No. 25-181 District 10

NORTH CAROLINA COURT OF APPEALS

****

JEFFERSON GRIFFIN, Petitioner-Appellant, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, Respondent-Appellee, and ALLISON RIGGS, Intervenor-Respondent-Appellee.	)	From Wake County Nos. 24CV040619-910 24CV040620-910 24CV050622-910

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INTERVENOR-RESPONDENT-APPELLEE'S BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

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INTERVENOR-RESPONDENT-APPELLEE'S BRIEF

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Judge Griffin lost the race for Associate Justice in the November 2024 general election. In the final count, Justice Riggs received 734 more votes than Judge Griffin. Like many disappointed candidates in a close race, Judge Griffin used the procedures our General Assembly designed to test the integrity of the outcome. But after a machine recount, a hand recount, and individualized evidentiary hearings in nearly every county in the State, the result was unchanged. The State Board of Elections thus certified the vote totals on 11 December 2024.

After failing to win over the voters, Judge Griffin tried to change the election rules. Each of these rules has been applied, without controversy, for *years*. They applied in every primary and general election race in 2024. But Judge Griffin tried

to change the rules for his race only. The effect of his requested rule changes would be to retroactively disenfranchise more than 65,000 eligible North Carolina voters who followed the rules.

It gets worse. Judge Griffin adopted a flood-the-zone but cut-procedural-corners strategy, rushing out hundreds of protests targeting tens of thousands of North Carolinians. In doing so, Judge Griffin decided *not* to serve each affected voter with a copy of the relevant protest, as required by state law. Instead, he sent thousands of postcards with a QR code and an ambiguous warning that the recipient's vote "may be affected." Those postcards failed to give North Carolinians adequate notice that their fundamental right to vote was being challenged.

On 13 December 2024, the Board dismissed Judge Griffin's protests for a host of reasons under state and federal law. This Court should affirm under state law. (The federal courts have assumed jurisdiction over the federal-law issues.)

Judge Griffin's protests were properly rejected because they pose a risk to the stability and integrity of our elections. His effort to change the rules after an election is unprecedented. And if Judge Griffin succeeds, the implications are staggering. Rather than suing *before* an election to challenge rules they do not believe are valid, candidates will have an incentive to say nothing and wait to see if they win. Then if they lose, they will drag out elections through litigation for months, seeking to throw out votes until they win. Never again will North Carolina voters walk out of the voting booths knowing their votes will count, and the court system will be flooded with lawsuits after every election. That result is untenable and should be rejected by

this Court not only for the sake of this race, but to avoid undermining the public's confidence in every election going forward.

BACKGROUND

A. Judge Griffin Protests the Election Results

Shortly after the November 2024 general election, Judge Griffin filed over three hundred election protests seeking to overturn his apparent loss to Justice Riggs. Three categories of protest are at issue in this appeal.

i. Military and Overseas Citizen Voters

Judge Griffin first challenged 1,409 ballots "cast by military or overseas citizens under Article 21A" when those "ballots were not accompanied by a photocopy of a photo ID or ID Exception Form." (R p 11.)[1] He brought these challenges even though our Administrative Code is clear that these voters are "not required to submit a photocopy of acceptable photo identification." 8 N.C. Admin. Code 17.0109(d). Judge Griffin claimed for the first time after the election that this rule conflicts with North Carolina statutory law.

Judge Griffin's argument here implicates a series of laws designed to address problems faced by our military when voting. *See* R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 Fordham Urb. L.J. 935, 948 (2007). For decades in our country's early

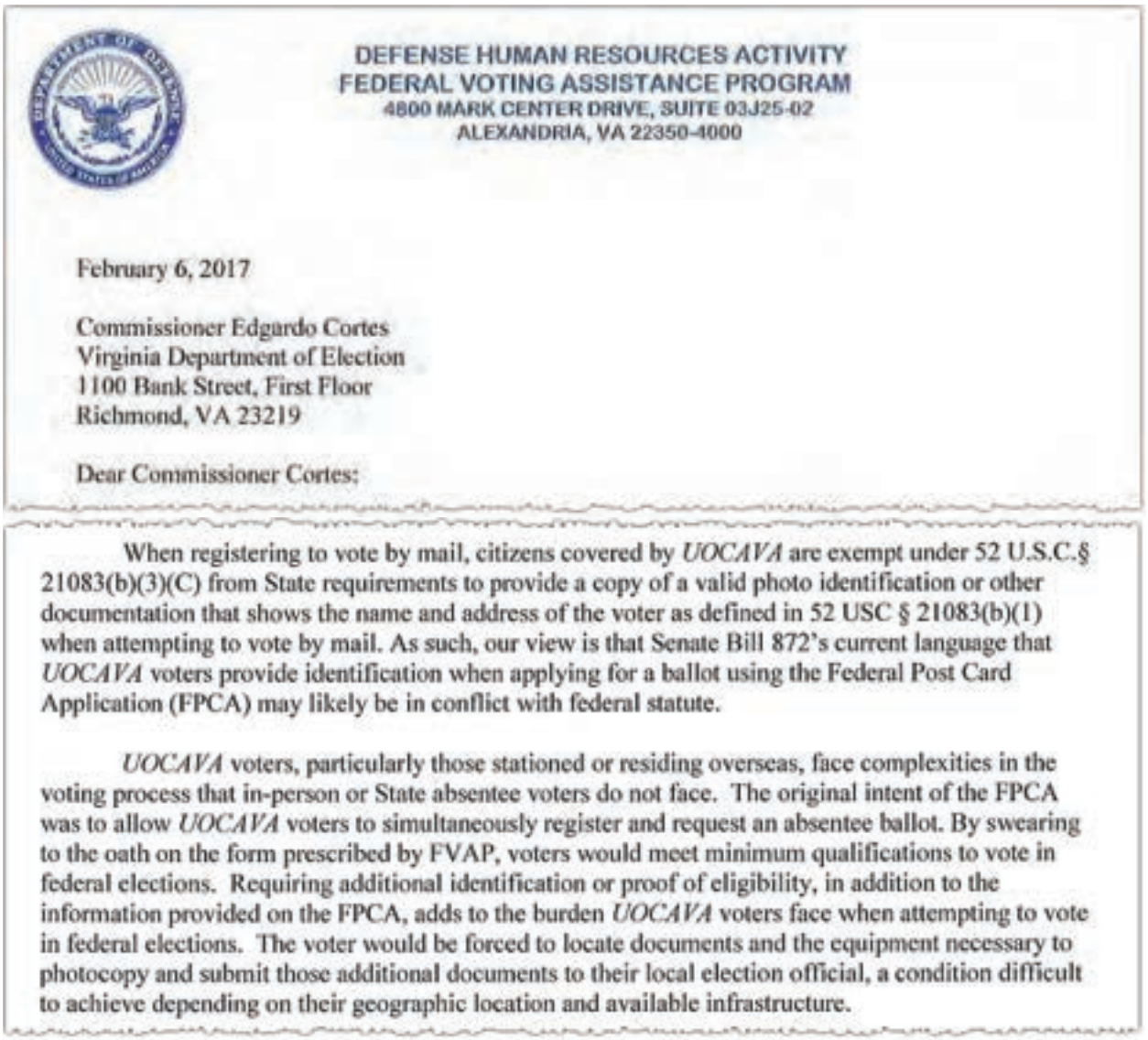
[1] Judge Griffin claims this first category applies to "5,509" ballots, but he filed only one timely protest of this type, challenging 1,409 voters in Guilford County. (Griffin Br. 7 & n.1.) Judge Griffin later sought to add "lists" of additional voters in "supplements" in Durham, Forsyth, and Buncombe Counties, but these new filings came well "after" the statutory "deadline to file an election protest." (R p 11 n.2.)

history, a patchwork of state laws governing military voting created hurdles to—and sometimes intentionally sought to disenfranchise—military voters. *Id.* at 959–60. These problems were compounded by a voting population "spread across the globe in highly inaccessible areas," from battlefields to submarines. *Id.* at 937 & n.16. With this context, Congress enacted statutes to address the concern that "our soldiers and sailors and merchant marines must make a special effort to retain their right to vote." S. Rep. No. 84-580, at 3 (1955), reprinted in 1955 U.S.C.C.A.N. 2778, 2779.

In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Pub. L. No. 99-410, 100 Stat. 924 (1986), which added new safeguards and established a uniform voting regime for active-duty military and their families and civilian voters living overseas. For registration, UOCAVA created a Federal Postcard Application (FPCA), to serve as a voter registration and absentee ballot application for groups covered by the Act. *Id.* §§ 101, 104, 100 Stat. at 926. In 2001, Congress amended UOCAVA to require states to accept that Application, *see* Pub. L. No. 107-107, § 1601, 115 Stat. 1012, 1274 (2001), and a federal write-in absentee ballot (FWAB), *see* 52 U.S.C. § 20302(a).

These federally prescribed forms and instructions do not tell covered voters to provide a photo ID. Indeed, under the first Trump Administration, the Federal Voting Assistance Program (FVAP), an agency of the U.S. Department of Defense responsible for administering UOCAVA, took the position that states may *not* apply a photo ID requirement. The Director of the FVAP explained that, "[w]hen registering to vote by mail, citizens covered by UOCAVA are *exempt* under 52 U.S.C.

§ 21083(b)(3)(C) from State requirements to provide a copy of a valid photo identification":



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

February 6, 2017

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

Dear Commissioner Cortes:

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

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

Letter from Director Beirne to Commissioner Cortes, Virginia Department of Election (Feb. 6, 2017) (App. 23), available at fvap.gov and archived at https://perma.cc/2BSZ-VUJ4.

The FVAP also publishes a comprehensive Voting Assistance Guide to provide uniformed servicemembers, their families, and overseas citizens with a "reference

guide for everything you need to know about absentee voting in all 55 States, territories and the District of Columbia." FVAP, Voting Assistance Guide, https://www.fvap.gov/guide (last visited Feb. 27, 2025), archived at https://perma.cc/QVF3-3UTK. This Guide includes "state-specific election dates, deadlines, guidance, and contact information required to vote absentee," but there is *no instruction for any U.S. state* that its UOCAVA voters must comply with a photo ID requirement when requesting or voting their ballot. FVAP, 2024–25 Voting Assistance Guide at 3 (rev. Aug. 2023), available at fvap.gov and archived at https://perma.cc/B4M4-L8QE.

Against this federal backdrop, our General Assembly decided in 2011 to allow military and overseas citizens to vote in state elections using the same method. It enacted the Uniform Military and Overseas Voters Act (UMOVA) and established a comprehensive regime for absentee voting, with a separate set of requirements codified in Article 21A of Chapter 163. (Article 20 governs absentee voting for domestic civilian voters). Article 21A entitled covered voters to cast a "military-overseas ballot," defined as:

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

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

Article 21A, like UOCAVA, included no photo ID requirement. The General Assembly delegated the power to implement Article 21A to the Board, including the

power to adopt "standardized absentee-voting materials, including privacy and transmission envelopes and their electronic equivalents, authentication materials, and voting instructions, to be used with the military-overseas ballot." N.C. Gen. Stat. § 163-258.4(d). By this authority, the Board adopted the regulation Judge Griffin now challenges here, which provides that military-overseas voters are "*not* required to submit a photocopy of acceptable photo identification." 8 N.C. Admin. Code 17.0109(d) (emphasis added).

