is "fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations") (quoting *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938)). Legislatures are "understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Laches is one such principle. *See, e.g.*, *Teachey*, 214 N.C. at 294, 199 S.E. at 88.

Petitioner also asserts that he is unaware of any cases applying *Purcell* after an election to bar a statutory protest remedy. Br. 43. But the Wisconsin Supreme Court has done just that. In an opinion by Justice

Hagedorn, the court applied laches to bar post-election challenges to roughly 220,000 votes under Wisconsin's election-protest statute. *Trump*, 951 N.W.2d at 570. The court explained that "the proposition that laches may bar an untimely election challenge . . . appears to be recognized and applied universally." *Id.* at 572-73 & n.7 (collecting cases).

Applying this principle, the court found unreasonable delay in bringing election challenges when those challenges similarly concerned events and rules in place long before the start of the election. *Id.* at 575 ("Waiting until after an election to challenge the sufficiency of a form application in use statewide for at least a decade is plainly unreasonable."); *id.* (same for challenge to election-agency guidance "relied on in 11 statewide elections" since 2016). "The time to challenge election policies," the court explained, "is not after all ballots have been cast and the votes tallied." *Id.* at 575-76. Rather, "[p]arties bringing election-related claims have a special duty to bring their claims in a timely manner." *Id.* at 577. "Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results." *Id.*

The Wisconsin Supreme Court's decision is on all fours here. Petitioner here was on notice long before the election took place of the rules

that he now contests. The election-protest statutes do not bar the application of the *Purcell* principle on these facts.

3. The *Purcell* principle is not limited to federal courts.

Third, Petitioner contends that *Purcell* only makes sense as a rule for federal, not state, courts. Br. 46-47. But, as discussed above, this Court has already applied this principle to state elections in *Pender County*. *See supra* Part II.A. Petitioner does not even acknowledge this case, much less explain why it would not apply here.

Lacking any support in this Court's case law, Petitioner resorts to out-of-state authority, making the sweeping claim that "many" state courts have rejected *Purcell*. Br. 46. But he cites all of two States. Br. 46-47. And he is wrong about one: Petitioner asserts that the Ohio Supreme Court has rejected *Purcell*, Br. 46, but that court held just the opposite several months ago. *State ex rel. Ohio Democratic Party v. LaRose*, No. 2024-1361*State ex rel. Ohio Democratic Party v. LaRose*, , 2024 WL 4488054, at *5 (Ohio Oct. 15, 2024) (per curiam) ("Though *Purcell* is a federal case and therefore not binding on this court, we find its logic persuasive."); *see id.* ("While primarily built on principles of federalism, *Purcell* also stands for the common-sense principle that judges—novices in election administration—should not

meddle in elections at the last minute . . . because when they do, they are likely to do more harm than good."). Petitioner also contends that the New York Court of Appeals has rejected *Purcell*. Br. 46. But the court did so in adjudicating partisan-gerrymandering claims that are not justiciable in our State. *Compare Harkenrider v. Hochul*, 197 N.E.3d 437, 454 n.16 (N.Y. 2022), *with Harper*, 382 N.C. at 319, 874 S.E.2d at 906 (Barringer, J., dissenting) (expressing that adjudicating partisan-gerrymandering claims on expedited basis violated *Purcell*). And in any event, contrary to Petitioner's claim, the vast majority of state high courts to have considered the issue have followed *Purcell*.[10]

III. Retroactively Changing Election Rules Here Would Violate the Fourteenth Amendment to the U.S. Constitution.

The Court should deny the petition for another threshold reason as well. If the Court declines to follow the *Purcell* principle and instead opts to

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[10] *See, e.g.*, *Fay v. Merrill*, 256 A.3d 622, 638 n.21 (Conn. 2021); *New PA Project Educ. Fund v. Schmidt*, 327 A.3d 188, 189 (Pa. 2024) (per curiam); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 216 (Iowa 2020) (per curiam); *Liddy*, 919 A.2d at*Liddy v. Lamone*, 919 A.2d 1287-88; *All. for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 49-50 (Me. 2020); *Moore v. Lee*, 644 S.W.3d 59, 65-66 (Tenn. 2022); *Maricopa Cnty. Recorder v. Az. Sec'y of State*, No. CV-24-0221-SA, 2024 WL 4299099, at *3 (Az. Sept. 20, 2024) (unpublished); *In re Hotze*, 627 S.W.3d 642, 645-46 & n.18 (Tex. 2020).

retroactively change the rules of the election after all the votes have been cast, it would violate the Fourteenth Amendment to the United States Constitution.

A. Retroactively cancelling votes violates due process.

It is "patent[ly] and fundamental[ly]" unfair to change the rules governing an election after it has already taken place. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *see Hendon*, 710 F.2d at 182 (describing this principle as "settled"). For that reason, the Fourteenth Amendment's Due Process Clause bars the systematic, "retroactive invalidation" of votes. *Burns*, 570 F.2d at 1079-80.

The seminal case on this point is *Griffin v. Burns*. There, election officials in Rhode Island issued absentee ballots in a party primary—a practice which had been in place for seven years, and which the officials believed was authorized by state law. *Id.* at 1067. After the primary, the losing candidate asserted that use of such ballots was unlawful. *Id.* The state supreme court agreed, invalidated those ballots, and changed the outcome of the election. *Id.*

The First Circuit held that this abrupt reversal violated due process. *Id.* at 1078. As the court explained, because absentee voters had cast their

ballots in an "officially-endorsed manner," invalidating their ballots en masse resulted in "broad-gauged unfairness" of a constitutional magnitude. *Id.* at 1073, 1077. Put another way: the U.S. Constitution forbids a state from discounting votes cast in accordance with "long-standing practice" and "the instructions of the officials charged with running the election."[11] *Id.* at 1075-76; *see also, e.g.*, *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998); *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995) (retroactively eliminating a requirement of Alabama law that absentee ballots contain the signatures of two witnesses or a notary after voting had begun violated due process); *Baber v. Dunlap*, 349 F. Supp. 3d 68, 76 (D. Me. 2018) ("f*Baber v. Dunlap*, 349 F. Supp. 3d 68, 76 (D. Me. 2018) ("[or this Court to change the rules of the election, after the votes have been cast, could well offend due process").

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[11] For the same reasons explained above, *see supra* Part II.C.1, *James v. Bartlett*, 359 N.C. 260 (2005), is not in tension with the Fourteenth Amendment. The out-of-precinct ballots challenged in that case were cast *contrary to* longstanding practice, governing statutes, and the Board's own official guidance. *Id.* at 265-68, 607 S.E.2d at 641-43. When the Board counted out-of-precinct ballots anyway, this Court rightly reversed. *Id.* at 271, 607 S.E.2d at 645. In contrast here, state law, the Board's regulations, and judicial decisions issued before the election all affirmed that the ballots Petitioner challenges *would* be counted.

This Court's precedent similarly recognizes the acute unfairness that would result from cancelling votes that were cast in compliance with guidance from election officials. In fact, this Court has specifically held that an error by election officials in the processing of voter registration cannot be used to discount a voter's ballot. In *Woodall v. Western Wake Highway Commission*, 176 N.C. 377, 97 S.E. 226 (1918), registrars failed to administer an oath to voters, which was then a legal prerequisite to registration. *Id.* at 388, 97 S.E. at 231. This Court rejected the argument that those votes should be canceled, explaining:

> A vote received and deposited by the judges of the election is presumed to be a legal vote, although the voter may not actually have complied entirely with the requirements of the registration law; and it then devolves upon the party contesting 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. at 389, 97 S.E. at 232. To hold otherwise would "be regarded as hostile to the free exercise of the right of franchise." *Id.* This Court reaffirmed *Woodall* decades later. It held in *Overton v. Mayor of Hendersonville*, 253 N.C. 306, 316, 116 S.E.2d 808, 815 (1960):

> [A] statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance by the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of

> suffrage liable to be defeated, without the fault of the elector, by the fraud, caprice, ignorance, or negligence of the registrars.

