NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 24CV040619-910

JEFFERSON GRIFFIN,

Petitioner,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Respondent.

PETITIONER'S BRIEF

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INTRODUCTION

The State Board is an administrative agency that has broken the law for decades, while refusing to correct its errors. This lawlessness was brought to the Board's attention back in 2023 and again in 2024, both before the 2024 general election, but the Board refused to follow the law. Now those chickens have come home to roost. In the 2024 general election, the Board's errors changed the outcome of the election for the open seat on the North Carolina Supreme Court. When those errors were raised again in valid election protests, the Board then claimed that it was too late to fix its law-breaking.

At bottom, this case presents a fundamental question: who decides our election laws? Is it the people and their elected representatives, or the unelected bureaucrats sitting on the State Board of Elections? If the Board gets its way, then it is the real sovereign here. It can ignore the election statutes and constitutional provisions, while administering an election however it wants.

Judge Griffin, currently a judge of the North Carolina Court of Appeals and candidate for Seat 6 on the Supreme Court of North Carolina, seeks to restore the supremacy of the democratic process and the preeminence of the rule of law. He filed election protests across all North Carolina counties to challenge the State Board's lawless administration of his electoral contest.

With this petition, Judge Griffin seeks judicial review of the Board's rejection of protests he filed concerning ballots cast by voters who have, by their own admission, never resided in North Carolina or anywhere else in the United States. Since 1776, our state

constitution has limited eligible voters in state races to bona fide North Carolina residents. *See Bouvier v. Porter*, 386 N.C. 1, 4 n.2, 900 S.E.2d 838, 843 n.2 (2024) ("Certain categories of individuals are also categorically ineligible to vote, such as . . . nonresidents . . . ."). But ballots were accepted in the Supreme Court race from people who were born outside the United States and have never lived *anywhere* in the United States. Counting the votes of these "Never Residents" was illegal.

In response to Judge Griffin's protests, the State Board and the opposing candidate, Justice Allison Riggs, have claimed that Judge Griffin is seeking a retroactive change in the election laws. That flatly mischaracterizes the timeline. For instance, our state constitution has imposed a residency requirement since 1776. The laws that *should* have governed this election were, therefore, established long before this election. The State Board simply chose to break the law.

But the State Board of Elections is no super-legislature. It doesn't get to make up its own rules, disregard state statutes, or rewrite the state constitution. Rather, the Board was required to discount votes that were cast in violation of state law. Like the Supreme Court explained twenty years ago, in an identical situation, "[t]o permit unlawful votes to be counted along with lawful ballots in contested elections effectively 'disenfranchises' those voters who cast legal ballots, at least where the counting of unlawful votes determines an election's outcome." *James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005).

STATEMENT OF THE FACTS

On Election Day in 2024, Judge Griffin maintained a sizeable lead over Justice Riggs. However, as ballots continued to trickle in over the next week, Justice Riggs took the lead. As of today, Justice Riggs leads by 734 votes.

A. The Election Protests

On 19 November 2024, Judge Griffin filed election protests in each of North Carolina's 100 counties. In total, Judge Griffin filed six categories of election protests. Three categories have been resolved, and there is no ongoing litigation over these three categories. But Judge Griffin has filed three independent petitions for judicial review for three other categories of protests that the State Board has rejected.

For context, the three categories of election protests for which Judge Griffin seeks review are described briefly below, as well as the likely impact of each on the outcome of the election. Election protests matter when they change the outcome of an election. *Bouvier v. Porter*, 386 N.C. 1, 4, 900 S.E.2d 838, 843 (2024) (discussing N.C. Gen. Stat. § 163-182.12).

No Photo ID. It's well known that photo identification is required for all voters, both those voting absentee ballots and those voting in person. N.C. Gen. Stat. § 163-230.1(a)(4), (b)(4), (e)(3), (f1) (absentee ballots); *id.* § 163-166.16(a) (in-person voting); N.C. Const. art. VI, §§ 2(4), 3(2) (same). Yet the State Board decided not to require photo identification for absentee ballots cast by voters who live overseas. State law, however, doesn't exempt overseas voters from the photo-identification requirement.

In the Supreme Court contest, 5,509 such ballots were unlawfully cast.[1] Judge Griffin anticipates that, if these unlawful ballots are excluded, he will win the election. An example of this type of protest can be found in the Administrative Record. (A.R. pp 349-58.)