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

Judge Griffin next challenged 266 ballots of children of overseas voters who checked a box indicating that they "never lived in the United States" because he claims that someone who has never lived in the United States cannot be a "resident" of North Carolina in accordance with Article VI of the North Carolina Constitution. (Doc.Ex.I 66.)

This argument also implicates UMOVA, which expanded voting rights in state elections to certain voters living abroad. UMOVA provides that various categories of "uniformed-service" and "overseas" voters could use unique procedures to register and vote absentee. *See* N.C. Gen. Stat. §§ 163-258.2–258.15. The "covered voters" include U.S. citizens "born outside the United States" who have never *lived* in this state but whose parents were eligible North Carolina voters before moving abroad. *Id.* § 163-258.2(1)(e). These voters often grew up while their parents were serving their country as uniformed military or serving as foreign aid workers or missionaries. The most natural example of such a "covered voter" would be an individual born to a North Carolina servicemember stationed overseas who—because of their parent's service—

has never "lived in" North Carolina. UMOVA "specifically authorized" these "U.S. citizens who have never lived in the United States" to vote in North Carolina elections "if they have a familial connection to this state." (R p 38 (Board Order).)

The General Assembly enacted UMOVA in June 2011 without a single nay vote and covered voters have routinely voted in every North Carolina election since (43 elections in all). But in October 2024, the North Carolina Republican Party sued, alleging that the Board "allows and has allowed persons to register to vote under N.C. Gen. Stat. § 163-258.2(1)(e), including persons who were never and are not presently residents of North Carolina." (Doc.Ex.I 5110.) That argument failed on the merits in Superior Court, (Doc.Ex.I 5124); this Court unanimously denied a challenge to that decision, (Doc.Ex.I 5128); and the Supreme Court declined to intervene before the election, (*see* Doc.Ex.I 5130 (pending petition for writ of supersedeas)). The November 2024 general election thus proceeded under the current rules.

After he lost the election, Judge Griffin argued for the first time that overseas voters who were eligible to vote under N.C. Gen. Stat. § 163-258.2(1)(e) should have their votes thrown out (*only for his race*) because that statute is unconstitutional under N.C. Const. art. VI, § 2(1).

iii. Allegedly Incomplete Registrations

The final category of protests challenged 60,273 ballots. These challenges re-litigate an issue rejected by the Board in 2023 and then by a federal court for the November 2024 election.

The Help America Vote Act (HAVA), 52 U.S.C. § 20901, *et seq.*, requires states to collect a voter's driver's license number or, if they do not have one, the last four

digits of their social security number for anyone registering to vote. 52 U.S.C. § 21083(a)(5)(A)(i). The state uses those numbers to confirm the registrant's identity. *Id.* § 21083(b)(3)(B). Eligible voters who have neither number still have a right to vote—the law just requires that the state assign a "unique identifier to an applicant." *Id.* § 21083(a)(1)(A), (5)(A)(ii). If a state registers a voter without collecting the information, the voter lacks the information, or the information provided by the voter does not match a state database, then the voter must produce a photo ID or other identifying document when they first go to vote, called a HAVA ID. *Id.* § 21083(a)(5)(A), (b)(1)(A), (b)(1)(B), (b)(2)(A). State law incorporates these requirements and applies them to all federal, state, and local elections in North Carolina. *See* N.C. Gen. Stat. §§ 163-82.11(c), 163-166.12(a), (b), (d).

For twenty years, from the enactment of HAVA to 2024, North Carolina's official registration form requested each voter's driver's license number or social security number but did not make clear that the voter was required to provide one of these numbers, if available, to comply with federal law. Some voters provided one or both numbers. For those who did not provide a number (or whose number could not be matched to a state or federal database), those voters were provided a unique identifier and required to produce a HAVA ID document when they first voted. (R pp 27-28; Doc.Ex.II 209-210.)

The North Carolina form went unchallenged until a voter filed an administrative complaint in October 2023. The Board resolved that complaint by implementing "recommended changes to the voter registration application form."

Minutes of Meeting at 4 (State Bd. of Elections Nov. 28, 2023), archived at https://perma.cc/CCW2-YX7R. The Board "did not approve the requested remedy to contact all existing registered voters whose electronic records do not show a driver's license number or last four digits of a Social Security number." (Doc.Ex.I 4828.) The Board explained that "the law's purpose of identifying the registrant upon initial registration is already accomplished because," under HAVA, "any voter who did not provide a driver's license number or the last four digits of a Social Security number would have had to provide additional documentation to prove their identity before being allowed to vote." (Doc.Ex.I 4828-29.)

No one—including Judge Griffin—complained about the Board's December 2023 decision until August 2024. Less than 90 days before the November 2024 general election, the Republican Party sued, alleging "that 225,000 people, including 'possible non-citizens' and other ineligible voters, registered to vote using the previous form." *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 399 (4th Cir. 2024). Despite the short window before the election, the plaintiffs made no attempt to seek a temporary restraining order or preliminary injunction. The November 2024 election thus proceeded with those 225,000 people on the voter rolls. These votes counted in every state and local race in 2024, just as they had for years or decades before. The Republican Party's lawsuit was removed to federal court, which ruled in November 2024 that "the outcome of this suit will have no bearing on the most recent election." *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, No. 5:24-cv-00547-M (E.D.N.C. Nov. 22, 2024), ECF No. 73, at 4.

But after the results were tallied in the race for Associate Justice, Judge Griffin filed protests raising this same HAVA issue again. He claimed to have identified 60,273 ballots that were cast (a) before election day and (b) by voters whose registration records with the Board "do not contain data in one or more of the following data fields: (1) Driver's License Number; or (2) Last Four Digits of Social Security Number." (R p 23.) Judge Griffin did not challenge similarly situated voters who voted on election day but whose registration records lack either number. Instead, he limited his challenges to ballots cast "before election day."

B. The Board Dismisses Judge Griffin's Protests

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

First, the Board dismissed all three protests because Judge Griffin "failed to serve the registered voters [he] seek[s] to challenge in [his] protests in a manner that would comply with the North Carolina Administrative Code and be consistent with the requirements of constitutional due process." (R p 14.)

Second, the Board held that "substantive due process protections under the U.S. Constitution" bar all of Judge Griffin's protests because, for each of these protests, Judge Griffin is seeking to throw out ballots cast by voters who followed the rules in place at the time of the election. (R p 31; *see also* R pp 40, 47.)

Third, the Board found that each category of protests lacked merit for reasons specific to that category. As to the military and overseas citizens who did not provide photo ID, the Board concluded these protests must be dismissed because Judge

Griffin's arguments (1) go against the statutory scheme, which "includes no requirement for covered voters to include a photocopy of their photo ID," (R p 44); (2) contradict the Board's rule, promulgated through "permanent rulemaking," which "makes it clear that the county boards of elections may not impose the photo ID requirement on such voters," (R p 44); and (3) "may likely be in conflict with" UOCAVA, (R p 47).

For U.S. citizens whose parents are North Carolina residents, the Board reasoned that state law is "very clear that such voters are entitled to cast an absentee ballot" under the procedures set forth in Article 21A. (R p 39.) The Board concluded that it could not "ignore a statute of the General Assembly under the theory that the State Board should deem that statute unconstitutional." (R p 37.) As an administrative agency, the Board is "bound to follow the law that governs it." (R p 39.)

For allegedly incomplete registrations, the Board found that the protests must be dismissed for five reasons:

(1) they "include insufficient allegations and evidence to establish probable cause to believe that their challenged voters failed to provide one of these identification numbers on their voter registration application," (R p 23);

(2) the "Board and a federal court, examining this very issue prior to and during this election, determined that any previous failure to implement this federal requirement cannot be held against already-registered voters casting ballots in this election," (R p 26);

(3) precedent "forbid[s] this type of election protest" because "an error by election officials in the processing of voter registration cannot be used to discount a voter's ballot," (R pp 30-31);

(4) granting "the relief they request in these protests . . . would violate state and federal voter registration laws," (R p 33); and

(5) the protests are "also unlawful under state law because [they] would undermine the clear intent of the legislature with regard to how a voter may have their eligibility to vote challenged in an election," (R p 35).

C. The Superior Court Affirms the Board's Dismissal After the Federal Court Assumes Jurisdiction Over the Federal Issues

North Carolina law provides that any person seeking review of a Board decision must file a petition for review in Wake County Superior Court. *See* N.C. Gen. Stat. §§ 163-22(*l*), 163-182.14(b). Instead, Judge Griffin first filed in the Supreme Court a petition for writ of prohibition and motion for temporary stay. *See Griffin v. N.C. State Bd. of Elections*, 910 S.E.2d 348, 348 (N.C. 2025) (per curiam order). Two days later, Judge Griffin "sought judicial review in the Superior Court of Wake County pursuant to N.C.G.S. § 163-182.14(b) on the same grounds as those set out in his petition." *Id*. at 349.

The Board removed both actions to federal court but, on 6 January 2025, the federal district court remanded both cases to state court. Justice Riggs and the Board appealed to the Fourth Circuit.

On 22 January 2025, and while that Fourth Circuit appeal was pending, our Supreme Court "dismisse[d] the petition for writ of prohibition so that the Superior Court of Wake County may proceed with the appeals that petitioner filed." *Id*. The Supreme Court ordered that a stay of certification "shall remain in place until the Superior Court of Wake County has ruled on petitioner's appeals and any appeals

from its rulings have been exhausted," and it directed the Superior Court "to proceed expeditiously." *Id*.

On 4 February 2025, the Fourth Circuit affirmed in part and modified in part the district court's 6 January 2025 order remanding the cases. (R p 137.) Relevant here, the Fourth Circuit "direct[ed] the district court to modify its order to expressly retain jurisdiction of the federal issues identified in the Board's notice of removal should those issues remain after the resolution of the state court proceedings, including any appeals." (R p 145 (citing *England v. La. State Bd. of Med. Exam'rs.*, 375 U.S. 411 (1964))); *see also* Order, *Griffin v. N.C. State Bd. of Elections*, No. 5:24-cv-00731-M-RJ (E.D.N.C. Feb. 26, 2025) (Add. 1-2) (modifying remand order in accordance with the Fourth Circuit's mandate).

On 5 and 6 February 2025, respectively, the Board and Justice Riggs notified the Superior Court of the Fourth Circuit's ruling and made so-called "*England* reservations." (*E.g.*, R pp 128, 146.) Justice Riggs explained in her reservation that, as a matter of federal law, she must inform the North Carolina courts of her federal arguments so that North Carolina law can be construed in light of those arguments. (*See*, *e.g.*, R p 148.) Justice Riggs thus notified the Superior Court that she was "exposing her federal contentions [t]here only for the purpose of complying with [federal law]" and that she "intends, should the state courts hold against her on

questions of state law, to return to the Eastern District of North Carolina for disposition of her federal contentions." (*E.g.*, R p 149.)[2]

On 7 February 2025, the Superior Court affirmed the Board's dismissal of Judge Griffin's protests. The Superior Court "conclude[d] as a matter of law that the Board's decision was not in violation of constitutional provisions, was not in excess of statutory authority or jurisdiction of the agency, was made upon lawful procedure, and was not affected by other error of law." (R pp 152, 210, 269.) This consolidated appeal followed.