These principles fully apply here. The rules Petitioner challenges have long been in place, without issue or protest. The challenged voters have thus voted in line with longstanding state law, administrative guidance, and judicial decisions. It would therefore be unlawful to cancel their ballots.

In sum, voters who followed all the official guidance in place when they registered and cast their ballots may not be retroactively disenfranchised because of alleged errors by election officials. Were the law otherwise, it would "permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Hendon*, 710 F.2d at 182 (cleaned up). Both the Fourteenth Amendment and this Court's precedents bar that patently unfair result.

B. *Anderson-Burdick* produces the same outcome.

Although the Board discussed these due-process protections at length, Pet. App. 23-25, Petitioner does not mention them at all. Instead, he asserts that the *Anderson-Burdick* line of cases provides the right framework for evaluating any Fourteenth Amendment concerns stemming from his protests. *See* Br. 56-60.

Assuming that *Anderson-Burdick* even applies to post-election challenges like these, it yields the same result. Under that test, state actions that "impose a severe burden on ballot access" are "subject to strict scrutiny." *Pisano v. Strach,* 743 F.3d 927, 933 (4th Cir. 2014). The protests here clearly fail to satisfy that standard. Were the protests to succeed, they would impose the severest possible burden on voting—literally cancelling votes—while advancing only peripheral state interests at best.

In arguing otherwise, Petitioner mischaracterizes both the relative "burden" and the State's interests. Br. at 57-58. Asking voters to append a driver's license or social security number to their registration form would perhaps impose a modest burden *before an election takes place*. The same is clearly true for photo ID requirements. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189-90 (2008). But the relevant "burden" here is Petitioner's attempt to irrevocably nullify voters' ballots *after the fact*. Doing so is plainly unconstitutional under *Anderson-Burdick*.

C. Petitioner's desired relief would also violate the Equal Protection Clause.

Separately, sustaining Petitioner's protests would violate the Equal Protection Clause. "Having once granted the right to vote on equal terms,

the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam). But were Petitioner to prevail, "the standards for accepting or rejecting" ballots would "vary" for wholly arbitrary reasons. *Id.* at 106.

Petitioner writes that "anybody who wants to vote in North Carolina must be a resident and lawfully registered—no exceptions are allowed." Br. 57. But, under the hood, his protests tell a different story.

Most of the votes that Petitioner seeks to cancel were cast by voters whose registration records in the Board's database do not include a social security or driver's license number. Critically, Petitioner does not challenge *all* voters whose records lack this information. Instead, he challenges only the approximately 60,000 of these votes cast *before* election day—either absentee-by-mail or early in-person. He has not challenged the approximately tens of thousands of identically situated voters within this category who voted *on election day*. *See, e.g.*, *Republican Nat'l Comm. v. N.C. State Bd. of Elections* (*RNC*), 120 F.4th 390, 399 (4th Cir. 2024) (noting allegation that 225,000 registered voters were missing this data in their records). By seeking only to invalidate a subset of identically situated voters, Petitioner would force the Board to arbitrarily "value one person's vote over

that of another." *Bush*, 531 U.S. at 104-05. This would plainly violate the Equal Protection Clause. *Id.*; *see Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 920 (E.D. Va. 2018) ("Courts have generally found equal protection violations where a lack of uniform standards and procedures results in arbitrary and disparate treatment of different voters.").

The same is true for the next-largest category of voters that Petitioner challenges—military and overseas voters who did not provide a copy of their photo ID when casting absentee ballots. Among the 32,033 voters falling into this category,[12] Petitioner has chosen to challenge only the 5,509 voters hailing from four of North Carolina's 100 counties—Buncombe, Durham, Forsyth, and Guilford. *See supra* n.3. And only one of these protests (Guilford) was timely, meaning that only that one county's 1,409 votes were properly challenged. In other words, Petitioner asks this Court to cancel the votes of only a fraction of the military and overseas voters who he claims voted improperly. But as the Supreme Court has held, it violates equal protection for "the standards for accepting" ballots "[to] vary . . . from county

[12] *See N.C. Absentee & Early Voting Statistics for the 2024 General Election*, N.C. State Bd. of Elections, https://tinyurl.com/4jyz2fh8 (last visited Jan. 20, 2025).

to county." *Bush*, 531 U.S. at 106. This Court has an "obligation to avoid [such] arbitrary and disparate treatment of the members of its electorate." *Id.* at 105.

IV. Petitioner's Failure to Adequately Notify Voters of His Protests Violates Procedural Due Process.

This Court should also deny Petitioner for a final threshold reason: Petitioner did not provide voters with constitutionally adequate notice of his protests.

Voters have a "constitutionally protected liberty interest" in their right to vote. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 227 (M.D.N.C. 2020); *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("v*Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[oting is of the most fundamental significance under our constitutional structure.") (cleaned up). As a result, when a voter's "ballot [is] challenged," due process requires that voters be "given notice," so they can take steps to protect their vote. *Democracy N.C.*, 476 F. Supp. 3d at 228. Constitutionally adequate notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [a matter] and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also In re Chastain*, 909 S.E.2d 475, 481

(N.C. 2024) (same). That is why the Board's rules direct protesters to serve voters with copies of protests that concern "the eligibility or ineligibility of particular voters." 08 N.C. Admin. Code 02 .0111.[13]

Here, the notice that Petitioner provided voters was not "reasonably calculated" to inform them that he sought to invalidate their votes. *Mullane, Co.*, 339 U.S. at 314. Petitioner did not send physical copies of his protests to voters' addresses. Instead, Petitioner's political party mailed voters a postcard, which stated that their "vote *may* be affected by one or more protests filed in relation to the 2024 General Election." (Pet. App. 175 (emphasis added)) The postcard did not inform voters that their vote *was* actually under protest. It also did not inform voters that it was meant to effect formal service of an election protest.

Rather, the postcard merely directed voters "to scan a QR code to view the protest filings." (Pet. App. 175) This QR code, when scanned with a smartphone, took users to a website where hundreds of protests were listed.

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[13] The Board specifically directs protestors: "You must serve copies of all filings on every person with a direct stake in the outcome of this protest ('Affected Parties'). . . . If a protest concerns the eligibility or ineligibility of particular voters, all such voters are Affected Parties and must be served." 08 N.C. Admin. Code 02 .0111.

(Pet. App. 78 (showing smartphone screenshots)) Voters then, to find out if any protests concerned them, had to scour hundreds of protests to try to locate their names on attached spreadsheets. These spreadsheets listed voters' names in small print, out of alphabetical order. Some spreadsheets contained hundreds of pages, listing thousands of names. (Pet. App. 79)

In these circumstances, neither the postcard nor its QR code were reasonably calculated to apprise voters that their votes were being contested. The postcard did not even inform voters that their votes had *actually* been challenged. Vague, equivocal notice of this kind, which does not "specifically" disclose that a person's rights will be impaired, does not give "adequate notice." *In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993); *see e.g.*, *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000) (if a "notice is unclear," it is not adequate); *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998) (a party's notice to an attorney only saying it was seeking sanctions against him was inadequate because "[t]he bases for the sanctions must be alleged").

This lack of specificity, moreover, was not cured by the QR code. Many voters do not own smartphones. *See* Pew, *Mobile Fact Sheet* (Nov. 13, 2024), https://tinyurl.com/yeywjxfn (noting that one in five senior citizens do not have a smartphone) (last visited January 19, 2025); *see also* No. 5:24-

cv-00724, D.E. 24-2, 24-3, 24-4 (E.D.N.C.) (affidavits from voters attesting that they do not know how to use QR codes). These voters would therefore not have been able to scan the code to learn if a protest affected them. As a result, in "a significant number of instances," notice by QR code would not "provide [voters with] actual notice" of protests. *Greene v. Lindsey*, 456 U.S. 444, 453 (1982). As the U.S. Supreme Court has held, where a chosen form of notice will not notify a "significant number" of persons, as here, it does not satisfy "due process." *Id.*[14]

Despite this precedent, Petitioner argues that the U.S. Supreme Court has held that notice is sufficient so long as most affected persons receive notice. Br. 51-52. Petitioner is mistaken. The Court has actually held that where service of papers via "the mails" is possible, then that form of notice is *required*. *Mullane*, 339 U.S. at 319; *see also Greene*, 456 U.S. at 455. By relying on QR codes instead, Petitioner failed to provide adequate notice.