Never Residents. Our state constitution limits voters for state offices to people who actually reside in North Carolina. N.C. Const. art. VI, § 2(1); *Bouvier*, 386 N.C. at 4 n.2, 900 S.E.2d at 843 n.2 (explaining that "nonresidents" are "categorically ineligible to vote" for state offices). Nonetheless, the State Board allowed approximately 267 people to vote in the protested election who have never resided in North Carolina or anywhere else in the United States. These voters self-identified themselves as such, stating on a form "I am a U.S. citizen living outside the country, and I have never lived in the United States." Counting these ballots is unlawful. An example of this type of protest can be found in the Administrative Record. (A.R. pp 288-303.)

It is unknown whether this category of election protests will affect the outcome of the election, standing alone. As it stands, fewer than 300 Never Residents voted in the

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1 Judge Griffin filed protests challenging no-ID overseas voters in six counties in which a local election official confirmed that the county board accepted overseas ballots without requiring photo identification. Before filing the protest, counsel to Judge Griffin requested the list of such voters from these six counties. (A.R. p 3739.) After the protests were filed and consolidated by the State Board, Judge Griffin also requested that the State Board subpoena the county boards for such over lists, (A.R. pp 3682-83), but the State Board did not do so. When the protests were originally filed, only one county (Guilford) had provided a list of such voters, and this list was included with the protest filed in Guilford County. (A.R. pp 1504-51.) Since filing the protests, Durham, Forsyth, Buncombe counties have provided the lists as well, and the lists were filed as supplements to Judge Griffin's protests. (A.R. pp 3790-4042.)

election, and the current margin between the candidates is over 700 votes.[2] However, if the other election protests were to reduce the vote margin between the candidates, then it's possible that the issue of Never Resident voting could become outcome-determinative.

Incomplete Voter Registrations. Since 2004, the General Assembly has required someone registering to vote to provide his drivers license or last four digits of his social security number on his voter registration application. N.C. Sess. Law 2003-226, § 9 (codified as amended at N.C. Gen. Stat. § 163-82.4). However, until December 2023, the State Board of Elections chose not to enforce this law. And even when the Board admitted its decades of lawlessness, it refused to cure the improper registrations and would only require the

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2 Judge Griffin requested data on Never Resident voting from all counties in the state before he filed his election protests and also requested information from the counties themselves. At the time he filed his protests, Judge Griffin had received data from the State Board for a limited number of counties about Never Resident voting, and he filed protests in those counties on this issue. Those protests identified 267 Never Residents who voted in the protested election.

After filing the original protests, 35 counties responded to Judge Griffin's requests and Judge Griffin supplemented 25 protests with additional data for the additional counties that had it. That supplemental data showed 138 additional Never Residents who voted in the election. Thus, combining the voters combined in the original protests with the supplemental data, it's apparent that at least 405 Never Residents voted in the election.

However, it's unknown exactly how many Never Residents voted in the election, and whether that figure is more or less than the current vote margin in the protested election. Since the Board rejected this protest, another five counties have produced records indicating an additional 111 Never Residents who voted in the election, bringing the total 516. At this time, 60 counties have still not responded to public records requests on how many Never Residents voted in the election. It's possible that this irregularity changed the outcome of the election, but because most counties have failed to respond to public records requests, it is not certain whether this irregularity, standing alone, is outcome-determinative.

information from new registrants. In the race for Seat 6 of the Supreme Court, over 60,000 people cast ballots, even though they had never provided the statutorily required information to become lawful voter registrants. Under state law, unless someone is lawfully registered to vote, he cannot vote. N.C. Const. art. VI, § 3(1); N.C. Gen. Stat. § 163-82.1(a).

A sample of the protest for incomplete voter registrations can be found in the Administrative Record. (A.R. pp 304-48.) Judge Griffin anticipates that, if these unlawful ballots are excluded, then he will have won the contest.

B. Further Proceedings

After Judge Griffin filed his protests, the State Board took over jurisdiction from the county boards for the three categories of protests just described. (A.R. p 5366.)

The parties filed briefs, then the State Board heard arguments on the protests on 11 December 2024. On 13 December 2024, the Board emailed and mailed the parties a copy of its final decision on these categories of protests. (A.R. pp 5368-410). This decision consolidated the Board's treatment of a number of the protests. The decision is a final decision as to hundreds of protests. The protests dismissed by the State Board's order are included in the Administrative Record. (A.R. pp 1-3562.)