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[2] Justice Riggs incorporates her *England* reservations here by reference. If necessary, Justice Riggs intends to argue to the federal courts that (1) Judge Griffin failed to provide adequate notice to voters under the U.S. Constitution by mailing confusing postcards; (2) the Civil Rights Act bars Judge Griffin's effort to throw out votes because of alleged paperwork errors unrelated to the whether the voter is qualified to vote; (3) the Equal Protection and Due Process Clauses of the U.S. Constitution, the National Voter Registration Act, and the Voting Rights Act prohibit Judge Griffin's effort to disenfranchise voters by changing the election rules after the election; and (4) the Equal Protection Clause of the U.S. Constitution bars Judge Griffin from selectively challenging voters by seeking to change the rules only for voters who cast their ballots in Democratic-leaning counties or who voted early or by mail. Justice Riggs's federal arguments also include those identified in the Fourth Circuit's 4 February 2025 opinion in this case, such as the contentions that Judge Griffin's requested relief would violate HAVA and UOCAVA. (*See* R p 207.)

Justice Riggs summarizes these federal contentions here to inform this Court "what h[er] federal claims are, so that the state [law] may be construed 'in light of' those claims." *England*, 375 U.S. at 420. As the Fourth Circuit forecasted in its opinion and Justice Riggs explained in her *England* reservations, this Court should not resolve those federal questions. *Cf. id*. at 422 n.12 (expressing confidence that state courts "will respect a litigant's reservation of h[er] federal claims"). Judge Griffin asks this Court to decide those questions anyway, (*see* Griffin Br. 44–52), but "no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question," *England*, 375 U.S. at 422 n.13.

ARGUMENT

Judge Griffin's protests fail under North Carolina law.[3] The Board correctly rejected all three categories at the threshold for two independent reasons: (i) Judge Griffin's protests attempt to change the rules in effect at the time of the election, and (ii) Judge Griffin failed to provide proper notice under state law. The Board was also right to hold that each of Judge Griffin's protests fails on its own terms.

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

The Board correctly denied each of Judge Griffin's protests because, as a matter of North Carolina law, Judge Griffin cannot throw out votes cast by eligible voters who followed the rules in effect during the election.

A. Judge Griffin's Attempts to Change the Rules Are Untimely

Judge Griffin's petition is, "in effect, post-election litigation that seeks to remove the legal right to vote from people who lawfully voted under the laws and regulations that existed during the voting process." *Griffin v. N.C. State Bd. of Elections*, 909 S.E.2d 867, 871 (N.C. 2025) (Dietz, J., dissenting).

As Justice Dietz explained, North Carolina law recognizes a corollary to the federal election doctrine set forth in *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). The *Purcell* principle "recognizes that, as elections draw near, judicial intervention becomes inappropriate because it can damage the integrity of the election process." *Griffin*, 909 S.E.2d at 871 (Dietz, J., dissenting); *see also Merrill v.*

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[3] Justice Riggs's arguments in this brief rely on North Carolina law. All references to federal law are made in support of her state-law arguments. Justice Riggs reserves her federal-law arguments for federal court.

Milligan, 142 S. Ct. 879, 880–81 (2022) (Mem.) (Kavanaugh, J., concurring) (collecting cases).

To be sure, parties may bring challenges to the State's electoral regulations *between elections*, and these challenges can be important to ensuring election integrity. But as an election draws near, the candidates, parties, and courts must eventually go "pencils down" and run an election with the rules in place. As Justice Kavanaugh observed, when "an election is close at hand the rules of the road should be clear and settled." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Mem.) (Kavanaugh, J., concurring). Knowing that these rules will not change is essential to "giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Id.*

The alternative is a constantly changing landscape of election laws, a flood of post-election litigation, and the threat that a voter will never know—even after leaving the voting booth—whether their vote will count. In such a system of electoral bedlam, post-election litigation could *always* threaten to invalidate the rules under which voters cast their votes. The "chaos" that could "emerge from repeated court-compelled changes to how we administer elections" requires that "at some point the rules governing an election must be locked in." *Griffin*, 909 S.E.2d at 872 (Dietz, J., dissenting).

Accordingly, candidates such as Judge Griffin who seek to bring "grievances based on election laws" have a "duty" to "bring their complaints forward for pre-election adjudication when possible." *Hendon v. N.C. State Bd. of Elections*, 710 F.2d

177, 182 (4th Cir. 1983). They cannot "gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action." *Id.* (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)).

As Justice Dietz recognized, the Supreme Court has acknowledged a state version of this *Purcell* doctrine in past cases (though not always by name). *See, e.g.*, *Pender Cty. v. Bartlett*, 361 N.C. 491, 510 (2007); *see also Holmes v. Moore*, 382 N.C. 690, 691 (2022) (Mem.) (Newby, C.J., dissenting); *Harper v. Hall*, 382 N.C. 314, 318-319 (2022) (Barringer, J., dissenting). In the context of voter registration, a long-settled line of North Carolina cases rejected attempts to throw out votes of duly registered voters after-the-fact when a candidate later claims technical defects in their registrations should invalidate their votes. *See, e.g.*, *Woodall v. W. Wake Highway Comm'n*, 176 N.C. 377, 389 (1918) ("Where a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be rejected"); *Overton v. Mayor & City Comm'rs of City of Hendersonville*, 253 N.C. 306, 315, 116 S.E.2d 808, 815 (1960) (collecting cases).

This timeliness principle is a "necessary part of our state law doctrine for the same reasons it is incorporated into federal law." *Griffin*, 909 S.E.2d at 872 (Dietz, J., dissenting). "Permitting post-election litigation that seeks to rewrite our state's election rules—and, as a result, remove the right to vote in an election from people who already lawfully voted under the existing rules—invites incredible mischief." *Id.* It will "lead to doubts about the finality of vote counts following an election"; it will

"encourage novel legal challenges that greatly delay certification of the results"; and it will "fuel an already troubling decline in public faith in our elections." *Id.*

Courts across the country have taken this well-recognized approach of refusing to change election rules shortly before—or after—an election. Sometimes they refer to the principle underlying this refusal as laches; at other times, they use a different moniker, like due process or the *Purcell* principle. *See, e.g.*, *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.").[4] Whatever the nomenclature, the consistent thread is that candidates who raise arguments *post-election* are barred from raising challenges to election rules that were established *before* the election and subject to challenge if the candidate had filed suit at the proper time. *See, e.g.*, *Trump v. Biden*, 394 Wis. 2d 629, 646, 951 N.W.2d 568, 577 (2020) ("The issues raised in this case, had they been pressed earlier, could have been resolved long before the election."); *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (rejecting attempt to "invalidate" election, citing laches, when plaintiff could have sued before election because to hold otherwise would "encourage sandbagging on the

[4] Judge Griffin opposes this well-settled principle in election law—that challenges to the rules need to be made well in advance, or not at all—by quibbling about the application of laches outside the election law context. (Griffin Br. 59-60.) Those non-election law cases are inapposite. In any event, Judge Griffin is wrong to argue that laches is inapplicable in the administrative or legal contexts. *See, e.g.*, *Daugherty v. Cherry Hosp.*, 195 N.C. App. 97, 102, 670 S.E.2d 915, 919 (2009) (rejecting argument that laches could not apply in an administrative workers' compensation proceeding) (citing *Zebulon v. Dawson*, 216 N.C. 520, 522, 5 S.E.2d 535, 537 (1939) (noting that laches may "supplemen[t] the law").

part of wily plaintiffs"); *Waldrep v. Gaston Cty. Bd. of Elections*, 575 F. Supp. 759, 760 (W.D.N.C. 1983) (denying relief to losing candidate who challenged established practice for counting votes when he made no showing he was "unable" to bring challenge before the election); 29 C.J.S. Elections § 459 (2020) ("Extreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to an election. Therefore, laches is available in election challenges.").

Judge Griffin claims that applying this "*Purcell* principle" post-election would take this Court in a direction "no jurisdiction has ever gone." (Griffin Br. 56.) But that is wrong, as reflected in the cases cited above. Indeed, "[t]he same imperative of timing and the exercise of judicial review applies with *much more force* on the back end of elections." *See, e.g.*, *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020) (emphasis added). It would make little sense to bar changes to election rules *before* an election only to apply those very same rule changes retroactively *after* an election—when it would be not just inconvenient or confusing for voters to comply with those rule changes, but *impossible*. The *Purcell* principle is intended to prevent "confusion" about the rules during "every step" of the electoral process and preserves "confidence in the fairness of the election" by ensuring voters, officials, and candidates can prepare for and conduct elections under voter rules which remain in place both "before and during the election, and again in counting the votes afterwards." *Wis. State Legislature*, 141 S. Ct. at 31 (Kavanaugh, J., concurring).

Indeed, applying Judge Griffin's logic to our Supreme Court's holding in *Pender County* exposes the flaws in his position. In *Pender County*, the Supreme Court held that a redistricting plan violated the Voting Rights Act but "stayed" the redrawing of the unlawful maps until after the *next* election because candidates had "been preparing" for the upcoming election "in reliance upon the districts as presently drawn." 361 N.C. at 510, 649 S.E.2d at 376. If Judge Griffin were correct that the *Purcell* principle bars action *before* an election, but not in an election protest *after* an election, then when the North Carolina courts next hold that it is too late to change unlawful maps before an election, we can expect mass challenges to votes throughout the unlawful districts in the context of a post-election protest. That outcome would conflict with the Supreme Court's holding in *Pender County*. That cannot be, and is not, the law in North Carolina.

What Judge Griffin wants this Court to do—throw out votes that were validly cast under laws and guidance in effect at the time they were cast—is unprecedented. He cites examples of courts that rejected arguments based on *Purcell* post-election, (*see* Griffin Br. 55-56), but only in contexts where votes were *counted* (and where counting these additional votes would have no impact on "voter behavior"), not where courts acquiesced in a litigant's request to change the rules and throw out votes after the election, *see, e.g.*, *La Unión del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 767 (W.D. Tex. 2023) ("Plaintiff's requested injunction does not affect the procedures for voting by mail from a voter's perspective" and "would not disenfranchise anyone").

B. *James v. Bartlett* Undermines, Rather Than Supports, Judge Griffin's Attempts to Change the Rules

Judge Griffin is wrong to argue that his challenges are "no different" from those at issue in *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). (Griffin Br. 13.) Justice Dietz, concurring in the order dismissing Judge Griffin's petition for a writ of prohibition, specifically highlighted key differences between *James* and this case. *See Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring). And while *James* was decided before the U.S. Supreme Court's decision in *Purcell*—and thus did not account for that now-settled doctrine of election law—it still specifically evaluated the "timeliness" of the arguments raised. *See James*, 359 N.C. at 265, 607 S.E.2d at 641.

In *James*, the Supreme Court did require out-of-precinct provisional ballots to be excluded from the final tally in the context of a post-election protest. *Id.* But different from this case, where Judge Griffin seeks to change long-settled rules, in *James*, the "2004 election cycle was *the first time in North Carolina history* that State election officials counted out-of-precinct provisional ballots." *Id.* (emphasis added). Also different from this case, the Board's decision to count out-of-precinct votes was "unlawful under the election rules that existed at the time of the election," contrary to both statute and regulation. *Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring). Election law statutes provided that a voter must "*vote in the precinct in which he resides*," *James*, 359 N.C. at 267, 607 S.E.2d at 642 (quoting N.C. Gen. Stat. § 163-55), and applicable regulations held that a person is eligible to vote a provisional

ballot "*if the person resides in the precinct*," *id.* at 268, 607 S.E.2d at 643 (quoting 8 N.C. Admin. Code 10B.0103(d)).