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[14] Petitioner notes that the Board has sent voters mailers with QR codes. Br. 51. The mailers that Petitioner references, however, were not meant to provide notice of formal proceedings. Unlike the postcards that Petitioner sent voters, moreover, the Board's mailers did not rely on QR codes to convey their primary message. (*See* Pet. App. 350-51)

But even if a QR code could theoretically provide adequate notice, it did not do so here. The Fourth Circuit, for instance, has held that an eviction warning provided inadequate notice when "it [was] time-consuming to wade through" the entire form at issue to locate the warning, which was listed "in small print two-thirds of the way down the back of a form." *Todman v. Mayor & City Council of Baltimore*, 104 F.4th 479, 488-89 (4th Cir. 2024). Here, for voters to find out if protests affected them, they had to "wade through" hundreds of protests, some of which listed thousands of names "in small print." *Id*. This kind of needle-in-a-haystack notice offends due process as it is not "reasonably calculated" to convey notice. *Id.* at 488.

Despite these serious defects, Petitioner suggests that the failure of his protests to comply with due process should be ignored because he had no obligation to serve his protests on voters at all. Br. 50. He claims that the county boards have exclusive statutory responsibility for "giv[ing] notice" of "protest hearing[s]." N.C. Gen. Stat. § 163-182.10(b).

Notwithstanding that statutory duty of county boards, however, the Board also has distinct statutory authority to "promulgate rules providing for adequate notice" of election protests. *Id.* § 163-182.10(e). The Board's rulemaking authority is thus not limited to prescribing rules for the *county*

boards to follow when they provide notice of a *hearing*, as Petitioner argues. *Id.* § 163-182.10(b)(2). Instead, the Board has ample authority to require that separate notice also be provided when persons *file protests* that initiate legal proceedings, as Petitioner did here. That authority is especially important where, as here, protests directly implicate constitutional rights.

The Board's duly promulgated rules, moreover, leave no doubt that Petitioner was required to notify voters in this situation, *see* 08 N.C. Admin. Code 02 .0111—which Petitioner expressly agreed to do. (*See, e.g.*, Pet. App. 355) Given this commitment, Petitioner cannot now claim he had no obligation to notify the voters he seeks to disenfranchise. *Cf. State v. Gillespie*, 362 N.C. 150, 152, 655 S.E.2d 355, 356 (2008) (noting that parties can "waive[]" arguments through "consent[]").

In sum, the petition should be denied because Petitioner failed to serve his protests consistent with procedural due process.

V. Each of Petitioner's Protests Fail on the Merits.

For all the reasons described above, this Court should deny the petition outright. But even if this Court were to consider the protests on their merits, it should still deny the petition because the Board correctly dismissed Petitioner's protests for failing to set out valid claims for relief.

A. Petitioner's HAVA protest is meritless.

1. North Carolina law implements HAVA for state elections.

HAVA seeks to establish "uniform and nondiscriminatory election technology and administration requirements" across the States to govern federal elections. Pub. L. No. 107-252, §§ 301-12, 116 Stat. 1666, 1704-15 (2002). Among other things, HAVA directs States to establish "a single, uniform, official, centralized, interactive computerized statewide voter registration list" to "serve as the official voter registration list" for all federal elections. 52 U.S.C. §§ 21083(a)(1)(A), (a)(1)(A)(viii).

HAVA also imposes voter-list-maintenance and registration requirements on States. As for voter-list maintenance, HAVA directs States to maintain voter lists "on a regular basis." *Id.* § 21083(a)(2)(A). But HAVA limits how they may do so. For example, States may only remove individuals from the voter list consistent with the requirements in the NVRA, Pub. L. No. 103-31, 107 Stat. 77 (1993). *Id.* §§ 21083(a)(2)(A)(i)-(iii).

As for voter-registration applications, HAVA generally prohibits States from "accept[ing] or process[ing]" any application unless it includes the applicant's driver's license number or the last four digits of the applicant's

social security number. *Id.* § 21083(a)(5)(A)(i). HAVA instructs state election officials to establish a system to attempt to "match" the identification number provided in an application with existing government records, *id.* § 21083(a)(5)(B)(i), and to establish state-law procedures to address registrations that do not match with such records, *see id.* § 21083(a)(5)(A)(iii). However, HAVA does not make a match a prerequisite to accepting an application. *See id.* §§ 21083(a)(5)(A), (b).

HAVA allows certain voters who do not provide a driver's license number or the last four digits of their social security number in a registration application to register to vote. For applicants who have not been "issued" either number, HAVA instructs States to instead assign "a number which will serve to identify the applicant for voter registration purposes." *Id.* § 21083(a)(5)(A)(ii). And if a State did not have a system complying with the requirement to collect a driver's license number or last four digits of a social security number, HAVA provides that a new voter registration applicant by mail may vote by providing an alternative form of identification before or upon voting for the first time. *See id.* §§ 21083(b)(1)-(3). This identification—a so-called HAVA ID—may include "a current and valid photo identification" or "a copy of a current utility bill, bank statement,

government check, paycheck, or other government document that shows the name and address of the voter." *Id.* §§ 21083(b)(2)(A)(i)-(ii).

Although HAVA itself only applies to federal elections, in 2003, the General Assembly enacted a statute that applied HAVA's federal rules to state elections. The law's express purpose was to "ensure that the State of North Carolina has a system for all North Carolina elections that complies with the requirements for federal elections set forth in the federal Help America Vote Act of 2002." Act of June 19, 2003, S.L. No. 2003-226, sec. 1, 2003 N.C. Sess. Laws 341, 341. The law specifically instructed the Board to ensure "[c]ompliance [w]ith [f]ederal [l]aw" by "updat[ing] the statewide computerized voter registration list and database to meet the requirements of section 303(a) of the Help America Vote Act of 2002." *Id.* sec. 6 (codified at N.C. Gen. Stat. § 163-82.11(c)).

Through this Act, the General Assembly amended several of North Carolina's voter registration and list-maintenance statutory provisions to incorporate HAVA's requirements. For example, state law now requires all voter registration applications to "request" that voters provide their driver's license number or the last four digits of their social security number. N.C. Gen. Stat. § 163-82.4(a)(11). Like HAVA, however, the statute allows voters

who have not been issued one of those numbers to receive a "unique identifier number" from the Board for registration. *Id.* § 163-82.4(b). Like HAVA, North Carolina law also requires voters who register by mail and who have not had their driver's license or social security number validated beforehand to present a HAVA ID when they vote for the first time. *Id.* §§ 163-166.12(a)-(b), (f). And although state law directs county boards to attempt to match an identification number provided on a registration form with an existing government database, *id.* §§ 163-82.12(6)-(9), when the information provided by the voter does not match, voters may vote by providing a HAVA ID before voting for the first time, *id.* § 163-166.12(d); *see also Voting Site Station Guide* 19, N.C. State Bd. of Elections, bit.ly/3BQDmWR (last visited January 21, 2025) (same).

The result is that, like most States, North Carolina has a single voter registration system for both federal and state elections that incorporates HAVA's requirements. *RNC*, 120 F.4th at 401 ("North Carolina has a unified registration system for both state and federal elections."); N.C. Gen. Stat. § 163-82.11(a) ("The system shall serve as the single . . . official list of registered voters . . . for the conduct of all elections in the State."). North

Carolina "thus is bound by" provisions of federal law, like HAVA, governing voter registration and list maintenance. *RNC*, 120 F.4th at 401.