On 18 December 2024, Judge Griffin petitioned the North Carolina Supreme Court for a writ of prohibition, along with a motion for a temporary stay. On 19 December 2024, the State Board removed the petition from the Supreme Court to federal district court. On 20 December 2024, Judge Griffin filed three notices of appeal and petitions for judicial review in this Court. Each filing encompassed one of the three categories of election protests

rejected by the Board. That same day, the Board also removed these proceedings from this Court to federal court.

In federal district court, Chief Judge Richard Myers ordered the Board to show cause why the cases should be in federal court at all. The parties then filed competing briefs on the propriety of the Board's removal of all the actions. On the evening of 6 January 2025, Judge Myers remanded all the cases back to state court, including this petition for judicial review back to this Court.

On 7 January 2025, the Supreme Court granted the motion to stay certification and requested expedited briefing on the writ of prohibition. On 22 January 2025, the Supreme Court dismissed Judge Griffin's petition for a writ of prohibition so that this Court may proceed with the petitions for judicial review filed by Judge Griffin. The Supreme Court ordered this Court "to proceed expeditiously." Order at 3, *Griffin v. State Bd. of Elections* (No. 320P24) (N.C. Jan. 22, 2025), *available at* https://appellate.nccourts.org/orders.php?t=P&court=1&id=444272&pdf=1&a=0&docket=1&dev=1. The Supreme Court also stayed certification of the election while this Court acts, and until "any appeals from [this Court's] rulings have been exhausted." *Id.*

The Board filed the administrative record on 24 January 2025.

ARGUMENT

The State Board intends to count unlawful ballots and thereby change the outcome of the election.

To start, this case is not the first of its kind. Twenty years ago, election officials instructed certain voters to vote in a manner that was illegal. The election-law violation was raised in election protests that were ultimately brought before the North Carolina Supreme Court. In that case, *James v. Bartlett*, a unanimous Supreme Court held that the State Board had violated the election laws and, in doing so, altered the outcome of the election. The Supreme Court ordered the illegal votes to be discounted.

Next, the merits of the protests challenging ballots cast by individuals who have never resided in North Carolina are addressed, as well as the errors committed by the State Board. All the issues presented in this petition are questions of law that are reviewed de novo. *See, e.g.*, *Appeal of Ramseur*, 120 N.C. App. 521, 523-24, 463 S.E.2d 254, 256 (1995). As the State Board agreed, these protests present "legal questions of statewide significance." (A.R. p 5371.)

After addressing the merits, the brief addresses the State Board's attempt to dismiss the protests, on alternative grounds, for procedural defaults. But the Board had no justification for trying to disqualify Judge Griffin from challenging the election results. Judge Griffin's protests complied with all the relevant procedural requirements.

Next, Justice Riggs raised federal laws that, she has argued, require the State Board to count illegal ballots and declare her the winner of this race. But federal law has nothing to say about the issues in Judge Griffin's protests. It's why Judge Myers sent the removed cases back to state court.

Finally, the State Board reasoned in its order that, under the Fourteenth Amendment, it is too late to correct the legal defects in this election. As explained below, it is not too late to demand that elections law be followed.

I. The Posture of This Case Is No Different Than *James v. Bartlett*.

This case is not the first time that an election protest has caught the State Board breaking the law and counting unlawful ballots. The last time this happened, the Supreme Court ordered the State Board to exclude 11,310 ballots cast unlawfully.

In 2004, the general election resulted in two disputed electoral contests, a council of state race and a county commissioner race. *James v. Bartlett*, 359 N.C. 260, 262, 607 S.E.2d 638, 639 (2005). In total, there were three separate actions, all challenging the same error by the State Board of Elections. *Id.* at 262-63, 607 S.E.2d at 639-40. The first two actions were election protests filed by the Republican candidates, which the State Board of Elections rejected. *Id.* at 262 n.2, 607 S.E.2d at 639 n.2. That action was then appealed to Wake County superior court. *Id.* The third action was a declaratory judgment action filed by the Republican candidates, also in Wake County superior court, which was consolidated and heard in that court with the election protests. *Id.* The superior court rejected all the actions, and an appeal quickly arrived at the Supreme Court. *Id.*

On the merits, the challenges all focused on one legal question: "whether a provisional ballot cast on election day at a precinct other than the voter's correct precinct of residence may be lawfully counted in final election tallies." *Id.* at 263, 607 S.E.2d at 640. The Republican candidates argued that the State Board's allowance of out-of-precinct

voting violated the state constitution, so these unlawful ballots had to be excluded. *Id.* at 263 n.2, 266, 607 S.E.2d at 640 n.2, 642. The challenge affected 11,310 ballots cast by voters outside of their precincts. *Id.* at 263, 607 S.E.2d at 640.