By contrast, the voters who Judge Griffin challenges have been told for years, and multiple election cycles, that they can vote in precisely the way they voted in this election. Accordingly, Judge Griffin had years to challenge the laws he now wants this Court to take up and overturn. *See Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring) ("Here, by contrast, the State Board of Elections *complied* with the election rules existing at the time of the election."). "Judge Griffin's argument is not that the Board violated the existing rules, but that the rules themselves are either unlawful or unconstitutional." *Id.*

As Justice Dietz concluded, this case is "more akin" to the post-election challenge in *Hendon*. In that case, a North Carolina congressional candidate alleged a state election law was unconstitutional and sought a recount that complied with the U.S. Constitution. *Id.* The Fourth Circuit "agreed the law was unconstitutional" and "struck it down for future elections." *Id.* (citing *Hendon*, 710 F.2d at 182). The court declined, however, to apply that ruling to the election at hand, pointing to "the general rule that denies relief with respect to past elections." *Id.*

Also, different from this case, the protestors in *James* had a reason for their failure to challenge the Board's rules *before* the election when the candidates and the Board argued that these changes were not timely. As the Supreme Court explained in a section titled "Timeliness," the election challengers in *James* specifically inquired of the Board *before the* 2004 Election Cycle whether out-of-precinct ballots would be

counted. *James*, 359 N.C. at 265, 607 S.E.2d at 641. The Board vaguely replied that "North Carolina law is clear on this issue. We have and will continue to enforce and administer the provisions as to provisional voting as set out in North Carolina law." *Id.* James interpreted that response to mean that those votes would not be counted (consistent with state statute and regulation) and so did not seek to challenge that decision before the election. *Id.*

When James and another candidate later filed suit to challenge the ultimate counting of those ballots, the Board and the prevailing candidates argued that James's challenge was untimely because it was not made before the election. *Id.* The *James* court disagreed, but not because a protester has the right to challenge any election rule at any time up until the election protest deadline (as Judge Griffin contends here). *Id.* Instead, the *James* court held that the Board's "response, *coupled with the absence of any clear statutory or regulatory directive that such action would be taken*, failed to provide plaintiffs with adequate notice that election officials would count the 11,310 ballots now at issue." *Id.* The *James* court accordingly found that James's post-election challenge was timely filed. *Id.*; *see also Hendon*, 710 F.2d at 182 (recognizing there are "exceptions" to the rule that one cannot seek to undo ballot results with court action arising from a "lack of opportunity for one reason or another to seek pre-election relief").

That is not the case here. The laws and regulations Judge Griffin is challenging have been in place for years. Therefore, his complaints about the rules "could have been—and should have been—addressed in litigation long before people

went to the polls in November." *Griffin*, 909 S.E.2d at 872 (Dietz, J., dissenting). Judge Griffin never received a contradictory or confusing communication from the Board that caused him to forestall a challenge. Rather, the rules in place at the time of the election—and for many preceding election cycles—were *clear*. Judge Griffin simply *waited* to challenge these rules until after he lost.

Accordingly, *James* not only fails to support Judge Griffin's position, it underscores why his arguments miss the mark.

C. Judge Griffin's Invocation of a Zoning Board Decision in *Godfrey* Does Not Permit Him to Change the Rules

Judge Griffin invokes, for the first time in North Carolina, the so-called *Godfrey* doctrine—never cited outside the zoning context—in an attempt to avoid arguments related to timeliness (*Purcell* and laches) and later equal protection. That doctrine has no application to the superior court's *de novo* review of the Board's decision for at least three reasons.

First, as Judge Griffin concedes, the superior court's review of the Board's order was "de novo," as the issues presented to the board were "only legal" and the decision was made in the "preliminary consideration" posture, "somewhat akin to a summary judgment proceeding." (Griffin Br. 5); *see Rotruck v. Guilford Cty. Bd. of Elections*, 267 N.C. App. 260, 264-65, 833 S.E.2d 345, 349 (2019); N.C. Gen. Stat. § 150B-51(c). On *de novo review* of an administrative decision, the superior court "consider[s] the matter anew" and may "freely substitute its own judgment for the agency's judgment." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (cleaned up); *see also Trotter v. N.C. Dep't of Health & Human*

Servs., Pub. Health Dep't, 189 N.C. App. 655, 660, 659, S.E.2d 749, 752 (2008) (same). *De novo* review "requires a court to consider a question anew, *as if not considered or decided by the agency*." *Amanini v. N.C. Dep't of Human Res., N.C. Special Care Ctr.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (emphasis added).

This broad scope of review aligns with the application of *de novo* review in other contexts as well. *See, e.g.*, *In re Estate of Pope*, 192 N.C. App. 321, 331, 666 S.E.2d 140, 148 (2008) (declaring that "[u]nder a *de novo* review, the superior court was entitled to base its decision on different grounds than that relied upon by the clerk"); *see also Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.").

Thus, the Superior Court was permitted in its *de novo* review to "consider the question presented on appeal anew, as if undecided by an agency." *Homoly v. N.C. State Bd. of Dental Exam'rs.*, 125 N.C. App. 127, 130, 479 S.E.2d 215, 217 (1997). That review may necessarily include additional legal issues not part of the Board's decision because the Superior Court is "substitut[ing] its own judgment" in place of the Board. *Mann Media, Inc.*, 361 N.C. at 13-14, 565 S.E.2d at 17.

Second, Judge Griffin's attempt to graft an irrelevant line of zoning cases (in the context of a whole record analysis) onto *de novo* review in the election law context is inapposite. In *Godfrey v. Zoning Board of Adjustment of Union County*, the

Supreme Court ruled that it was improper for the Court of Appeals to uphold a zoning board's decision based on a *sua sponte* finding that the landowner had vested rights in the property—an issue addressed by neither the board nor the Superior Court, and which necessarily required findings of fact that the Court of Appeals was not empowered to make. 317 N.C. 51, 62-64, 344 S.E.2d 272, 279 (1986). Despite Judge Griffin's insistence that *Godfrey* is a "fundamental administrative law doctrine," Judge Griffin does not cite—nor can Justice Riggs locate—any decision invoking *Godfrey* outside the zoning board context. But more importantly, *Godfrey* did not limit, or even address, *de novo* review by a superior court of errors of law by an administrative board. Thus, *Godfrey* does not apply here. *See Fuchs v. Washington*, No. 4:21-CV-81-FL, 2023 WL 5664107, at *13 (E.D.N.C. Aug. 21, 2023) (interpreting *Godfrey* as a case involving whether the board's decision had been arbitrary and capricious, rather than a legal issue). Neither of the other cases Judge Griffin cites counsels to the contrary. *See Frazier v. Town of Blowing Rock*, 286 N.C. App. 570, 576, 882 S.E.2d 91, 96-97 (2022) (rejecting arguments before the Court of Appeals because "neither the BOA *nor the superior court* relied upon these theories in reaching their decision" (emphasis added)); *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 195, 689 S.E.2d 576, 589 (2010) (holding the superior court acted incorrectly in basing decision on facts not presented to the Board of Adjustment),

Third, Judge Griffin cites no case where a *party* to a proceeding was barred on administrative review from making arguments that party *also made* before the

administrative body (even if not expressly addressed in an agency's written decision). The issues that Judge Griffin now seeks to exclude—the timeliness of Judge Griffin's attempt to change the rules and equal protection—were raised before the Board and then again in superior court.

Justice Riggs's arguments on timeliness (whether described as *Purcell*, laches, or substantive due process) boil down to the same fundamental principle—that Judge Griffin may not try to change the rules of the election *after* the election has concluded and *after* citizens of North Carolina exercised their right to vote based on then-existing voting laws. That concept has *always* been foundational to Justice Riggs's opposition to Judge Griffin's challenges. As Justice Riggs argued before the Board, the "Board should deny the protests as an illegal attempt to change the election rules after the votes have been cast and counted." (Doc.Ex.I 5058.) She contended that while Judge Griffin's effort to change the rules, then to "throw out their votes for failure to anticipate the new rules" was both "legally and constitutionally improper" it was also "wrong on an even more basic level—one familiar in every North Carolina schoolyard." (*Id.*) "Whether playing a board game, competing in a sport, or running for office, the runner-up cannot snatch victory from the jaws of defeat by asking for a redo under a different set of rules." (*Id.*) Further, Justice Riggs argued that Judge Griffin's retroactive changes were "unconstitutional" and violate the due process provisions of the U.S. Constitution, as well as its North Carolina analogue. (*Id.* at 5068-5069.) She also cited a case invoking "laches" to reject an attempt to change the rules post-election. (*Id.* at 5068 n. 36); *Trump v. Biden*, 394 Wis. 2d at 647, 951

N.W.2d at 577 ("Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began.").

Judge Griffin insists that it was not until Justice Dietz framed this settled principle in election law as "our state's *Purcell* principle" that Appellees used that specific moniker to describe their arguments. The fact that there are multiple ways to characterize the same fundamental point about the untimeliness and impropriety of Judge Griffin's proposed changes to voting law does not mean that Judge Griffin is "chas[ing] [a] moving target[]." (Griffin Br. 54.) Rather, it merely reinforces that no matter what it is called—a *Purcell* violation, a substantive due process violation, a claim barred by laches—Judge Griffin's desired outcome is barred under state (and federal) law.

As for the issue of equal protection, the Board's decision not to rely on that point in its dismissal of Judge Griffin's protest is of no moment when the Superior Court took up *de novo* review of the legal issues in Judge Griffin's petition. In any event, Justice Riggs *did* present equal protection (under both the U.S. and N.C. Constitutions) as one of the many flaws in Judge Griffin's petition before the Board. (*See* Doc.Ex.I 5068-69 & n.38, 40). Thus, as part of the Superior Court's *de novo* review of the record, Appellees were free to raise equal protection arguments based on issues of law and matters uncontested within the record.