2. Canceling the challenged votes would violate HAVA and the NVRA.

To begin, Petitioner's HAVA protest is meritless because his proposed remedy of canceling these votes would run afoul of HAVA and the NVRA. Both HAVA and North Carolina law require any voter-registration list maintenance to be performed in accordance with the NVRA. 52 U.S.C. § 21083(a)(2)(A); N.C. Gen. Stat. § 163-82.14. The NVRA only allows the removal of ineligible voters from the rolls in specific, enumerated circumstances: (1) at the request of the registrant, (2) for criminal conviction or mental incapacity, as provided by State law, (3) for death or a change in residence, and (4) if an individual has not participated or responded to a notice in two consecutive federal general elections. 52 U.S.C. § 20507(a)(3), (a)(4), (b)(2). Petitioner does not claim that his basis for canceling these votes falls among these narrow, enumerated reasons. The NVRA therefore squarely forecloses Petitioner's requested relief. *See RNC*, 120 F.4th at 402-03 (concluding that the NVRA does not authorize removal from voter rolls based on this same allegation of HAVA non-compliance).

Moreover, the NVRA forecloses Petitioner's relief for a separate reason as well. Under the NVRA, systematic removals, other than by registrant request, felony conviction, or death, must be completed "not later than 90 days prior to the date of a primary or general election for Federal office." 52 U.S.C. § 20507(c)(2)(A). While we are not technically within this quiet period, requiring the Board to purge voters now would clearly violate the quiet period's purpose. *See id.* Congress enacted the quiet period to "prevent the discriminatory nature of periodic voter purges." S. Rep. 103-6, at 20 (1993). It would be strange indeed for Congress to have instituted a prophylactic prohibition against voter purges for the 90-day period before an election only for the State to implement mass voter purges *after* an election has occurred.

3. Petitioner has not established probable cause of any HAVA violation.

In any event, Petitioner has not shown probable cause of a HAVA violation here. At bottom, probable cause requires "'a reasonable ground for belief'" that the law has been violated, a belief that must be "particularized with respect to" the individual who allegedly committed the legal violation. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ybarra v. Illinois*, 444

U.S. 85, 91 (1979)). In other words, the question is whether an objectively reasonable decisionmaker can reach a "reasonable conclusion to be drawn from the facts known . . . at the time" that a legal violation "has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

Under this standard, Petitioner has failed to show probable cause of any HAVA violation. Petitioner's protest is based on a list of over 60,000 registered voters—provided to him by the Board—who lack a recorded driver's license or social security number in the Board's database and who voted early or absentee in the 2024 elections.[15] Petitioner carelessly assumes that all of these voters are improperly registered. Br. 33. But this assumption is indisputably false.

For a variety of reasons, a voter may lack a driver's license or social security number in their records and still be legally registered.

First, voters who have not been issued a driver's license or social security number will necessarily lack this information in the Board's database. But these voters are nonetheless allowed to register to vote using a

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[15] As noted above, this list is vastly underinclusive, as it excludes in-person voters. *See supra* Part III.Cp 7.

number assigned to them by the Board. 52 U.S.C. § 21083(a)(5)(A)(ii); N.C. Gen. Stat. § 163-82.4(b) (state law implementing this HAVA requirement).

Second, many voters who *did*, in fact, provide an identification number when they registered may nevertheless not have that number recorded in the Board's database because of a database-matching failure. (Pet. App. 53 ("Unvalidated identification numbers are not retained in a voter's registration record.")) As discussed, HAVA instructs state election officials to establish a system to attempt to "match" the identification number provided in an application with existing government records. 52 U.S.C. § 21083(a)(5)(B)(i); N.C. Gen. Stat. §§ 163-82.12(6)-(9) (state law implementing this HAVA requirement). But county workers may make "routine data-entry errors" that do not enable a match and cause the database to lack a recorded identification number. (Pet. App. 62 n.16) Voters may also make a data-entry error in their registration form causing the database to lack this information. (Pet. App. 53) The matching error may also result from voters having different names at different points in

their lives—for example, differences between married and maiden names or hyphenated last names.[16]

Importantly, HAVA explicitly contemplates that these kinds of matching errors might occur and that voters are not improperly registered as a result. *See* 52 U.S.C. §§ 21083(a)(5)(A), (b). Instead, HAVA directs States to establish procedures to address registrations that do not match existing government records. *Id.* § 21083(a)(5)(A)(iii); N.C. Gen. Stat. § 163-166.12(d) (implementing this HAVA requirement); *cf. Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1296 (W.D. Wash. 2006) ("HAVA's matching requirement was intended as an administrative safeguard for 'storing and managing the official list of registered voters,' and not as a restriction on

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[16] It is a matter of public record that some voters provided a driver's license or social security number when they initially registered but nonetheless lack this information in the Board's database because of a matching error, for example, caused by the discrepancy between the voter's maiden and married name. Joe Bruno, *Voter whose ballot is being challenged provided SSN during registration*, WSOC-TV, Jan. 8, 2025, bit.ly/3CoNuWY. It is also a matter of public record that the Social Security Administration's database matching program "to assist States with verifying the accuracy of voter information for newly registered voters . . . [does] not always provide States with accurate verification responses for individuals who were registering to vote" and "may indicate a no-match when a match does in fact exist in SSA records." Off. of the Inspector Gen., Soc. Sec. Admin., A-03-09-29115, *Quick Response Evaluation: Accuracy of the Help America Vote Verification Program Responses* 4 (2009), bit.ly/4g7Ltw4.

voter eligibility." (quoting 52 U.S.C. § 21083(a)(1)(A)(i)). North Carolina has done so by allowing voters to provide a HAVA ID before or upon voting for the first time. In doing so, the General Assembly made clear that "[i]f that identification is provided and the board of elections does not determine that the individual is otherwise ineligible to vote a ballot, the failure of identification numbers to match shall not prevent that individual from registering to vote and having that individual's vote counted." N.C. Gen. Stat. § 163-166.12(d). Thus, the law is clear that voters whose information was subject to a matching error *may register and vote* even though their voter records lack an identification number in the Board's database.

Third, even assuming that North Carolina's registration system did not previously comply with HAVA, voters who applied to register by mail without providing a driver's license or social security number would nonetheless have been eligible to register upon providing a HAVA ID before or when voting for the first time. *See* 52 U.S.C. §§ 21083(b)(1)-(3); N.C. Gen. Stat. §§ 163-166.12(a)-(b), (f) (implementing this HAVA requirement). Thus, both HAVA and state law make clear that these voters may register and vote even if the Board's database lacks an identification number.

Petitioner is simply wrong that HAVA and state law always require voters who register by mail to provide a driver's license or social security number to register. Br. 36-37. In a variety of circumstances—if such voters do not have this information when they register, if officials are unable to match their information with an existing government database, or if voters register under a system that is not set up to halt a registration that lacks an identification number—both HAVA and state law allow those voters to register and vote by providing HAVA ID on or before voting in their first election. 52 U.S.C. §§ 21083(b)(1)-(2); N.C. Gen. Stat. §§ 163-166.12(a)-(b). Voters who register by mail and who provide a driver's license or social security number that matches with an existing government database are merely *exempt* from the requirement that they provide HAVA ID. 52 U.S.C. § 21083(b)(3)(B); N.C. Gen. Stat. § 163-166.12(f)(2).

Fourth, although Petitioner purports to challenge only those voters who were registered after HAVA's effective date, some of these voters actually "registered *prior* to the effective date of HAVA but a new registration was created for them that is not linked to that older registration." (Pet. App. 62 n.16 (emphasis added)) Yet nothing in HAVA or the state law that implements HAVA required voters who registered to vote

before HAVA's effective date to re-register in compliance with HAVA's requirements. Indeed, as one of Petitioner's own cited cases holds, Br. 45, "HAVA did not direct states to purge all existing voters from state rolls and force them to re-register in accordance with the new federal requirements." *Entero*, 705 F. Supp. 3d at 752. After all, "[s]uch a requirement would almost certainly violate the constitution." *Id.* at 752 n.21.

Fifth, voters may lack this information in the Board's database because they "supplied such a number in a previous application under a different registration record than the one challenged." (Pet. App. 62 n.16) But again, nothing in HAVA or the state law that implements HAVA provides any basis to conclude that such voters would be improperly registered.

All told, there are therefore at least five independent ways that a voter may have registered to vote in full compliance with HAVA, but their records nevertheless lack an identification number in the Board's database. Petitioner has failed to even *attempt* to establish probable cause that *any* of the 60,000 voters he targets fall outside these circumstances. Lacking any particularized, objectively reasonable facts *with respect to any individual voter*, Petitioner cannot meet the probable-cause standard. *Ybarra*, 444 U.S. at 91 (probable cause must be "particularized with respect to that person").

