No. 320P24-3 DISTRICT 10

SUPREME COURT OF NORTH CAROLINA

****

JEFFERSON GRIFFIN,

Petitioner-Appellee,

v.

NORTH CAROLINA BOARD OF ELECTIONS,

Respondent-Appellant,

and

ALLISON RIGGS,

Intervenor-Appellant.

From the Court of Appeals
No. 25-181

From Wake County
Nos. 24CV040619-910,
24CV040620-910,
24CV040622-910

****

JEFFERSON GRIFFIN'S OPPOSITION TO PETITIONS FOR DISCRETIONARY REVIEW AND WRITS OF SUPERSEDEAS

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The pending petitions should all be denied. Five months ago, Judge Griffin filed election protests that identified straightforward violations of election law by the State Board of Elections. The Court of Appeals conducted a thorough and careful analysis of those clear-cut claims.

But given the simple nature of the protests' merits, this case has primarily presented a remedial question. Since the Board's misconduct changed the outcome of the race, Judge Griffin asked that the illegal ballots be discounted. The Petitioners opposed any discounting of the illegal ballots, saying it was unfair to the affected voters. The Court of Appeals took a middle approach. It ordered a cure process for the two categories of protests for which a cure was possible. This cure process ensures that only legal votes are counted while also defusing Petitioners' objections.

Judge Griffin respects the remedial decision of the Court of Appeals and isn't challenging it. This litigation has drawn on long enough. The cure process, rather than more courthouse battles, is the pathway for restoring integrity in this election. It is now time to bring the litigation to a close and let the cure process run its course.

Alternatively, if this Court is inclined to grant discretionary review of any of Petitioners' issues, it should narrowly limit review to the merits of the three protests. Many of the Petitioners' other proposed issues are clearly unpreserved. And Petitioners don't even explain why some of their other proposed issues meet the criteria for discretionary review. Plus, if the Court does grant review, it should also review the federal defenses that Petitioners originally raised but have, ever since, tried to shelter from state-court review.

REASONS WHY DISCRETIONARY REVIEW SHOULD BE DENIED

I. Discretionary Review Is Inappropriate Under Section 7A-31.

Discretionary review of this case is not warranted. First, the case does not meet the heightened statutory requirement for review of interlocutory decisions. Second, the decision below faithfully applies this Court's precedent.

A. Review of this interlocutory decision will cause further delay.

Ordinarily, this Court may grant a petition for discretionary review to answer an important issue, even if the Court believes that the opinion below is correct. But that ordinary course does not apply in this case.

The opinion by the Court of Appeals was an interlocutory determination because it remanded the matter to the State Board for other proceedings in the form of the cure process. Under the statute creating this Court's discretionary-review jurisdiction, the General Assembly limits this Court's jurisdiction in cases like this one. Section 7A-31 provides, "Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm." N.C. Gen. Stat. § 7A-31(c) (flush text).

That standard is not met in this case. Indeed, Petitioners ignored this standard and offered no argument as to how they meet it. Discretionary review will not avoid delay but rather prolong it. Judge Griffin filed his election protests five months ago. It took that long for him to get meaningful judicial review. And as three members of this Court explained three months ago, the delay in this case has been caused by the State Board. *Griffin v. N.C. Bd. of Elections*, 910 S.E.2d 348, 351 (N.C. 2025) (Newby, C.J., concurring, joined by Berger and Barringer, JJ.) ("Moreover, any delay in the resolution of petitioner's election protests was caused by the State Board.").

But more delay is to come. Petitioners have already asserted their purported *England* reservations, hoping to preserve their federal defenses for review by the federal courts. Their *England* preservations forecast that, if this Court sides with Judge Griffin, Petitioners will ask the federal courts to overturn this Court's judgment. Because the opinion below is correct, and review by the Court might only prolong this already protracted litigation (with more federal litigation on the horizon), the Court should deny the petitions under section 7A-31(c).

B. The decision below faithfully applies this Court's precedent.

Petitioners each argue that the opinion below conflicts with this Court's precedent. Yet they can't fully agree with each other on which set of precedents creates the conflict—which undermines their claims that such conflicts exist.

First, Justice Riggs makes the surprising claim that the decision conflicts with *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). Recall that, in *James*, this Court threw out over 11,000 ballots illegally cast by voters outside of their precincts. *Id.* at 263 n.2, 266, 607 S.E.2d at 640 n.2, 642. Although these voters had simply followed the instructions of the State Board, this Court said it could not "allow our reluctance to order the discounting of ballots to cause us to shirk our responsibility to 'say what the law is.'" *Id.* at 270, 607 S.E.2d at 644 (quoting *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803)).