In response to these challenges, the State Board leveled numerous accusations against the Republican candidates. The Board accused the Republican candidates of trying to change the rules after an election: "Plainly, plaintiffs are seeking to change the rules for an election that has already been conducted. Candidates and voters have already relied on the statutes of the General Assembly as implemented by the State Board. . . . This would in essence cause the retroactive disqualification of thousands of voters whose ballots were partially or wholly counted by the county boards of elections . . . ." Br. for Defs.-Appellees at 41-42, *James*, 359 N.C. 260 (No. 602PA04-2), *available at* https://www.ncappellate-courts.org/show-file.php?document_id=93938. The Board argued that the election challenges should have been "brought before the November election." *Id.* at 43.

The 2004 general election was not the first time that the State Board had counted out-of-precinct votes. As the Board argued, it had also counted out-of-precinct ballots two times before the general election, in the first and second primary elections of 2004, in which the protesting-candidates had also run for election. *Id.* at 5, 41, 45. The Board argued that out-of-precinct ballots "were in fact cast and counted in the primary held on July 20, 2004, and in the second primary held on August 17, 2004. [The protestors], all of whom were candidates in this year's elections and all of whom were elected officials, had no excuse for

not knowing until November 15, 2004, that out-of-precinct provisional ballots might be cast and counted." *Id.* at 45.

The Board concluded its brief with this assertion: "[The protestors] should not be allowed to change the rules for the election after the election is over, thereby causing thousands of ballots—all of which were cast by voters in reliance on the representations of elections officials—to be thrown out. Plaintiffs' failure to press their claims in a timely manner forecloses the relief plaintiffs seek—to alter the rules of and amend the official returns of the election." *Id.* at 46. In other words, the Board argued, the election rules existing at the time of the election permitted out-of-precinct voting. *See id.*

The Board directed its argument about timeliness at the protestors' declaratory judgment action. Br. for Defs.-Appellees at 41, *James*, 359 N.C. 260 (No. 602PA04-2), *available at* https://www.ncappellatecourts.org/show-file.php?document_id=93938. Indeed, that was the heading of the argument: "Plaintiffs failed to bring their declaratory judgment action in a timely manner." *Id.* Notably, the Board never accused the protestors of filing their election protests too late, since the protestors complied with the deadline in the election-protest statute.

The Board further argued that it would be unfair, and a due process violation, for these ballots to be excluded, since the Board had told these voters that they could vote out of precinct: "It would be grossly unfair to those voters to allow them to cast their ballots under one set of rules, and then to subtract their votes after the election under a new set of rules—all without notice to the affected voters." *Id.* at 42. Last, the Board argued that,

before the election, it had issued an administrative rule that allowed out-of-precinct voting, so no one could challenge the Board's counting of these ballots after the election. *Id.* at 45.

Federal law was also put into play. A group of amici curiae argued that the Republican candidates' argument, if accepted, would violate the federal Voting Rights Act, since a disproportionate number of out-of-precinct votes were cast by racial minorities. Br. of Amici Curiae in Support of Defs. at 20-27, *James*, 359 N.C. 260 (No. 602PA04-2), *available at* https://www.ncappellatecourts.org/show-file.php?document_id=93940.

The Supreme Court rejected all these arguments and ordered the State Board to exclude the out-of-precinct ballots from the vote tallies. As to the constitutionality of out-of-precinct voting, the Court avoided the question by interpreting existing state statutes to forbid out-of-precinct voting. *James*, 359 N.C. at 266-69, 607 S.E.2d at 642-44. Thus, the Court concluded, "the State Board of Elections improperly counted provisional ballots cast outside voters' precincts of residence on election day in the 2004 general election." *Id.* at 269, 607 S.E.2d at 644.