As a leading treatise explains, "it is commonly said" that "events as consistent with innocent as with [unlawful] activity," without more, are "too equivocal to form the basis" of probable cause. 2 W. LaFave et al., *Criminal Procedure* § 3.3(b) (4th ed.) (cleaned up). That is the case here.

4. Petitioner's contrary arguments are unpersuasive.

At the outset, Petitioner contends that HAVA does not apply here, because the statute governs only federal elections. Br. 39-40. But as discussed, the General Assembly has expressly applied HAVA's federal-election requirements to state elections as well. *See supra* Part V.A.1. Petitioner cites this Court's decision in *James* for the proposition that HAVA itself does not apply to state elections. Br. 39. That is true. But as *James* goes on to confirm, the General Assembly then passed a law "in response to Congress' passage of the Help America Vote Act" that implemented HAVA's requirements for state elections. 359 N.C. at 267, 607 S.E.2d at 643. Thus, whether this Court examines HAVA itself or its implementing state laws, the analysis is the same.

When Petitioner addresses HAVA, his arguments are unpersuasive. Petitioner is correct that HAVA generally prohibits a State from processing a voter-registration application unless it includes a driver's license or social

security number. 52 U.S.C. § 21083(a)(5)(A)(i)(I)-(II); *see* Br. 34. But Petitioner proceeds as if this were HAVA's only provision.

To the contrary, as discussed, HAVA elsewhere explicitly allows some voters to register and cast ballots absent this information. Moreover, HAVA explicitly contemplates that voters may still register when they provide one of these numbers but that number does not validate against other government databases. 52 U.S.C. § 21083(a)(5)(A)(iii). And importantly here, when a number does not validate, the Board does not retain it, and the voter's database record will lack a number. (Pet. App. 53) Thus, there are many voters within this group who *did* provide a driver's license or social security number when registering, but because the number did not validate, the statewide database lacks an entry in that data field. (Pet. App. 53)

All told, HAVA expressly contemplates that many lawfully registered voters will not have a validated identification number in their voter records, and creates a process for verifying their identity to allow them to vote. Thus, no voter that Petitioner targets could have cast a ballot without at least first presenting election officials with a HAVA ID —just as federal law requires.

Petitioner's reliance on the so-called "cure" provision in section 163-82.4(f) reflects a simple misunderstanding of the statute. Petitioner claims

that the procedures set out in this provision are the only way to "cure" voter registrations that lack a driver's license or social security number. Br. 39. But section 163-82.4(f) applies *before* a voter has been registered by a county board. N.C. Gen. Stat. § 163-82.4(f). And it requires the *county board*, not the voter, to take steps in the event of an incomplete voter registration by contacting the voter and giving the voter an opportunity to correct the application. *Id.* Here, by contrast, Petitioner is challenging the votes of voters who are *already* on the voter rolls. And as explained above, there are at least five independent ways that a voter may be lawfully registered, but lack an identification record in the Board's database.

Petitioner's focus on the cure provision demonstrates a more fundamental defect in his arguments: Petitioner confuses voter registration with voter *eligibility*. Petitioner has never suggested that the more than 60,000 voters he challenges in this protest category are *actually* ineligible to vote in North Carolina elections. *See* N.C. Gen. Stat. § 163-55 (outlining statutory qualifications to vote); N.C. Const. art. VI, § 2 (same, constitutional). Moreover, all persons who register to vote, including those challenged here, are required to affirm that they meet all the qualifications to vote, under penalty of a Class I felony. *See* N.C. Gen. Stat. §§ 163-

82.4(c)(1), (e); *see also* North Carolina Voter Registration Form, Section 11, bit.ly/4iUMGtv (last visited January 21, 2025). Petitioner therefore openly seeks to use technicalities to disenfranchise tens of thousands of *lawful North Carolina voters*—many of whom have been voting without controversy in North Carolina elections *for decades*. Nothing in HAVA or the state law that implements HAVA permits this audacious request. Indeed, this Court has twice rejected arguments of just this kind. *See supra* Part III.A. And as discussed above, the federal constitution affirmatively forbids it. *Id.*

B. Military and overseas voters did not have to submit a copy of identification with their absentee ballots.

Petitioner next seeks to cancel the votes of military and overseas voters who followed North Carolina statutory law and the Board's official guidance by not including a copy of their identification with their absentee ballot. Br. 16-21. As already noted, however, under the rules in place at the time of the election, "[m]ilitary and [o]verseas [v]oters" were "not required to submit a photocopy of acceptable photo identification" or an affidavit explaining their reason for not doing so. 08 N.C. Admin. Code 17 .0109(d).

As explained above, disenfranchising voters—many of whom are active-duty military, both stationed in North Carolina and overseas—after they relied on that unequivocal guidance from the Board would violate their

constitutional rights. *See supra* Part III.A. And doing so in the selective way that Petitioner proposes—where he challenges *only* military and overseas voters in a handful of large, urban counties that voted disproportionately for his opponent in the 2024 election—would violate the U.S. Constitution once again. *See supra* Part III.C.[17]

In any event, even if none of that were so, the guidance that the Board conveyed to military and overseas voters about their exemption from usual identification rules accurately described North Carolina law.

1. North Carolina law does not require military and overseas voters to submit a copy of identification.

The Board's rules, as noted, provide that military and overseas voters are "not required to submit a photocopy of acceptable photo identification" with their absentee ballots. 08 N.C. Admin. Code 17 .0109(d). This rule reflects the fact that absentee ballots in North Carolina can be submitted

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[17] Petitioner implies that he only seeks to cancel ballots cast by "overseas" voters. Br. 16. In fact, his protests explicitly challenge votes cast by members of our military, many of whom do not reside overseas. *See* Pet. App. 177-343 (challenging both military and non-military voters in Buncombe, Durham, and Forsyth counties); *N.C. Absentee & Early Voting Statistics for the 2024 General Election* 2-4, N.C. State Bd. of Elections (showing that total votes that Petitioner challenges necessarily includes military votes), https://tinyurl.com/4jyz2fh8 (last visited Jan. 21, 2025).

under two different sets of statutory rules—one for civilian residents, and another for military and overseas voters.

For civilian residents, absentee ballots must be cast under Article 20 of Chapter 163 of the General Statutes. Under that article, all absentee ballots must be "accompanied by a photocopy of [an] identification" or an excuse "affidavit." N.C. Gen. Stat. § 163-230.1(f1). By its own terms, however, this requirement is limited to only voters who cast ballots under Article 20. That article states that "ballots [voted] *under this section* [in Article 20] shall be accompanied by a photocopy of identification." *Id.* (emphasis added).

Military and overseas voters, however, may choose to cast absentee ballots under a distinct set of rules. In 2011, the General Assembly enacted model legislation known as UMOVA, which is today codified in Article 21A of Chapter 163. *See* 2011 N.C. Sess. Laws at 686-92. UMOVA implements under state law a federal law, UOCAVA, which requires states to allow military and overseas voters to register, request ballots, and vote by mail in federal elections using specific federal forms. *See* 52 U.S.C. §§ 20301-11.

In implementing UOCAVA through UMOVA, the legislature chose to allow military and overseas voters to vote in both federal *and* state elections under UOCAVA's rules. *See, e.g.*, N.C. Gen. Stat. § 163-258.3; *see also* Unif.

Mil. & Overseas Voter Act, at 2 (Nat'l Conf. of Comm'rs on Unif. State Laws 2010) (explaining that UMOVA's purpose is "to extend to state elections the assistance and protections for military and overseas voters currently found in federal law"), https://tinyurl.com/4jnwh54k (last visited Jan. 21, 2025).