The State Board does not contend that the holding below conflicts with *James*. The State Board seemingly recognizes that the Court of Appeals' remedy—a cure process that ensures only lawful votes are counted—is consistent with *James*, which held that unlawful votes cannot be counted. Moreover, if the decision below somehow conflicted with *James*, it is Judge Griffin who would be harmed by it, because Judge Griffin sought the discounting remedy ordered by *James*. But Judge Griffin does not challenge the cure process ordered by the Court of Appeals, so there is no basis for discretionary review.

Second, the State Board, for its part, argues that the opinion below conflicts with *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007). Bd. PDR at 2,

13-14. The *Pender County* argument is doubly unpreserved, as explained below. *See infra* § II.A. But there's also no conflict with precedent.

Pender County is, at best, a routine application of *Purcell* because it was an injunction that was stayed to prevent disruption of an *upcoming* election. The plaintiffs sought to enjoin use of a House district, whose boundaries were drawn in violation of the state constitution. *Pender Cnty.*, 361 N.C. at 495, 649 S.E.2d at 367; Printed Record on Appeal at 8, *Pender Cnty.*, 361 N.C. 491 (No. 103A06), https://www.ncappellatecourts.org/show-file.php?document_id=65479. The trial court rejected the claim. *Pender Cnty.*, 361 N.C. at 497, 649 S.E.2d at 368. This Court reversed, finding a constitutional violation, and ordered that maps be redrawn. *Id.* at 510, 649 S.E.2d at 376. The Court also ordered that its injunction be stayed until after the 2008 general election to "minimize disruption to the *ongoing election cycle*." *Id.* (emphasis added).

Pender County is how *Purcell* typically works. When some election procedure is illegal, a court must decide whether to stay otherwise valid injunction relief to avoid disruption of an imminent election. But that does not speak to this case. There is no "ongoing election cycle" that could be disrupted. And, unlike *James*, *Pender County* was not even an election-protest case. Even law professors that disliked the majority opinion below have criticized Judge Hampson's reliance on *Purcell*. *See, e.g.*,

Richard Pildes, Election Law Blog (Apr. 6, 2025), https://electionlaw-blog.org/?p=149341 ("But [the dissent] frames these interests in terms of the *Purcell* doctrine. *Purcell*, though, applies to late in the day pre-election changes and is a rule of federal judicial practice, not one of constitutional law."). Applying *Purcell* after an election would be an unfortunate category error. No court in the nation has applied *Purcell* after an election is over. *See, e.g.*, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244-45 (6th Cir. 2011) ("Because this election has already occurred, we need not worry that conflicting court orders will generate 'voter confusion and consequent incentive[s] to remain away from the polls.'" (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006))).

What's more, to apply *Purcell* to an election-protest remedy, filed after an election, would invalidate the election-protest statutes. By statute, the deadlines for filing an election protest are *post*-election, based on the date of county canvassing. N.C. Gen. Stat. § 163-182.9(b)(4)(a)-(c). There are no *pre*-election deadlines for filing an election protest. In fact, an election protest that's filed before election day is automatically stayed and ordinarily cannot be heard at all by an election board "until after election day." *Id.* § 163-182.9(b)(4)(d).

The only member of this Court that has suggested that *Purcell* or *Pender County* might apply to this case is Justice Dietz, during the prohibition proceedings.

But even Justice Dietz should agree that there is no conflict with this Court's precedents here. Justice Dietz acknowledged that "this Court has never recognized the version of *Purcell*" (and *Pender County*) for which he advocated. *Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring).

Third, Petitioners both contend that the Court of Appeals' ruling conflicts with decisions from this Court that purportedly "held that it is unlawful to discount votes in circumstances here—where a candidate claims that election officials made errors in registering voters during the registration process." Bd. PDR at 14; *see* Riggs PDR at 9-10.

But Petitioners overstate the holdings in this Court's older precedents. In each of the cases cited by Petitioners, *see id.*, the Court reasoned that, because registrars had a duty to issue oaths (while voters had no obligation to take an oath), a *registrar's failure* of his *personal* duty could not result in a voter being disqualified. *See, e.g.*, *State v. Lattimore*, 120 N.C. 426, 26 S.E. 638, 639-40 (1897); *Overton v. Mayor & City Comm'rs of City of Hendersonville*, 253 N.C. 306, 315, 116 S.E.2d 808, 815 (1960); *Woodall v. W. Wake Highway Comm'n*, 176 N.C. 377, 97 S.E. 226, 232 (1918). Here, the protests concern the *registration applicants' failure* to comply with their duty to provide information necessary to be lawfully registered.