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

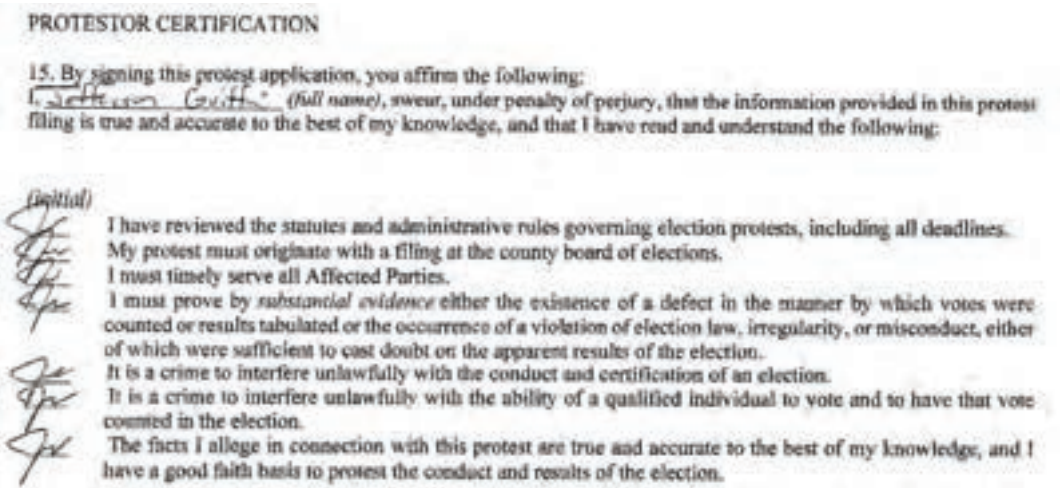
As a matter of North Carolina constitutional and regulatory law, voters have the right to sufficient notice that their ballots are being challenged. North Carolina ensures that voters receive this notice by requiring protestors to "*serve copies of all filings* on every person with a direct stake in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

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

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

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

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



PROTESTOR CERTIFICATION

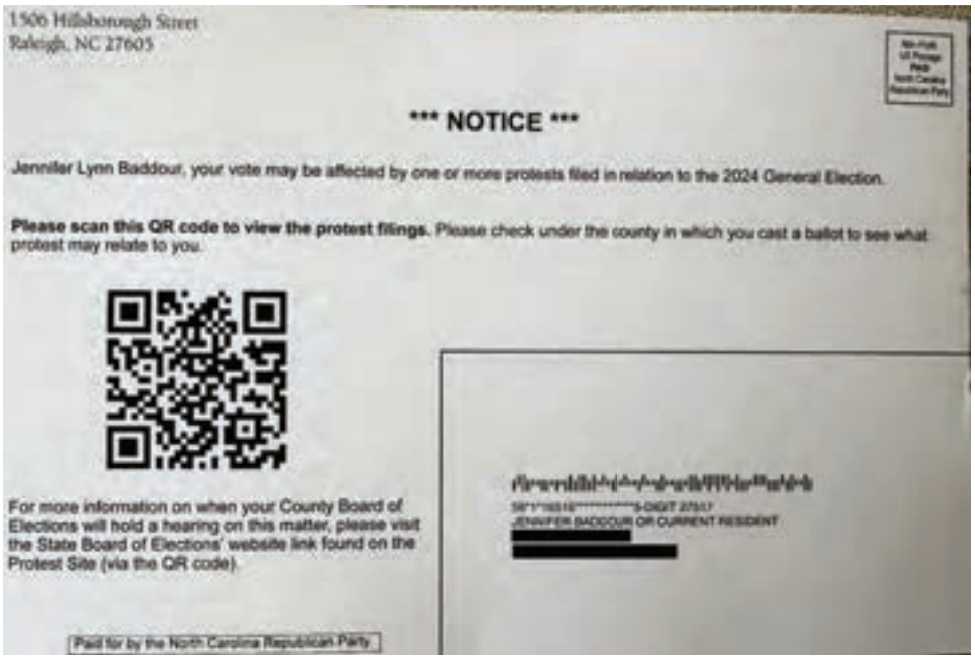
15. By signing this protest application, you affirm the following:
I, Jeffrey Griffin (*full name*), swear, under penalty of perjury, that the information provided in this protest filing is true and accurate to the best of my knowledge, and that I have read and understand the following:

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

Doc.Ex.I 8.

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

Instead, Judge Griffin caused postcards to be sent by non-forwardable bulk mail with this equivocal message: "your vote *may be affected by one or more protests* filed in relation to the 2024 General Election." (R pp 16-18; *see* Doc.Ex.II 312 (postcard).) As noted below, *infra* at 35, not every voter received the cards. For those who did, the postcards looked like the following:


1506 Hillsborough Street
Raleigh, NC 27605

*** NOTICE ***

Jennifer Lynn Baddour, your vote may be affected by one or more protests filed in relation to the 2024 General Election.

Please scan this QR code to view the protest filings. Please check under the county in which you cast a ballot to see what protest may relate to you.

For more information on when your County Board of Elections will hold a hearing on this matter, please visit the State Board of Elections' website link found on the Protest Site (via the QR code).

JENNIFER BADDOUR OR CURRENT RESIDENT

Paid for by the North Carolina Republican Party

Brief of *Amicus Curiae* at Ex. 3, *Griffin v. N.C. State Bd. of Elections*, No. 5:24-cv-00724-M (E.D.N.C. filed Jan. 1, 2025), ECF No. 41-1; (*accord* Doc.Ex.I 4889 (App. 5)).

The postcards included a QR code that led to a N.C. Republican Party website with links to *hundreds* of protests filed by four candidates. Recipients who did not discard the postcard as election season junk-mail and were able to navigate the QR code, would then have to sift through spreadsheet printouts, not organized alphabetically, to determine whether and why their votes "may be affected" by the various protests. (R p 16-18.) The Board's decision includes screenshots of what those voters would have seen when they accessed the link. (*See* R p 49-50.)

The Board correctly determined that the postcard failed to satisfy 8 N.C. Admin. Code. 2.0111. In arguing otherwise, Judge Griffin starts not by explaining how he complied with the rule, but by arguing that the rule itself is flawed, permitting him to disregard its requirements. He argues that N.C. Gen. Stat. § 163-182.10(b) burdens county boards of elections, not protestors, with serving copies of protests on

affected parties. (*See* Griffin Br. 62.) That argument misreads the law. Section 163-182.10(b) requires county boards to "give notice of the *protest hearing* to . . . those persons likely to have a significant interest in the resolution of the protest" (emphasis added), not to serve the protest documents on the voter. Indeed, a separate sentence of N.C. Gen. Stat. § 163-182.10(b) states that "[e]ach person given notice shall also be given a copy of the protest or a summary of its allegations." The General Assembly could have drafted the statute to state that county boards must provide notice of the hearing *and* serve the protests, but it chose not to—presumably because the protester must serve his protest on the affected parties.

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

This framework is not unique. Under the North Carolina Administrative Procedure Act, "the party that files the petition [commencing a contested case] shall serve a copy of the petition on all other parties," but the "Office of Administrative

Hearings" must give "notice of [the] hearing" to the parties. N.C. Gen. Stat. § 150B-23(a); *see also* N.C. R. Civ. P. 3–4 (requiring plaintiffs filing a complaint to serve the complaint in accordance with the Rules of Civil Procedure).

Judge Griffin argues in the alternative that the postcards satisfied 8 N.C. Admin Code 2.0111's service requirements because the Board uses similar mailers in other contexts. (Griffin Br. 63.) But Judge Griffin relies on two statutes that expressly discuss the issuance of "cards," neither of which implicates a voter's right to have their ballot counted and neither of which uses the word "serve" or "service" with respect to the Board's responsibilities. *See* N.C. Gen. Stat. § 163-82.8(c) (discussing a "voter registration card" containing certain information); N.C. Gen. Stat. § 163-82.14(d)(2) (discussing a confirmation mailing in the form of a "preaddressed return card"). Here, in contrast, challenged voters must be served with "copies of all [protest] filings," 8 N.C. Admin. Code 2.0111. Judge Griffin failed to do so. Accordingly, his protests were properly dismissed for lack of proper service.

Judge Griffin next contends he met the due process requirements outlined in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950), protesting that the "standard does not demand perfection." (Griffin Br. 64.) But *Mullane* dealt with notice to a class of *potential* beneficiaries of a trust, many of whom were either "unknown, "nonresidents" of the state, or had interests that were "conjectural or future," and many of their "addresses [were] unknown to the trustee." 339 U.S. at 317, 318. Here, in contrast, all the challenged voters are North Carolina voters who have a "direct stake in the outcome of [Judge Griffin's] protest[s]." 8 N.C. Admin.

Code 2.0111. And there is no suggestion that Judge Griffin could not locate the challenged voters.

By failing to serve the voters he challenged, Judge Griffin left countless North Carolina voters without any notice *at all*, including voters who (i) mistook his postcard as just political junk mail from the "North Carolina Republican Party"—not a serious legal document warning of a loss of a constitutional right—and threw it away; (ii) never *received* the postcard because they moved and Judge Griffin chose to send the notice by non-forwardable bulk mail; (iii) lack a cellphone to scan the QR code; (iv) distrust QR codes from unknown sources; (v) could not find their names amid hundreds of links with spreadsheets listing names out of alphabetical order, and (vi) did not understand that the notice that their right to vote "may" be affected meant that Judge Griffin had specifically identified them *by name* in a specific protest challenging their individual right to vote.

* * *

For the reasons discussed above, the Court should affirm the superior court's rejection of all three of Judge Griffin's petitions, without considering the substance of the protests he is attempting to pursue here. If the Court considers Judge Griffin's arguments in support of those protests, however, it should hold that each fails under settled North Carolina law just as they did before the Board.

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

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

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

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

As the Board explained, Article 20 and Article 21A establish two regimes for absentee voting. Article 21A "comprehensively addresses the requirements for voting by absentee ballot for 'covered persons'" (*i.e.*, uniformed military, their family, and overseas voters). (R p 40.) By contrast, the "provisions of Article 20 comprehensively address" the requirements for domestic absentee voting. (*Id.*) To be sure, in some

areas, the same requirements apply to both types of absentee voters, but the "requirements of one article do not apply to the class of individuals subject to the other article, unless otherwise stated in the statute." (*Id.*)

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

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

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

As the Board correctly stated in its Decision and Order, the "clear intent" of this language "and especially the title of the statute" is that Article 21A does not "apply to or modify" Article 20, meaning that UMOVA's *separate* voting procedures are inapplicable to absentee voting covered by Article 20. (R pp 43-44); *see also Myers v. Myers*, 269 N.C. App. 237, 241, 837 S.E.2d 443, 448 (2020) (holding a statute's meaning can be derived from "the title" of the statute).

On the other hand, UMOVA provides that its voters can "apply for a military-overseas ballot using *either* the regular application provided by Article 20 of this Chapter *or* the federal postcard application," and are not prohibited "from voting an absentee ballot under Article 20." N.C. Gen. Stat. § 163-258.7(a), (f) (emphasis added). Thus, military and overseas voters are expressly authorized to apply for and

cast a ballot under the methods set forth *either* in Article 21A *or* Article 20. But UMOVA voters must make a choice between the two. Simply put:

> by setting forth two distinct sets of comprehensive regulations for requesting and casting absentee ballots for two distinct classes of voters, and separating those comprehensive regulations in different statutory articles, the General Assembly clearly did not intend for the State Board to pick and choose laws from one article and apply those laws to persons subject to the other article.

(R p 43.)

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

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

General Assembly to enact laws that "include exceptions." N.C. Const. art. VI, §§ 2(4), 3(2).

Trying to avoid this conclusion, Judge Griffin maintains that Article 21A should be read to "incorporate" Article 20's photo identification requirement because "[i]f our legislature intended to exempt overseas absentee voters from the photo identification requirement, it would have said so explicitly." (Griffin Br. 18.) But that gets the statutory construction backwards. If the General Assembly imposes a requirement in one Article of the statutes, *but does not include it* in another, the conclusion to be drawn is that it did not intend to include it where it was omitted. It is "not reasonable to assume that the legislature would leave an important matter . . . open to inference or speculation"; therefore, "the judiciary should avoid ingrafting upon a law something that has been omitted." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008). Of course, it would be wrong to read a photo ID requirement into Article 21A if the requirement were simply *included* in Article 20 but *omitted* from Article 21A. But here the photo ID requirement in Article 20 is even clearer: it is *explicitly* limited to "voted ballots *under this section*." N.C. Gen. Stat. § 163-230.1(f1).