Notably, nothing in UOCAVA allows states to require that military and overseas voters present identification before they can cast ballots. *See* 52 U.S.C. §§ 20301-11. And federal law also separately exempts persons voting under UOCAVA from other rules that require voters to present identification to vote. *See id.* § 21083(b)(3)(C). Accordingly, when Virginia once considered imposing a state-law photo identification requirement on UOCAVA voters, the Trump Administration informed Virginia that such a rule would violate federal law. It explained that military and overseas voters "face complexities in the voting process" that other voters "do not face," and that requiring "additional identification" unlawfully "adds to the burden" that these voters already "face when attempting to vote."[18]

[18] *See* Letter from David Beirne, Director, Fed. Voting Assistance Program, to Edgardo Cortes, Comm'r, Va. Dep't of Election (Feb. 6, 2017), https://tinyurl.com/2me8w77n (last visited Jan. 21, 2025).

Because it was designed to extend UOCAVA's rules to state elections, UMOVA naturally does not contain any provisions that require military and overseas voters to provide a copy of a photo identification with their ballots either. *See* N.C. Gen. Stat. §§ 163-258.1 to -258.31. UMOVA rather contains distinct provisions that provide for a voter's identity to be verified by other means, which do not require the submission of copied identification. *See, e.g.*, *id.* §§ 163-258.4(e), -258.13.

Thus, Petitioner is wrong to claim that state law required military and overseas voters to submit a copy of photo identification with their ballots. UMOVA contains no such rule, which would be inconsistent with federal law. Indeed, given the weakness of his arguments, the Board rejected Petitioner's protest on this issue in a unanimous vote. (Pet. App. 76)

2. Petitioner fails to show that military and overseas voters had to submit a copy of identification.

Despite all this authority, Petitioner nonetheless advances a series of arguments to try to show that military and overseas voters, like other voters, had to present a copy of an identification with their absentee ballots. None of his arguments are persuasive.

First, Petitioner argues that "federal law" has no relevance with respect to the proper interpretation of UMOVA. Br. 22. As just shown, however, the General Assembly enacted UMOVA "to extend to state elections the assistance and protections for military and overseas voters currently found in federal law." Unif. Mil. & Overseas Voter Act, at 2. UMOVA therefore applies to both "federal" and "[s]tate" elections uniformly, without distinction. N.C. Gen. Stat. § 163-258.3(1). The legislature therefore plainly meant for our State's rules for state elections in this area to be applied consistently with the federal rules that govern federal elections.

Second, Petitioner argues that the "general absentee voting provisions of Article 20 [for civilian residents] apply to overseas absentee voting under Article 21"—where UMOVA is codified. Br. 16. In support of this argument, he cites Article 20's final provision, entitled "Article 21A relating to absentee voting by military and overseas voters not applicable." N.C. Gen. Stat. § 163-239. This provision states that "[e]xcept as otherwise provided therein, Article 21A of this Chapter shall not apply to or modify the provisions of this Article [20]." *Id.* Petitioner reads this provision as applying all of Article 20's rules, including its photo-identification rules, to persons voting under UMOVA's provisions in Article 21A.

Petitioner has things backwards. On its face, the provision does not apply Article 20's rules to the military and overseas voters who cast absentee ballots under Article 21A. It does the opposite. It provides that the rules in "*Article 21A* . . . shall not apply to or modify . . . Article [20]." *Id.* (emphasis added). It thus makes clear that voters who do not qualify to vote under Article 21A must vote under Article 20's provisions alone.

The broader text of Article 20 leaves no doubt that the General Assembly did not intend its provisions to generally apply to UMOVA's provisions in Article 21A. When provisions in Article 20 do apply to ballots cast under Article 21A, they expressly say so. *See, e.g.*, N.C. Gen. Stat. § 163-231(b)(1) (specifying that rules that appear in Article 20 for the transmission of ballots apply to ballots cast under both "Article [20] and Article 21A"). No such express language referencing Article 21A, however, appears in Article 20's provision requiring civilian residents to submit "a photocopy of identification" with their ballots. *Id.* § 163-230.1(f1). That rule thus does not apply to voters under Article 21A. *See Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 21-22, 803 S.E.2d 142, 150 (2017) (giving effect to legislature's decision only to "selectively" cross-reference another law).

Third, Petitioner next argues that Article 20's provisions concerning "container-return envelopes" show that persons voting under UMOVA must provide a copy of their identification with their ballots. Br. 17 (quoting N.C. Gen. Stat. § 163-231(b)(1)). Section 163-230.1(f1) in Article 20, he claims, mandates that all ballots in a "container-return envelope," including those cast under UMOVA, "must contain a valid photo identification." Br. 17.

Section 163-230.1(f1), however, says nothing at all about what voters casting ballots under UMOVA's distinct provisions in Article 21A must do. That provision instead mandates that "voted ballots *under this section*" in Article 20 "shall be accompanied by a photocopy of identification." N.C. Gen. Stat. § 163-230.1(f1) (emphasis added). Ballots cast under UMOVA, however, are not cast under "th[at] section." Thus, this provision actually undermines Petitioner's argument rather than supports it.

Fourth, Petitioner claims that if the General Assembly had meant to exempt UMOVA voters from the new photo-identification rules in Article 20 that it enacted in 2019, it would have expressly said so. Br. 16-17. Petitioner again gets things backwards. If the legislature had meant to apply Article 20's new identification rules to UMOVA's provisions in Article 21A, then it would have amended Article 21A to provide so. But the 2019 session law that

newly required voters under Article 20 to provide "a photocopy of identification," N.C. Gen. Stat. § 163-230.1(f1), did not amend *any provision* in Article 21A, thereby leaving its preexisting rules in place. *See* Act of Nov. 6, 2019, S.L. No. 2019-239, 2019 N.C. Sess. Laws 1118.

Indeed, in 2019, the legislature likely chose not to amend UMOVA's provisions in Article 21A because it knew that requiring military and overseas voters to present a copy of their identification in federal elections would violate federal law, including under guidance from the Trump Administration. *See supra* Part V.B.1. And it likely also understood that imposing divergent rules for state elections would defeat UMOVA's purpose of extending "to state elections the assistance and protections for military and overseas voters currently found in federal law." Unif. Mil. & Overseas Voter Act, at 2. Thus, despite Petitioner's claims otherwise, the enactment history of Article 20's photo identification rules actually shows that they *do not* apply to UMOVA.

Fifth, Petitioner maintains that the Board's administrative rule that confirms that military and overseas voters need not submit identification with their ballots is based on an "unconstitutional" legislative "delegation." Br. 20. As just shown, however, the Board's rule is entirely consistent with

the statutes that the General Assembly has enacted on this subject. Indeed, the Rules Review Commission voted unanimously that this rule was "within the authority delegated to the [Board] by the General Assembly." N.C. Gen. Stat. § 150B-21.9(a)(1); *see also* Pet. App. 74. Petitioner's makeweight claims to the contrary are meritless.

Sixth, Petitioner finally argues that allowing military and overseas voters to cast absentee ballots without providing a copy of identification is irrational and therefore unconstitutional. Br. 21. He claims that there is "no legitimate reason to impose a greater burden—photo identification—on those living in North Carolina than is imposed on those living abroad." *Id.*

At the outset, Petitioner misunderstands UMOVA. That law not only applies to persons residing abroad, it also applies to military voters on active duty (and their spouses and dependents) within the United States. *See* N.C. Gen. Stat. § 163-258.2(7).

The State, moreover, surely has a compelling interest in reducing the many "logistical obstacles" that military and overseas Americans face in voting. Unif. Mil. & Overseas Voter Act, at 1. As the Trump Administration has explained, military and overseas voters "face complexities in the voting process" that other voters "do not face." Letter from David Beirne to

Edgardo Cortes, *supra*. Helping these voters participate in our democracy, as many other states have also done, is hardly irrational.

Petitioner therefore fails to show that military and overseas voters had to submit a copy of an identification with their absentee ballots. His protests on this basis should therefore be rejected.

C. The North Carolina Constitution does not prohibit overseas voters who have never lived in North Carolina from voting.

Petitioner also challenges the votes of 266 overseas citizens who the General Assembly has explicitly allowed to vote even though they have never resided in North Carolina. Br. 22-32. Petitioner claims that this statute violates our state constitution, and so these votes should be cancelled.