Plus, the General Assembly changed the law in 2001, when it enacted the election-protest statutes, which authorizes a protestor to challenge an election's result if an election-law violation has "affected the outcome of the election." N.C. Gen. Stat. § 163-189.10(d)(2)(d), (d)(2)(e); *see* N.C. Sess. Law 2001-398, § 3. The statutes make clear that such challenges are raised *after* the election. N.C. Gen. Stat. § 163-189.9(b)(4)(c). To the extent the Court previously held that a vote could not be discounted due to an official's failure to comply with the registration laws, the legislature upended this holding by enacting a post-election process that allows for challenging such illegal votes. *See, e.g.*, *Bouvier v. Porter*, 386 N.C. 1, 4 n.2, 900 S.E.2d 838, 843 n.2 (2024) (explaining that an election protest can be used to challenge votes cast be people who are "not legally registered to vote").

Indeed, four years after the enactment of the election-protest statutes, this Court disqualified thousands of voters who unlawfully voted at the instruction of election officials. *James*, 359 N.C. at 270, 607 S.E.2d at 644. The Court of Appeals appropriately cited *James* for its conclusion that the ballots of unlawfully registered voters could not be the deciding votes in a close election. Slip op. at 25.

Petitioners' reliance on *Lattimore* and its progeny also overlooks that the Court of Appeals ordered a cure process. Under the cure process, a vote will be discounted only if the voter, after receiving notice, fails to comply with the voter's duty

to provide the necessary information. The cure process eliminates Petitioners' objection that votes could be discounted based on an election official's error.

II. If This Court Grants Discretionary Review, It Should Limit the Scope of the Review.

If this Court is inclined to accept this case for discretionary review, it should limit its review to just the merits of the three election protests. Those are proposed issues 4, 5, and 6 in the Board's petition, and issues 3, 4, 5, and 6 in Justice Riggs' petition.

A. The Court should reject review of unpreserved issues.

Several of the issues proposed by the Petitioners are unpreserved and meritless.

Petitioners' preservation problems begin with a misunderstanding of judicial review of agency action. In *Godfrey v. Zoning Board of Adjustment of Union County*, this Court held that a reviewing court must judge an agency's decision "solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." 317 N.C. 51, 63-64, 344 S.E.2d 272, 279-80 (1986) (cleaned up). In other words, a court can't affirm on alternative grounds.

Godfrey's origin is the federal *Chenery* doctrine, which *Godfrey* cited. *Id.* at 64, 344 S.E.2d at 280. In *SEC v. Chenery Corp.*, the Supreme Court announced a core

tenet of administrative law: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. 80, 95 (1943). The *Chenery* and *Godfrey* doctrines "promote[] agency accountability" by ensuring that the agency puts all its cards on the table when it acts. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). They ensure that the "reasons given" for agency action "are not simply convenient litigating positions." *Id.* (cleaned up). Were the rule otherwise, agencies would "upset the orderly functioning" of judicial review by "forcing both litigants and courts to chase a moving target." *Id.* (cleaned up).

Petitioners' primary proposed issue—which they alternatively call *Purcell* and *Pender County*, and sometimes laches—is foreclosed by the *Godfrey* doctrine. The State Board decision never mentioned *Purcell*, *Pender County*, laches, or any other issue with timeliness. (R pp 9-48.) That's no surprise because no one argued these issues in the agency proceedings. The first time *Purcell* was ever mentioned with this case was in Justice Dietz's separate opinion from the 7 January 2025 amended order granting a temporary stay. By that time, Judge Griffin had already appealed from the State Board's final decision.

In addition, the *Purcell* argument is meritless. As explained, Petitioners are mistaken in believing that *Purcell* and *Pender County* are relevant to a post-election protest proceeding.

Justice Riggs, for her part, argues that the Court of Appeals' ruling violates the equal protection clause. But equal protection issues were not ruled on by the State Board, or even argued to the State Board. These issues are barred by *Godfrey* too. (*See* R pp 9-48 (showing Board decision does not address these issues).)