The timing of the enactment of these statutes aligns with this analysis. The UMOVA was passed in 2011 and became effective in January 2012. The first photo identification law, applicable to in-person voting, was signed in August 2013. *Compare* N.C. Sess. Law 2011-182 (H.B. 514), *with* N.C. Sess. Law 2013-381 (H.B. 589). The General Assembly *later* added legislation to amend Article 20 to include a

photo identification requirement for domestic absentee ballots. *See* N.C. Sess. Law 2019-239 (S.B. 683). No such amendment was made to Article 21A. If the General Assembly had intended to impose a photo identification requirement in Article 21A, it would have amended Article 21A to "explicitly" include such a requirement—just as it did with respect to Article 20 in 2019.

Judge Griffin argues that Article 20's photo identification requirement nevertheless *must be* incorporated into Article 21A because absentee ballots cast under both articles are "generally treated alike and are all considered absentee ballots." (Griffin Br. 19.) But that results-oriented approach is not the way statutory construction is conducted under North Carolina law. *See, e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) ("The General Assembly is the 'policy-making agency' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws.").

In any event, to support his argument that Article 20 and Article 21A should just be "treated alike," Judge Griffin cites statutes that, while they apply a uniform rule to Article 20 and Article 21A absentee ballots for one purpose or another, *specifically* distinguish between the two types of ballots. *See, e.g.*, N.C. Gen. Stat. § 163-132.5G(a1)(4) (requiring reporting of early vote ballots separate from "absentee ballots cast under Article 20 *or* 21A of this Chapter" (emphasis added)); *id.* § 163-234 (setting different deadline for counting of absentee ballots "issued under Article 21A"). Where the General Assembly wanted requirements from Article 20 to apply to Article 21A, it explicitly adopted parallel requirements for Article 21A or made

appropriate statutory cross-references. *Compare* N.C. Gen. Stat. §§ 163-232, 232.1 *with* N.C. Gen. Stat. § 163-258.26 (requiring preparation of certified lists of absentee ballots under Article 21 and Article 21A).

At the same time, Judge Griffin ignores the many other distinctions between the two types of absentee ballots, underscoring that they are distinct absentee voting regimes for different types of absentee ballots and that the provisions in Article 21A are intended to facilitate voting while away from North Carolina. *See Insulation Sys., Inc. v. Fisher*, 197 N.C. App. 386, 391, 678 S.E.2d 357, 360 (2009) (articulating basic principle that "[b]y enacting two separate statutes, the legislature clearly intended that two distinct standards be applied."). For example, ballots cast under Article 21A, unlike absentee ballots cast under Article 20, can be submitted electronically. N.C. Gen. Stat. §§ 163-231(b)(1)(c), 163-258.4(d). In addition, unlike the declaration required to authenticate an Article 21A ballot, an absentee ballot under Article 20 must be authenticated by two witnesses or a notary. *Id.* § 163-231(a)(6). And all ballots under Article 20 must be submitted no later than 7:30 p.m. on the date of election, while Article 21A ballots are counted so long as they are received before the county canvass. *Compare id.* § 163-231(b)(2), *with id.* § 163-258.12. These distinctions in the methods and deadlines for submitting absentee domestic ballots under Article 20 and Article 21A underscore that the methods for voting absentee under the two Articles are distinct.

Judge Griffin also argues that Article 21A makes no reference to a "sealed container-return envelope" and speculates that the term requires the Board to look

outside Article 21A to Article 20 for guidance. (Griffin Br. 18-19 (discussing N.C. Gen. Stat. § 163-231(b)(1)).) But the reason Article 21A makes no reference to "sealed container return envelopes" is because, under Article 21A, the Board prescribes "privacy and transmission envelopes and their electronic equivalents . . . to be used with the military-overseas ballot of a voter authorized to vote in any jurisdiction in this State." N.C. Gen. Stat. § 163-258.4(d); *see also id.* § 163-231(b)(1), (2) (specifically recognizing in Article 20 that Article 21A allows for different methods of transmission than regular absentee ballots).

Judge Griffin also cites several provisions that he assumes "*must* apply to overseas voters" from Article 20 even though Article 20 "does not say so expressly" because "Article 21A is silent on the issue." (Griffin Br. 20.) As an initial matter, Judge Griffin is wrong about some of his examples. For example, Article 21A *does* impose penalties for perjury. *See* N.C. Gen. Stat. § 163-258.13. As that statute indicates, however, sometimes prosecution of military-overseas voters needs to be done by the United States rather than North Carolina, explaining the absence in Article 21A of provisions regarding referral of legal violations to a local district attorney. To the extent there are interstitial gaps in Article 21A, that Article specifically tasks the Board with filling those gaps in a manner that harmonizes state law and federal law under UOCAVA (*e.g.*, regulations for maintaining proper registration records for military overseas voters). *See, e.g.*, N.C. Gen. Stat. §§ 163-258.4, 163-258.30.

Judge Griffin is also wrong to conclude that "Article 21 recognizes that overseas voters will need to provide photo identification" because it provides that a military or overseas voter may apply for an absentee ballot by using "the regular application provided by Article 20." (Griffin Br. 20 (citing N.C. Gen. Stat. § 163-258.7(a)).) To the contrary, that provision of state law makes clear that *it is the voter's choice* whether to vote an absentee ballot under Article 20 instead of Article 21A. Whatever the voter's choice, the applicable set of laws and regulations under the pertinent absentee voting regime (whether Article 20 or Article 21A) then apply.

Nor is it correct to conclude that there would be no "rational basis" for this difference in treatment or that it "would make no sense to require photo identification for voters presented in the United States but not for overseas voters" including our uniformed military. (Griffin Br. 26, 35); *see also Griffin,* 909 S.E.2d at 871-72 (Dietz, J., dissenting) ("Exempting voters in foreign countries from voter ID" is "inconsistent with the law's intent"). While there may be policy arguments for extending photo ID to military and overseas voters, the General Assembly has not yet decided to impose such a requirement. That legislative choice is not only consistent with the law for UOCAVA voters in *other states across the country*, but also with the historical recognition in federal and state law that it is simply harder for overseas citizens to exercise their right to vote—from uniformed military on the battlefield or in submarines, to missionaries and nonprofit workers in remote locations. Indeed, the Department of Defense disagrees with Judge Griffin's argument that it "makes no

sense" to permit military and overseas voters to access the ballot without a photo ID and has explained why these voters *should* be treated differently.[5]

As the Board also recognized, Article 21A implements UOCAVA, a federal law that does not require photo ID. Because Article 21A *requires* the Board to allow military-overseas voters to register and vote using UOCAVA ballots, and counties used a combined federal-state ballot in this election, *see* N.C. Gen. Stat. § 163-165.5B, Article 21A is properly read not to impose a photo ID requirement. As the Board has recognized, an exception from photo ID requirements for these votes may ultimately be required by federal law.

There are still multiple checks designed to ensure the integrity of the overseas vote. A voter must confirm their identity when submitting the standard federal forms. (*See* R p 41 (federal forms require information such as the voter's "name, birthdate, and their driver's license number or social security number" for the purpose of "confirm[ing] the voter's identity.").) And each Article 21A ballot includes a declaration swearing to the voter's eligibility and identity. *See* N.C. Gen. Stat. §§ 163-258.4(e); 163-258.13. A military or overseas voter submitting a ballot under Article 21A must provide "a declaration signed by the voter declaring that a material misstatement of fact in completing the document may be grounds for a conviction of perjury under the laws of the United States or this State." N.C. Gen. Stat. § 163-258.13. A separate section sets out specific facts to which a covered voter must "swear

[5] *See, e.g.*, Letter from Director Beirne to Commissioner Cortes (Feb. 6, 2017) (App. 23) (cited in Board's Order at R p 47 n.26).

or affirm" including "specific representations pertaining to the voter's identity, eligibility to vote, [and] status as a covered voter." N.C. Gen. Stat. § 163-258.4(e).[6]

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

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

Judge Griffin argues the Photo ID Exemption Rule is unenforceable because "[t]here is no textual indication that the General Assembly ever intended for the State Board to decide whether to require photo identification for any kind of voter." (Griffin Br. 25.) That is wrong. The Board did not exceed the scope of its authority; the *General Assembly* made the policy choice to impose a photo ID requirement for an absentee ballot under Article 20 without at the same time imposing such a requirement for casting a ballot under Article 21A. In addition, the General Assembly *did* direct the Board to develop "standardized absentee-voting materials . . . in coordination with other states." N.C. Gen. Stat. § 163-258.4(d). And the ID exception found in 8 N.C. Admin. Code 17.0109(d) aligns with this directive. As noted, the FVAP's Voting Assistance Guide "reveals no instruction from any state to

[6] As the Board pointed out, (*see* R pp 41–44), these are the *only authentications* that may be required to cast an Article 21A ballot: "An authentication, other than the declaration specified in G.S. 163-258.13 or the declaration on the federal postcard application and federal write-in absentee ballot, is not required for execution of a document under this Article. The declaration and any information in the declaration may be compared against information on file to ascertain the validity of the document." N.C. Gen. Stat. § 163-258.17(a).

its UOCAVA voters stating that they must comply with a photo ID requirement when requesting or voting their ballot." (R p 46.) The regulation was thus clearly within the General Assembly's express direction to the Board to develop "standardized absentee-voting materials" for Article 21A voters, including "authentication materials, and voting instructions." N.C. Gen. Stat. § 163-258.4(d).

This regulation was adopted during an *open participatory process*, with a specific check designed to ensure the Board does not exceed its statutory authority. The Rule took effect 15 months before the election, beginning in August 2023, first as a temporary rule, then as a permanent rule. (R p 45.) During rulemaking, Judge Griffin submitted no comments on the Rule. The North Carolina Republican Party submitted "thorough comments on the Rule" but "did *not* object to this aspect of the Rule" or seek to invalidate it through administrative or judicial process. (R p 45.) The Rule was approved unanimously by the Rules Review Commission, an agency appointed by the leadership of the General Assembly that is required to object to rules proposed by an agency "if those rules exceed the authority of the agency to adopt them." (R p 45 (citing N.C. Gen. Stat. § 150B-21.9(a)(1)).) After the rule was adopted, neither Judge Griffin *nor anyone else* ever challenged it through litigation.

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

C. Judge Griffin's Selective Prosecution of This Claim Violates Equal Protection Under the North Carolina Constitution

Not only is Judge Griffin's post-election protest too late to challenge a lawfully enacted regulation, and not only is his argument wrong on the merits, but it also presents a clear equal protection problem. *See Blankenship v. Bartlett,* 363 N.C. 518, 525, 681 S.E.2d 759, 765 (2009) ("[O]nce the legal right to vote has been established, equal protection requires that the right be administered equally."); *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) ("The right to vote on equal terms is a fundamental right.").