For multiple reasons, this argument fails at the threshold. This category of voters, of course, is too small to independently alter the results of the election. And granting this relief now, after votes have been cast and counted, would be unconstitutional. There is no dispute that, under the rules established by our legislature at the time of the election, these citizens were allowed to vote. *See supra* Parts II & III.

But even if this Court were to consider this argument on the merits, Petitioner has failed to establish "beyond a reasonable doubt" that this state

statute is unconstitutional. *Harper v. Hall*, 384 N.C. 292, 324, 886 S.E.2d 393, 414-15 (2023).

1. Petitioner has failed to satisfy the standards to succeed on his facial challenge.

The inherited-resident statute allows an overseas voter who has never lived in the United States to vote in North Carolina elections if they have never registered in another state and their parent or legal guardian last lived in North Carolina. N.C. Gen. Stat. § 163-258.2(1)(e). Petitioner claims that this statute violates our state constitution because, in his view, the constitution requires a voter to have "resided in the State of North Carolina for one year" before the election. Br. 23 (quoting N.C. Const. art. VI, § 2).

At the outset, this is a classic facial constitutional challenge. Petitioner claims that subsection (1)(e) is unconstitutional in all circumstances. *See Cooper v. Berger*, 371 N.C. 799, 803, 822 S.E.2d 286, 291 (2018) (holding that a challenge to a statute requiring gubernatorial appointees to the Cabinet to be subject to advice and consent under all circumstances was facial).

Petitioner claims otherwise, but his arguments on this score are clearly incorrect. First, he notes that he is only seeking to cancel a "small subset of UMOVA-covered voters." Br. 28 n.7. That is true, but irrelevant. Petitioner is unequivocally asking this Court to cancel the votes of *anyone* covered by

section 163-258.2(1)(e). He thus challenges the entire statutory provision, which by definition is a facial challenge. Second, he notes that he seeks relief only as to "this election protest"—in essence, only for himself. Br. 28 n.7. This argument likewise fails. Although there is no "clear-cut test to distinguish facial challenges from as-applied challenges," "the label [that a plaintiff gives it] is not what matters." *Kelly v. State*, 286 N.C. App. 23, 31-32, 878 S.E.2d 841, 848-49 (2022) (cleaned up). Rather, the test is whether the "claim and the relief that would follow *could* reach beyond the particular circumstances" of a given case. *Singleton v. N.C. Dep't of Health & Hum. Servs.*, 906 S.E.2d 806, 808 (N.C. 2024) (cleaned up) (emphasis added). Here, there is no question that, if Petitioner's arguments are correct, then the entire statutory provision is unconstitutional and cannot be applied to any other race.[19]

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[19] Petitioner again strangely insists that he is not challenging the votes of military inherited-resident voters. Br. 29-30. But he offers no explanation for how his challenge to subsection (1)(e) could plausibly be read to exclude members of the military. By its terms, subsection (1)(e) covers any "overseas voter"—which, of course, includes those serving abroad in the military. And even if this Court were to credit Petitioner's position, that would only give rise to an equal protection violation, as he would challenge only some identically situated voters.

Because Petitioner's challenge to this statute is a facial one, it must be brought in the Superior Court of Wake County before a three-judge panel. *See* N.C. Gen. Stat. § 1-267.1(a) ("Any action that is a facial challenge to the validity of an act of the General Assembly shall be . . . transferred to the Superior Court of Wake County."). There are no exceptions to section 267.1 that allow facial challenges to be brought under different vehicles directly in the Supreme Court. Petitioner seems to concede as much, as he does not claim that he may bypass the three-judge panel process if his claim is, indeed, a facial challenge. Br. 28 n.7. As a result, even if this Court believes this claim should move forward, it should direct the case to a Wake County three-judge panel.

2. Even if this Court could reach the substance of Petitioner's protest, it fails on its merits.

This Court is required to presume that subsection (1)(e)—like all "laws duly enacted by the General Assembly"—is valid. *Fearrington v. City of Greenville*, 386 N.C. 38, 54, 900 S.E.2d 851, 867 (2024) (cleaned up). A challenged law can only be unconstitutional where it is "plainly and clearly the case." *Id.* And, as this Court recently held, "a claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that

the statute is unconstitutional beyond a reasonable doubt." *Harper*, 384 N.C.at 324, 886 S.E.2d at 414-15. Petitioner fails to meet this high bar.

The North Carolina Constitution does not contain a durational residency requirement. It instead provides that "[a]ny person who has resided in the State of North Carolina for one year . . . *shall be entitled to vote* at any election held in this State." N.C. Const. art. VI, § 2(1) (emphasis added). Petitioner reads this clause as a durational residency requirement—that a person may not vote unless she has resided in North Carolina for at least a year. That interpretation misreads the provision's text: The text confers an affirmative *guarantee* that otherwise-qualified citizens who reside here for at least a year "shall be entitled to vote." *Id.* Moreover, nothing in the provision's text forecloses the General Assembly from choosing to extend the franchise beyond this group by statute. *See Harper*, 384 N.C. at 323, 886 S.E.2d at 414 (holding that the legislature is authorized to pass laws unless the constitution expressly forecloses it from doing so).

The sole case Petitioner relies on is not to the contrary. *Bouvier v. Porter*, 386 N.C. 1, 900 S.E.2d 838 (2024), held that those involved in an election protest have an absolute privilege from defamation claims. *Id.* at 2, 900 S.E.2d at 842. In the course of describing the general background law,

the Court noted that the Constitution and state statutes generally deem "[c]ertain categories of individuals . . . ineligible to vote," including nonresidents. *Id.* at 4 n.2, 900 S.E.2d at 843 n.2. But that general statement was clearly not intended to be determinative. After all, the Court's list included "convicted felons"—who are explicitly *not* barred from voting in North Carolina elections, so long as their rights have been restored by law. *See* N.C. Const. art. VI, § 2(3); N.C. Gen. Stat. § 163-275(5). As with felons, it is up to the General Assembly to determine residency requirements, and it has done so in section 163-155. And again, there is no dispute that the legislature expressly granted the franchise to the challenged voters here.

Finally, interpreting the state constitution to include a one-year durational residency requirement would violate the federal constitution. In *Dunn v. Blumstein*, the Supreme Court considered a Tennessee statute that imposed a one-year durational residency requirement for voting. 405 U.S. 330, 334 (1972). The Court held that this requirement violated the Equal Protection Clause because it impermissibly discriminated against new residents. *Id.* at 360.

It is true that the Supreme Court left open a state's ability to restrict the franchise to "bona fide" residents. *Id.* at 343-44. This Court has likewise

recognized the State's right to impose bona fide residency requirements that are "appropriately defined and uniformly applied." *Lloyd v. Babb*, 296 N.C. 416, 440, 251 S.E.2d 843, 859 (1979). But subsection (1)(e), which grants the franchise to certain overseas voters, does just that. And again, nothing in the text of our state constitution forecloses the legislature from extending the franchise to citizens who inherit their residence from their parents.

In sum, more than a decade ago, the General Assembly made a conscious decision to allow the small category of challenged voters to vote in state elections. (Pet. App. 68) Petitioner cannot meet his heavy burden to show that this statute is unconstitutional beyond a reasonable doubt.

VI. Petitioner's Proposed Remedy Is Improper and Unlawful

For all the above reasons, this Court should deny the writ of prohibition. But even if this Court were to consider the petition and agree with Petitioner that the Board erred in adjudicating his protests, Petitioner's proposed remedy is clearly improper. Under these circumstances, the only appropriate remedy would be for this Court to remand to the State Board for further proceedings, including factfinding hearings on Petitioner's protests.[20]

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[20] Given the individualized nature of Petitioner's protests, on remand, the State Board may direct initial hearings to be conducted at the county level where individual voter records are most conveniently available.

A. Petitioner's request that this Court selectively consider only certain protests is obviously improper.

Petitioner raised challenges to three different groups of votes at the same time, which were adjudicated by the Board simultaneously. Petitioner then chose to file this petition challenging all three protests. At this point, he has two choices: He can forgo further review of certain protests, or he can seek review of them all.