Justice Riggs is also mistaken to assert that the cure remedy violates a voter's equal protection rights. *See* Riggs PDR at 12 (Issues 7, 8, 9). As a threshold matter, only the *state's* classification of persons can violate equal protection rights—a classification drawn by a private actor cannot. *See Bailey v. Flue Cured Tobacco Co-op. Stabilization Corp.*, 158 N.C. App. 449, 456, 581 S.E.2d 811, 816 (2003) (state constitution restrains only state action); *see also NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (federal constitution restrains only state action). Here, the Court of Appeals was adjudicating protests filed by a private citizen; any classifications drawn by the protests were not created by the state.

But even if a private citizen could violate the equal protection clause, the mere fact that the protests challenged some, but not all, unlawful voters does not create an equal protection violation. "One who violates a law, valid upon its face, does not

bring himself within the protection of [the equal protection clause] merely by showing that numerous other persons have also violated the law and have not been" similarly challenged. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 661, 178 S.E.2d 382, 386 (1971). Rather, to prove an equal protection violation, one must show "the state *intended* to discriminate" in enforcing the laws. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 819 (4th Cir. 1995) (emphasis in original); *see S.S. Kresge Co.*, 277 N.C. at 662, 178 S.E.2d at 386. Thus, the mere fact that the protests identify some unlawful voters, but not all, does not constitute an equal protection violation. And Justice Riggs does not—and cannot—allege that the state intentionally discriminated against anybody.

B. The Court should also reject review of the notice issue.

Both the State Board and Justice Riggs object that the Court of Appeals erred in reversing the State Board's dismissal of the protests due to service defects. *See* Br. PDR at 15 (Issue 3); Riggs PDR at 10 (Issue 1). Petitioners do not, however, offer any legal analysis or argument explaining how the Court of Appeals committed legal error on this issue.

This Court's review of this issue is especially unnecessary when the Court of Appeals' analysis is so obviously correct. The court easily concluded that the plain language of section 163-182.10(b) requires the boards to provide voters with notice

and a copy of the protest. Slip op. at 13–14. Thus, the State Board could not offload the notice-burden on protestors such as Judge Griffin. *See id.* The court also correctly recognized that the statutory obligation to provide notice does not arise until an evidentiary hearing has been scheduled, which has not happened. *Id.* at 14-15.

In addition, the court reasoned that Judge Griffin, despite not having an actual obligation to serve the protests, had sufficiently complied with the Board's demands. The court explained that, because the State Board itself uses postcards and QR codes in providing notice to North Carolinians, the Board's criticism of Judge Griffin for using similar means was tantamount to "throwing stones while still sitting inside a glass house." *Id.* at 15-16.

The Court of Appeals' straightforward interpretation of a clearly worded statute (and observation of the State Board's double standard) is not an issue requiring further review by this Court. Moreover, the service issue is now moot. The Court of Appeals ordered the State Board to implement a cure process for voters identified in the protests as having incomplete registrations or failing to provide photo identification, and this cure process begins with the State Board *providing notice* to affected voters. Judge Griffin's efforts to comply with the Board's (unlawful) service demand are irrelevant. Even if notice was lacking, the Board will cure it on remand.

C. The Court should reject review of issues that Petitioners have not even explained.

Petitioners have listed numerous issues in their discretionary review petitions but have failed to provide substantive arguments explaining why many of these issues merit this Court's attention. A case can be important without every issue in the case being important. Besides the notice issue, Petitioners did not explain why several of their issues warrant this Court's intervention. Their arguments are not fit for further review.

Petitioners object that the cure process is "fundamentally unfair" because it invalidates votes retroactively. Bd. PDR at 15 (Issue 2); *see id.* at 12 ("[T]he Court of Appeals decision allows votes to be discounted that were cast in compliance with the rules at the time of the election."). As Justice Riggs puts it, the cure process is unconstitutional because it "threatens mass disenfranchisement of more than 60,000 eligible voters." Riggs PDR at 2; *see id.* at 12 (Issue 9). Petitioners' objections are easily exposed as hyperbole.

Simply put, there's nothing unfair about a cure process. In fact, the State Board has already conceded that a cure process would be a reasonable remedy. In its response brief filed with the Court of Appeals, the Board argued that any remedy must "provide challenged voters an opportunity to address any deficiencies that the Court identifies before their votes are discarded." Resp. Br. of Respondent-Appellee

State Bd. at 80. That is exactly what the ordered cure process does: voters are notified of the defect and given an opportunity to cure; and only those voters who, after receiving notice, fail to cure the defect will have their votes discounted. *See* slip op. at 34-36.