Judge Griffin protested voters on this basis before the deadline *only in Guilford County*. (*See* Griffin Br. 7 n.1 (glossing over untimely filings in other counties); R p 11 n.2 (noting late filings but dismissing on the merits).) He later tried to supplement with data for three more counties (Durham, Forsyth, and Buncombe). He blames the timing of county boards in providing the requested data (without explaining why he did not request the data months earlier)—*but Judge Griffin never intended a uniform application of this change in the rules*. From the start, Judge Griffin only "requested the list of such voters from . . . six counties." (Griffin Br. 7 n.1.)[7] In other words, he does not seek to change the rules for all voters in the State. To change the rules and throw out the votes of North Carolinians in one county, or just four counties—

[7] Judge Griffin suggests that he requested data only in six counties because in those counties "local election official confirmed that the county board accepted overseas ballots without requiring photo identification." (Griffin Br. 7 n.1.) But *every county* was required by state law to do so. Therefore, the suggestion that his selective data request, targeted at urban counties, was anything but a deliberate choice appears to be misleading.

particularly when those counties are some of the most Democratic in the State—while counting the votes of similarly situated North Carolinians of the other 96 counties in the State would run directly into constitutional guarantees of equal protection of the law.[8]

This Court should not sanction this selective disenfranchising of our military, their families, and overseas voters. Moreover, if it does so, the Court will be forced to address whether to dramatically expand the inquiry to more than 32,000 North Carolinians who voted using this method in all 100 counties in 2024.[9]

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

Judge Griffin claims that children of North Carolinians stationed or living abroad who themselves have "never lived" in North Carolina are ineligible to vote because they do not satisfy the "voter residency" requirement of Article VI of the North Carolina Constitution. This argument is meritless. That argument fails to recognize the difference between where a voter "lives" and their residency and contradicts a statute enacted by the General Assembly in 2011 that deliberately extended the franchise to these voters.

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[8] Judge Griffin contends that, as a private actor, he "cannot violate anyone's equal protection rights." (Griffin Br. 75.) But Judge Griffin is asking the Board—a state actor—to violate equal protection.

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

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

To start, this argument should be rejected outright because it simply does not implicate enough voters to change the outcome of the race. To succeed in an election protest, a protest must establish that any irregularities in the election were "sufficiently serious to cast doubt on the apparent results of the election." N.C. Gen. Stat. § 163-182.10(d)(2)(e). Absent such a showing, the protest must be dismissed. *Id.* § 163-182.10(d)(2)(c). In other words, a protest is unwarranted only to change the "vote count." It must be sufficient to affect the outcome. Here, Judge Griffin protested just 266 votes before the protest deadline. (R p 118.) That is *hundreds* of votes shy of the 734-vote margin by which Justice Riggs won this race. Accordingly, the Court may reject this category of protest without the need to reach the merits.

Judge Griffin knows this. For that reason, he is trying to amend his protests more than two months after the statutory deadline to shoehorn hundreds of new voters into his protests. Without any legal basis, Judge Griffin claims he can keep on amending his protests—to include even voters who were *never* presented to the Board and are not anywhere in the record before the Court—to change the outcome of the election in his favor. While Judge Griffin protested only 266 voters in his "Never Residents" category in protests filed before the statutory deadline, he now attempts to bring this total to 516 and claims that number can increase going forward. (*See*

Griffin Br. 8 n.2; *see also* R p 118 (referring to just "266 voters challenged").) That effort is *months* too late, procedurally improper, and should be rejected outright.[10]

"In all election protests, swiftness is the order of the day." *Bouvier v. Porter*, 386 N.C. 1, 16, 900 S.E.2d 838, 850 (2024). Accordingly, the General Assembly has carefully crafted a set of election protest rules that seek "to balance the public's interest in achieving accurate election results with the need to finalize those results in a short period of time." *Id.* at 4, 900 S.E.2d at 843. N.C. Gen. Stat. § 163-182.9 sets forth the procedures and deadlines for filing an election protest. "The timing of election protests is measured relative to the county boards of elections' canvasses, which are normally held ten days after an election." *Bouvier*, 386 N.C. at 15, 900 S.E.2d at 850; *see* N.C. Gen. Stat. § 163-182.5(b). "*At the latest*" an "election protest may be filed by '5:00 P.M. on the second business day after the county board of elections has completed its canvass and declared the results.'" *Bouvier*, 386 N.C. at 15, 900 S.E.2d at 850 (emphasis added) (quoting N.C. Gen. Stat. § 163-182.9(b)(4)). That deadline expired more than 90 days ago, on 19 November 2024. Accordingly, Judge Griffin's ongoing campaign to expand and supplement those protests comes much too late.

This is not the first time Judge Griffin has tried to shoehorn belated voter protests. During the proceedings before the Board, the Board noted that Judge Griffin "sought to add voters to the second and third protest categories in

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[10] The irony that Judge Griffin is trying to expand the *factual* basis of his protests months after the election, while invoking the "*Godfrey* doctrine" to prevent minor revisions in legal arguments before the superior court, is striking.

supplemental filings submitted *after* the deadline to file an election protest." (R p 11 n.2 (emphasis added) (citing N.C. Gen. Stat. § 163-182.9(b)(4)).) "Because the Board determine[d]" that those "protests [were] legally deficient," it did not expressly "determine whether such supplementations are allowable under the General Statutes and Administrative Code." (R p 11 n.2)

While the Board did not need to reach the procedural defects with Judge Griffin's belated supplementation, Judge Griffin cited no law that would authorize him to file supplements to amend his protests after the statutory deadline in N.C. Gen. Stat. § 163-182.9(b)(4). (*See, e.g.*, Doc.Ex.I 4044-46 ("Amendment and Supplementation of 'Never Resident' Protest in Pitt County").) Nor does he cite any law in his Brief before this Court.

Yet even if the supplementations he tried to include before the Board were included, Judge Griffin concedes that this "supplemental data" when combined with his "original protests" only brings the total to "405" voters protested in this election. (Griffin Br. 8 n.2.) That is 329 votes shy of the margin.

Now Judge Griffin wants to supplement his protests yet again—this time based on unsupported and extra-record claims that he is in the possession of records from five additional counties identifying another 111 North Carolina voters who voted in this election in compliance with N.C. Gen. Stat. § 163-258.2(1)(e). He *speculates* that if he received additional information from "60 counties" it is "possible" this issue could have "changed the outcome of the election." (Griffin Br. 8 n.2.)

This Court's judicial review is limited to the "official record" that was before the Board. *See* N.C. Gen. Stat. § 150B-51(c) (determination of whether petition is entitled to relief "based upon [the court's] review of the final decision and the official record"); Local Civ. R. Super. Ct., Tenth Judicial District, Rule 9.1 (requiring the agency to provide "the original or a certified copy of the official record in the case under review from which the final agency decision was entered"). Judge Griffin's representations regarding yet additional voters from yet additional counties are outside the record before the Board. Even if these claims were part of the record, the "total" of "516" votes he claims are subject to his protest are *still* nowhere close to being enough to change the outcome of the election.

Judge Griffin speculates that still-outstanding public records requests to 60 counties could increase that total. But the fact that Judge Griffin has received no responses after *months* just as likely reflects that those counties *do not have any more voters to identify* in this extremely narrow category. If the counties have information and failed to comply with public records laws in providing that information to Judge Griffin, he could, and should, have taken action long ago to enforce his public records requests under state law. *See* N.C. Gen. Stat. § 132 *et seq*.

Moreover, Judge Griffin's speculative forecast of a "possible" impact on the election would require not just 734 voters subject to his protest, but many more than that number. 734 votes would be enough only if—extremely implausibly—*every one of those voters* voted for Justice Riggs. To win, Judge Griffin must protest enough votes to *decrease the margin* Justice Riggs enjoys over Judge Griffin by 734 votes or

more. That will take many more than 734 votes—and Judge Griffin is still more than 200 votes short even when ignoring the election protest rules.

As the Supreme Court recognized in *Bouvier*, "[i]n all election protests, swiftness is the order of the day." *Bouvier*, 386 N.C. at 16, 900 S.E.2d at 850. Judge Griffin would turn that rule on its head by making an election protest a never-ending, open-ended process that continues until a candidate achieves his preferred outcome. This Court should reject that effort to circumvent the elections protest process.

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

Judge Griffin's claims also fail on the merits. Article VI guarantees the right to vote to eligible individuals who have "resided in" North Carolina for 30 days before an election. N.C. Const. art. VI, § 2(1). Citing this Constitutional right, Judge Griffin argues that any voter who "never lived in the United States" is ineligible to vote in North Carolina elections because such a person "has never resided in North Carolina." Griffin Br 28. This argument is wrong because "living" and "residing" in North Carolina are not synonymous under Article VI.

The term "resided" is not defined in the North Carolina Constitution. The North Carolina Supreme Court has therefore "held . . . without variation that residence within the purview of this constitutional provision [Article VI] is synonymous with domicile." *Owens v. Chaplin*, 228 N.C. 705, 708, 47 S.E.2d 12, 15 (1948) (collecting cases); *see also Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972) ("Residence as used in Article VI of the North Carolina Constitution of 1970 continues to mean domicile."). Domicile does not merely mean

where someone temporarily "lives." *See Hall*, 280 N.C. at 606, 187 S.E.2d at 55 ("One who lives in a place for a temporary purpose . . . effects no change of domicile."). Rather, domicile is an individual's "permanent" home. *Id.* North Carolina law therefore recognizes "three kinds" of domicile: "domicile of origin, domicile of choice, and domicile by operation of law." *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E.2d 307, 308 (1924). It is true that someone who has never lived in North Carolina cannot make North Carolina his or her domicile *of choice*. *Id.* ("A domicile of choice is a place which a person has chosen for himself."). But an individual need not live in North Carolina for the state to be their domicile of origin or domicile by operation of law.

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

At birth, a person inherits their parent's or legal guardian's domicile as their "domicile of origin." *Id.* ("As a general rule the domicile of every person at his birth is the domicile of the person on whom he is legally dependent."). This is true even if the person is born away from home and, by some twist of fate, never visits their parent's or legal guardian's domicile. It is therefore "entirely logical that on occasion, a child's domicile of origin will be in a place where the child has never been." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

Judge Griffin posits North Carolina cannot be the domicile of origin of an overseas voter who has never lived in this State by arguing—without citing any supporting legal authority—that a child's domicile of origin expires when they turn 18. (*See* Griffin Br. 34-35.) Judge Griffin is wrong. Domicile of origin cannot expire upon reaching majority, suddenly leaving a U.S. citizen without a domicile anywhere

in the United States. Such a result would contravene the basic principle that "[t]he law permits no individual to be without a domicile." *Hall*, 280 N.C. at 608, 187 S.E.2d at 57. Thus, domicile of origin, like any domicile, "once acquired is presumed to continue until it is shown to have been changed." *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 99 S.E.2d 240, 244 (1919); *see also Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979) (holding that college students may retain their domicile of origin while living away from home).

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

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

"A domicile by operation of law is one which the law determines or attributes to a person without regard to his intention or the place where he is actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308. For example, at common law, a wife obtained her husband's domicile by operation of law, no matter where she lived. *Id.*; *see In re Cullinan's Estate*, 259 N.C. 626, 631, 131 S.E.2d 316, 319 (1963). The General Assembly has remedied that anachronistic voting rule by statute. N.C. Gen. Stat. § 163-57(11) (allowing a spouse to establish a separate domicile "for the purpose of voting"). But the law is that domicile may be established by operation of law,

without respect to where a person is "actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308; *see also generally* N.C. Gen. Stat. § 163-57 (defining residence in various contexts for purposes of voting).