Petitioner instead makes an utterly baffling request: that this Court address his protests seriatim in an order of his choosing and stop whenever the election results turn in his favor. Br. 71-73. This request is improper and unlawful in numerous respects. At the outset, nothing in the elections statutes provides for piecemeal consideration of protests, to say nothing of immediately halting that consideration as soon as the outcome shifts in favor of one candidate.

Moreover, it is "not the role of the appellate courts to make findings of fact." *Nale v. Allen*, 199 N.C. App. 511, 521, 682 S.E.2d 231, 238 (2009). But that is precisely what Petitioner is asking this Court to do here. Petitioner asks this Court—in the first instance, without the benefit of a factual record—to make factual findings about whether each challenged ballot is unlawful. But the General Assembly has directed such factfinding to be

conducted by the State Board and county boards, not by this Court. N.C. Gen. Stat. §§ 163-182.10, -182.12.

Proceeding along the lines that Petitioner proposes would also violate the Equal Protection Clause. In *Bush v. Gore*, for example, the Florida Supreme Court allowed certification of a partial tally of votes identified through a single manual recount. 531 U.S. 98, 103 (2000). The U.S. Supreme Court reversed, holding that it would be unlawful to count these votes, uncovered during only a partial manual recount, without allowing for a complete tallying of outstanding votes. *Id.* at 108. The Florida Supreme Court's contrary ruling, the U.S. Supreme Court held, violated equal protection, because it would give greater value to some votes than others. *Id*. Petitioner's proposal gives rise to the same equal protection concerns here. If this Court were to simply stop counting votes as soon as one of Petitioner's challenges succeeded in flipping the results of the contest, it would value certain challenged votes over others. *See supra* Part III.C.

B. Petitioner is wrong that the substantial-evidence standard applies at this stage of the process.

Petitioner is also incorrect to argue that the substantial-evidence standard of review applies at this stage of his election protests. Br. 67. His

argument to the contrary misunderstands the current procedural posture of this case.

As described above, the statutory framework for adjudicating elections protests involves multiple steps, including an evidentiary hearing to test a protester's allegations against the evidence. *See supra* at 10-12.pp 7-15 Here, the Board dismissed the protests at a preliminary, threshold stage of the process. Specifically, the Board held that the protests failed at the outset because he failed to comply with filing requirements and failed to "establish[] probable cause to believe that a violation of election law or irregularity or misconduct has occurred." N.C. Gen. Stat. § 163-182.9; *see* Pet. App. 51, 66.

Because the Board dismissed the protests at this initial stage, it never moved on to conducting a hearing, where it could receive evidence and engage in factfinding to test Petitioner's factual allegations. *See id.*; N.C. Gen. Stat. § 162-182.10(c). As a result, the question before this Court is limited to whether the Board's decision on its initial consideration of Petitioner's protests was legally correct. If this Court disagrees with the Board's legal decisions, the only appropriate remedy would be to remand to for evidentiary hearings. It is *at a hearing* that the State Board or county

boards would apply the substantial-evidence standard to resolve Petitioner's protests. *Id.* § 162-182.10(d). Following hearings, the Board would be then required to "make a written decision on each protest" stating its findings of facts and accompanying conclusions of law. *Id.*

As a result, the question before this Court is limited to whether the Board applied the law correctly. Petitioner is simply wrong that this Court may consider his factual allegations under the substantial-evidence standard. Rather, the only appropriate remedy should the Board's threshold legal decisions be reversed, is to remand for evidentiary hearings, applying the substantial-evidence standard at that time.

C. Petitioner is wrong that the only appropriate remedy to any error here is discounting the challenged ballots wholesale.

Petitioner also incorrectly describes the remedies available to the Board following an evidentiary hearing. Petitioner claims that "discount[ing] . . . the unlawful ballots" is "the normal result of a successful election protest." Br. 70. This is incorrect. In reality, the Board is authorized by statute to take a wide variety of measures, as appropriate in a particular case, in response to an adjudicated election violation. Specifically, the General Assembly has authorized the Board, subject to judicial review, to correct vote totals, order a recount, or take any other action "necessary to assure that an

election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election." N.C. Gen. Stat. §§ 163-182.10(d), -182.12. In addition, under certain limited circumstances, the Board may also order a new election. *Id.* § 163-182.13(a).

Neither of the cases Petitioner cites supports his claim that discounting ballots is the sole appropriate remedy for the Board to take. In *James*, the Court held that out-of-precinct provisional ballots could not be counted. 359 N.C. at 271, 607 S.E.2d at 645. But that was a case-specific ruling that applied to out-of-precinct provisional ballots—which had *never before* been counted in the State's history, and which the Board had specifically advised before the election would not be counted. *Id.* at 265, 607 S.E.2d at 641. Nothing in *James* said or suggested that discounting ballots is the ordinary or expected remedy in election protests generally. The same is true of *Bouvier*. There, this Court merely stated that "[w]here [an] irregularity affects the election results, the county board of elections *may* order the ballots excluded from the vote total." *Bouvier*, 386 N.C. at 5, 900 S.E.2d at 843 (emphasis added). Again, this Court has never said that canceling votes is either a necessary or always appropriate remedy.

In sum, should this Court reverse the Board's initial legal determinations and order a factfinding hearing, and should the Board ultimately find that Petitioner has adduced substantial evidence of an election law violation, discounting ballots is only one of several remedies authorized by law.

D. Petitioner's suggested remedy is overbroad and violates federal law.

Finally, granting Petitioner's proposed remedy, especially at this preliminary stage of the process based only on Petitioner's factual allegations, would violate numerous federal laws.

First, as described above, granting Petitioner's requested relief would violate the Fourteenth Amendment because he seeks to change—after the election has taken place—the rules in place at the time of the election. *See supra* Part III.

Second, as described above, Petitioner's proposed remedy would also run afoul of the NVRA. *See supra* Part V.A.2.

Third, Petitioner's requested relief would also violate the Voting Rights Act. The VRA prohibits election officials from discounting ballots that have been cast in an election. Under the VRA, election officials may not "fail or

refuse to permit any person to vote who is entitled to vote" or otherwise "willfully fail or refuse to tabulate, count, and report such person's vote." 52 U.S.C. § 10307(a). Here, the Board has determined that all three categories of voters whose ballots are being challenged *are* qualified to vote. And other than the small handful of voters who have never resided in North Carolina, Petitioner does not dispute that the voters he challenges are lawful, eligible voters. The VRA thus prohibits the Board from refusing to count their votes.

Fourth, Petitioner's proposed remedy on his HAVA challenge would invalidate the votes of countless voters who registered in full compliance with HAVA and its accompanying state laws. As described above, there are several reasons why a voter's records might lack an identification number, but the voter is still properly registered. *See supra* Part V.A.3. Thus, even if Petitioner is correct on his challenge, factfinding would therefore be needed to determine if any of the challenged voters did, in fact, register improperly.[21]

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[21] Factfinding would also be needed to confirm that the 266 voters identified by Petitioner as inherited residents really are overseas voters who fit into that category. Recent analysis suggests, for example, that at least three of those individuals voted in person. *See* 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*, https://tinyurl.com/2thcsebr (last accessed Jan. 21, 2025).

Moreover, awarding Petitioner his requested relief, and thereby disenfranchising tens of thousands of voters, without providing those voters proper notice and a meaningful opportunity to be heard, would violate their procedural due process rights. *See supra* Part IV. Those voters are owed notice and an opportunity to take appropriate steps to defend their votes. These steps include, at minimum, the right to prove at a factfinding stage that they are lawfully entitled to vote.

Fifth, as also described above, Petitioner's requested relief would violate the Fourteenth Amendment's Equal Protection Clause. *See supra* Part III. Petitioner's HAVA challenge is limited to early and absentee voters, leaving out identically situated voters who cast ballots on election day. Petitioner's UOCAVA challenge of military and overseas voters who did not provide copies of their photo identification is likewise irrationally selective, as it targets only voters in four, large urban counties—leaving out identically situated voters across the rest of the State.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition.

This 21st day of January, 2025.

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N.C. R. App. P. 33(b) Certification:
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