Notably, Petitioners offer no argument explaining their claims of unfairness and disenfranchisement. That is because a voter cannot be disenfranchised by receiving notice of a voting requirement and being given an opportunity to comply with it. Indeed, in Petitioners' eyes, the cure processes already embedded in our election statutes have apparently been disenfranchising voters for years. For instance, section 163-82.4(f) says that someone applying to vote, if she fails to provide her drivers license or social security number, can still vote provisionally; but she must be notified of the defect and, unless she timely provides the information, her vote cannot be counted. N.C. Gen. Stat. § 163-82.4(f). Likewise, section 163-230.1(e) states that, if an absentee voter fails to provide photo identification with his ballot, he will be given notice of the defect and, absent correcting it, his ballot will not be counted. *Id.* § 163-230.1(e). According to Petitioners, it is fundamentally unfair for these statutes to require voters to cure such defects after learning of them.

The Court of Appeals correctly thought otherwise. Looking at these statutes, the court recognized that the registration and photo-identification defects raised by

Judge Griffin's protests were "curable" through pre-existing processes. *See* slip op. at 35.[1] The problem is that the State Board never offered the affected voters these cure processes. The court, therefore, ordered the Board to implement these cure processes now. Nobody is disenfranchised by a cure process—whether the process is set forth in the General Statutes (and followed by the State Board in the first place) or is later ordered by a court (because the Board failed to follow it in the first place).

The Board's final proposed issue asks whether the Court of Appeals violated a "statutorily required evidentiary-hearing stage." Bd. PDR at 15 (proposed issue 7). The Board nowhere explains what this issue means. This was never briefed to the Court of Appeals or raised at any other point in this proceeding. Contrary to the Board's claim about an evidentiary-hearing stage, the Court of Appeals did all that was necessary: it resolved the legal merits of each protest, and then directed the State Board to identify each voter who cast a ballot in violation of state law. There was no evidentiary hearing needed to resolve the purely legal issues before the Court of

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1 In *James*, the Court ordered the State Board to discount votes that were cast out-of-precinct, in violation of the law. 359 N.C. at 270, 607 S.E.2d at 644. Notably, voting in the wrong precinct does not appear to be a "curable" voting defect. Therefore, the Court in *James* seemed to lack a basis for ordering a cure process that might have allowed the voters, who were misguided by election officials, to cure their defective ballots. Consequently, recognizing that counting these illegal votes would dilute the votes of lawful voters, the Court expressed its "reluctance" in having to order the illegal votes to be discounted. *Id.*

Appeals. Indeed, the Board itself has always agreed that this case presents purely legal questions. (*See* R p 12 (explaining that the protests "presented legal questions of statewide significance").) The Board's brief to the Court of Appeals conceded that the case involves only questions of law subject to de novo review. Resp. Br. of Respondent-Appellee State Bd. at 21. Justice Riggs apparently sees no merit in the issue either, since she did not seek review of this issue.

III. The Supersedeas Petitions Should Be Denied.

Because discretionary review is not appropriate, this Court should also deny supersedeas relief.

CONDITIONAL ISSUES FOR REVIEW

Judge Griffin requests that this Court deny discretionary review. However, if the Court is inclined to grant review, then, under Appellate Rule 15(d), Judge Griffin proposes that the Court also review the following issues:

(1) Whether Petitioners failed to make an effective *England* reservation, or waived their right to make an *England* reservation.

(2) Whether this Court should otherwise exercise the jurisdiction that it already has over the entirety of the issues in this case, including all federal defenses raised below.

(3) Whether the *Godfrey* doctrine bars Petitioners from seeking affirmance on alternative grounds not stated in the State Board's decision.

(4) Whether the State Board erred in ruling that Judge Griffin's election protests did not comport with procedural due process under the federal constitution.

(5) Whether the State Board erred in ruling that the Help America Vote Act and the National Voter Registration Act preempt Judge Griffin's election protests.

(6) Whether the State Board erred in ruling that federal law preempts North Carolina law on the question of photo identification for overseas voters.

(7) Whether the federal Civil Rights Act bars the election protests, as Justice Riggs argued to the State Board.

(8) Whether the federal Voting Rights Act bars the election protests, as Justice Riggs argued to the State Board.

(9) Whether the remedy ordered by the Court of Appeals is barred by the federal or state constitutions.

CONCLUSION

Judge Griffin respectfully requests that the Court deny the petitions for discretionary review and petitions for writs of supersedeas.

This the 11th day of April, 2025.

Electronically submitted
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CERTIFICATE OF SERVICE

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This the 11th day of April, 2025.

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