The General Assembly expressed its clear intent to protect the right of children and dependents of North Carolinians living abroad to be heard in North Carolina elections when it enacted N.C. Gen. Stat. § 163-258.2(1)(e), and confirmed that a person "born outside the United States" is eligible to vote—regardless of whether he or she has ever "lived in" North Carolina—if his or her "parent or legal guardian" was eligible to vote in North Carolina "before leaving the United States." N.C. Gen. Stat. § 163-258.2(1)(e) establishes domicile by operation of law for these voters. This is reaffirmed by N.C. Gen. Stat. § 163-258.8, which specifically assigns a residence for these voters: "a voter *described by G.S. 163-258.2(1)e* . . . shall be assigned an address" which constitutes his or her *residence* "for voting purposes" (emphasis added). This "assigned" address for a voter covered by N.C. Gen. Stat. § 163-258.2(1)(e) is "the last place of residence in this State of the parent or legal guardian of the voter." *Id.* Thus, the "residency requirement" exception set forth in N.C. Gen. Stat. § 163-258.2(1)(e) refers exclusively to the *residence* requirement of N.C. Gen. Stat. § 163-57(1) and is consistent with the requirement that these voters be "residents" of North Carolina for purposes Article VI of the North Carolina Constitution.

This has "been the law of North Carolina for thirteen years" "faithfully implemented in 43 elections in this state since that time." (R p 39.) Accordingly, Judge Griffin cannot invalidate their votes in a post-election protest.

V. Judge Griffin Cannot Establish That Any Individuals Voted with Allegedly Incomplete Registration Information or, If They Did, That Any Such Persons Should Have Their Ballots Discarded

Judge Griffin claims that every voter without a driver's license or social security number in a state database should not have been permitted to vote *in any race in the 2024 General Election* and should have their vote thrown out—but only as to his race. As Judge Griffin knows, he has been unable to identify a single ineligible voter in this group. Further, it is federal law, not state law, that "requires" this information to vote. And North Carolina law is clear that an error in registering a voter cannot be a basis for removing them from the rolls or discounting their votes.

A. Judge Griffin Failed to Present Evidence That a Single Voter in This Group Is Ineligible to Vote

To start, Judge Griffin's protest lacks basic factual information sufficient to sustain his protest because his argument relies on an "unwarranted inference" about the State Board's data. (*See* R pp 25-26 (Board Order describing data issues).) He claims that voters never "lawfully registered to vote" because a driver's license or social security number is not saved in the Board's database. (*See* Griffin Br. 36.) But as the Board clarified in its Decision and Order, that database does not establish that even *one* voter was not actually eligible to vote, even under Judge Griffin's flawed reading of the law. (*See* R p 25.)

First, the data lacks a number for some voters because those voters had no driver's license or social security number when they registered, and neither state nor federal law requires that they have one to register to vote. (*See* R pp 24-25.)

Second, some voters *did* include a number on their registration form, but that number was deleted from the records Judge Griffin reviewed because it failed to match a number in an outside database. (*See* R pp 24-25.) When a registrant provides such a number, but the number does not match with state or federal databases, that voter will be given another way to confirm their identity by providing a HAVA ID, and that information will no longer be found in the electronic registration record (even though the voter provided the information). (*See* R pp 27-28.) If the voter provides a HAVA ID, then their vote must count, even if staff were unable to verify their voter registration or driver's license number. N.C. Gen. Stat. § 163-166.12(d).

Third, voters who failed to provide either number on their registration forms were given unique voter registration numbers. *See* N.C. Gen. Stat. §§ 163-82.4(b), 163-82.10A (implementing 52 U.S.C. § 21083(a)(1)(A), (5)(A)(ii)). They were then permitted to vote only if they submitted photo ID or a document establishing their residency (HAVA ID) before they voted in their first election. *Id*. § 163-166.12(a), (b). Voters who did so were lawfully registered, and county boards were required by statute to count their votes. *Id*. § 163-166.12(d) (an issue with the voter's driver's license or social security number "shall not prevent that individual from registering to vote and having that individual's vote counted" if they present photo ID or HAVA

ID when they vote). Every voter complied with this requirement. Thus, under clear state law, each voter's vote must count.

B. State Law Does Not Require Voters to Provide a Social Security or Driver's License Number to Vote

Judge Griffin's argument to the contrary depends on a state law requirement that does not exist. It is federal law, not state law, that "requires" that voters provide a social security number or driver's license to register to vote in accordance with HAVA, 52 U.S.C. § 21083(a)(5)(A). The plain text of the applicable state law statute merely provides that voter registration forms should "request" a driver's license and social security number from voters. N.C. Gen. Stat. § 163-82.4(a). State law also says that registration forms should "request" the "date of application" and "county of residence," but no one has ever contended that omitting that information on one's form could invalidate their registration or their vote.

While Judge Griffin invokes the cure provision in N.C. Gen. Stat. § 163-82.4(f), *see* Griffin Br 38, that provision applies *before* a voter is registered, not after an application is accepted by the county boards and the applicant is officially registered. *See* N.C. Gen. Stat. §§ 163-82.1(b), 163-82.1(c), 163-82.7(a), 163-82.7(c), 163-82.7(d), 163-82.10(a). Additionally, that cure provision applies only when the voter is "notified of the omission and given the opportunity to complete" the voter registration form "at least by 5:00 P.M. on the day before the county canvass as set in G.S. 163-182.5(b)." N.C. Gen. Stat. § 163-82.4(f). Here, no notice or opportunity to cure was given to the voters Judge Griffin challenges. Judge Griffin asks the Board to invalidate votes *post facto*—votes of individuals who have been on voter rolls for

decades and who fully complied with the law each time they voted—without such an opportunity, and after their applications were accepted by the county boards.

Judge Griffin also argues that the Board "admitted" that it violated the law. (Griffin Br. 39.) This is false and mischaracterizes the Board's December 2023 Order resolving the administrative complaint. True, the Board modified the form to be clear going forward that a voter must provide a driver's license or social security number if they have one, consistent with *HAVA*. *See* Order at 4 (State Bd. of Elections Dec. 6, 2023), archived at https://perma.cc/5KPY-SQP5. But it said nothing about state law, which as noted above, does not "require" this information. In any event, the N.C. Republican Party made this same argument to the Fourth Circuit, which went out of its way to note that it was "not convinced that [the Board] conceded to a violation of HAVA." *See Republican Nat'l Comm.*, 120 F.4th at 402 n.3.

Regardless, the State Board expressly (and unanimously) decided that no action was necessary for previously registered voters, such as the 60,273 voters challenged here, because they have proven their identity in the manner required by HAVA. Order at 4–5 (State Bd. of Elections Dec. 6, 2023), archived at https://perma.cc/5KPY-SQP5.

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

For each vote Judge Griffin challenges as an allegedly incomplete registration, the registration was submitted, *and accepted*, by county boards. County boards are responsible for registering eligible voters. N.C. Gen. Stat. § 163-82.1(b). Ultimately, once a voter completes a voter registration form, the *burden is on the county*, not the

voter, to identify and address any errors in the registration. N.C. Gen. Stat. §§ 163-82.7(a), 163-82.11(d). The county boards processed applications from these voters, added them to the official rolls, and mailed them voter registration cards to "evidence" their "registration." N.C. Gen. Stat. § 163-82.8(d). The voter rolls, rather than the voter registration application, are the official records of a voter registration. *Id.* § 163-82.10(a).

Once a voter is on the rolls, the Board must count the votes of all eligible voters who appear on that list of voters. For more than 100 years, North Carolina has been clear: "a mere irregularity in registration will not vitiate an election." *Plott v. Bd. of Comm'rs of Haywood Cty.*, 187 N.C. 125, 131, 121 S.E. 190, 193 (1924). Once a county board registers a voter who is otherwise "entitled to register and vote," the voter "cannot be deprived of his right to vote," even if the county board "inadverten[tly]" registered the qualified voter. *Gibson v. Bd. of Comm'rs of Scotland Cty.*, 163 N.C. 510, 513, 79 S.E. 976, 977 (1913).

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

registration law had not been complied with." *Id.* Put simply, "[w]here a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be rejected." *Id.* The *Woodall* decision is one of a robust line of binding Supreme Court cases prohibiting exactly what Judge Griffin seeks to do here—disenfranchise qualified voters who have legally cast ballots, by arguing that alleged technical defects in their registrations (without proof of one voter's ineligibility) should in and of themselves invalidate thousands of votes. *See, e.g.*, *Overton*, 253 N.C. at 315, 116 S.E.2d at 815 (collecting cases); *see also Wilmington, O. & E.C.R. Co. v. Onslow Cty. Comm'rs*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895) ("[T]he machinery provided by law to aid in attaining the main object—the will of the voters—[] should not be used to defeat the object which they were intended to aid.").

Judge Griffin's argument that the *Overton* and *Woodall* cases are "obsolete," (Griffin Br. 73),[11] fails to recognize that the General Assembly, when enacting the election protest statute, merely codified the legal standard set by the courts regarding election irregularities over the previous 100 years. *Compare* N.C. Gen. Stat. § 163-182.10(d)(2)(d), (e) (providing that remedial action or further consideration of protests are limited to irregularities that "might have affected the outcome of the

[11] Judge Griffin also argues here for the first time without citation to authority that the General Assembly nullified the *Overton* and *Woodall* cases by enacting the Chapter 163 provisions dealing with election protests. (*See* Griffin Br. 72-73.) Given that Judge Griffin failed to make this argument before the Board or the Superior Court, he may not make it for the first time in this Court. *See, e.g.*, *Clark v. Bischel*, 239 N.C. App. 13, 17, 767 S.E.2d 145, 148 (2015); *Floyd v. Exec. Pers. Grp.*, 194 N.C. App. 322, 329, 669 S.E.2d 822, 828 (2008).

election" or were "sufficiently serious to cast doubt on the apparent results of the election") *with, e.g.*, *Plott*, 187 N.C. at 131, 121 S.E. at 193; *In re Brown*, 56 N.C. App. 629, 632, 289 S.E.2d 626, 627 (1982) ("It is settled law that an election will not be disturbed for irregularities where it is not shown that such irregularities are sufficient to alter the result."). Our courts have been clear that statutes that follow common law pronouncements of the courts "must be construed with reference to the common law; for in this way alone is it possible to reach a just appreciation of its purpose and effect" and "the common law must be allowed to stand unaltered as far as is consistent with a reasonable interpretation of the new law." *Seward v. Receivers of Seaboard Air Line Ry.*, 159 N.C. 241, 245-46, 75 S.E. 34, 35 (1912) (quoting Henry Campbell Black, Interpretation of Laws, at 232). Judge Griffin points to no legislative history or other authority indicating that the General Assembly intended to repudiate an entire line of unbroken Supreme Court precedent by enacting legislation addressing protests.

D. Judge Griffin's Protest Would Violate the Equal Protection Rights of Voters Under the North Carolina Constitution

Last, Judge Griffin's final protest also presents a clear equal protection problem under state law. *Blankenship,* 363 N.C. at 525, 681 S.E.2d at 765; *Northampton Cnty.*, 326 N.C. at 747, 392 S.E.2d at 356 ("The right to vote on equal terms is a fundamental right."). Judge Griffin's protest includes no voters who voted *on election day*. Inevitably tens of thousands of North Carolinians voted in this race on election day had the very same issue with their registrations. Throwing out the votes of those who voted early or absentee just because that data was available to

Judge Griffin, while ignoring the votes of those who voted on election day (and whose ballots are not retrievable) would present an equal protection problem. This is a separate and independent basis for rejecting this protest all on its own.

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

CONCLUSION

The Court should affirm the Superior Court's orders on appeal.

Respectfully submitted, this the 27th day of February, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Intervenor-Respondent-Appellee certifies that the foregoing brief, which is prepared using a 12-point proportionally spaced font with serifs, is fewer than 17,500 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document as well as the accompanying Appendix and Addendum were electronically filed and served by email, addressed as follows:

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