That left only the remedial question, which the Supreme Court forcefully answered. Although the Court thought it was "unfortunate that the statutorily unauthorized actions of the State Board of Elections denied thousands of citizens the right to vote on election day," these unlawful ballots had to be excluded. *Id.* Indeed, it would have been unconstitutional for the Court to count unlawful ballots with lawful ballots: "To permit unlawful votes to be counted along with lawful ballots in contested elections effectively 'disenfranchises' those voters who cast legal ballots, at least where the counting of unlawful votes determines

an election's outcome." *Id.* at 270, 607 S.E.2d at 644. The unanimous justices explained that "we cannot allow our reluctance to order the discounting of ballots to cause us to shirk our responsibility to 'say what the law is.'" *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

The case before this Court is no different. This case comes to the Court in the same posture as *James*. Judge Griffin is following the statutory procedure to have his election protests resolved in the way that the General Assembly has asked. The State Board is making the same procedural arguments rejected by *James*. And on the merits, the Board's arguments fail. Because the Board's legal violations have likely changed the election's outcome, the remedy is to "order the discounting of ballots." *Id.*

II. The Boards of Election Cannot Count the Votes of People Who Have Never Lived Here.

Although United States citizenship may be a birthright, the right to vote in North Carolina elections for state offices is not. Instead, it is a right granted only to those who reside here. Our state constitution restricts voting rights to people who reside in North Carolina "to preserve the basic conception of a political community." *Lloyd*, 296 N.C. at 449, 251 S.E.2d at 864. That is why, just months ago, the Supreme Court confirmed that "nonresidents" are "categorically ineligible to vote" for state offices. *Bouvier*, 386 N.C. at 4 n.2, 900 S.E.2d at 843 n.2.

Yet people voted in the 2024 general election who, by their own admission, were born overseas and have never resided in North Carolina or anywhere else in the United

States. These overseas voters are United States citizens, but they aren't residents of North Carolina who can vote for state contests. It's unlawful to count the votes of these Never Residents.

Although the merits of this protest are straightforward, the State Board does not believe that this Court has jurisdiction to consider the protest. The Board insists that the protest is a facial constitutional challenge that may only be heard by a three-judge panel.

A. The Board believes this protest must be transferred to a three-judge panel.

In the prohibition proceeding before the Supreme Court, the State Board's *primary* argument about this protest was jurisdictional. It argued that the protest could only be heard and decided by three-judge panel because it's a facial challenge to a state statute.

The State Board argued that the Supreme Court itself lacked jurisdiction over the petition for a writ of prohibition, as to Never Residents, because the issue had to be decided first by a three-judge panel. After calling the protest "a classical constitutional challenge," the Board made this strenuous argument:

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

Br. of Respondent at 92, *Griffin* (No. 320P24), *available at* https://www.ncappellate-courts.org/show-file.php?document_id=367951.

Moreover, the Board's position before the Supreme Court would seem to require the addition of the Speaker of the House of Representatives and the President Pro Tempore of the Senate as necessary parties. *See* N.C. Gen. Stat. § 120-32.6(b).

When the parties discussed a scheduling order for this matter, Judge Griffin's counsel invited the Board to explain when it would be seeking the three-judge panel that it had insisted on just three days earlier. The Board stated in response, "The State Board does not plan to seek a 3JP at this time in 24CV040919-910."

As this is a threshold question, the Board should explain its change in position to this Court.

B. The state constitution forbids counting the votes of Never Residents.

The North Carolina Constitution defines the political community for purposes of voting in our elections. No one can vote in a state election unless they meet the "qualifications" in article VI of the constitution. N.C. Const. art. VI, § 1. The constitution then sets out the first of the qualifications in the voter residency clause. Under that clause, to vote in an election for a state office, a person must have "resided in the State of North Carolina for one year . . . next preceding an election." *Id.* § 2(1). This requirement is nothing new. In our original constitution, a person could vote for a legislator only in the county in which he "reside[d]." *See* N.C. Const. of 1776, art. VIII.

Despite the constitution's plain language, the election boards permitted people to vote in the general election who have never resided in North Carolina or anywhere else in the United States. The State Board, in response to a public records request, identified overseas voters who voted in the 2024 general election but who self-identified as having never lived in the United States. (A.R. pp 295-96 ¶¶ 10-13.) The Board identified a list of voters who, the Board explained, checked a box on a federal post card application that stated, "I am a U.S. citizen living outside the country, and I have never lived in the United States." (A.R. pp 295–96, 300 (sample FPCA).)

Someone who has never lived in the United States has never resided in North Carolina. These people, therefore, were not qualified to vote in our state elections under the voter residency clause. Yet the State Board chose to count their votes anyway. That was unlawful.

C. The residency clause is not preempted by the federal constitution.

Proponents of Never Resident voting have made a broadside attack on the state constitution itself, claiming that federal law preempts the state constitution. That is not correct.

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the U.S. Supreme Court considered whether a one-year durational residency requirement, as a prerequisite to registering to vote, violated the equal protection clause of the Fourteenth Amendment. *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972). The Court held that a one-year residency requirement was too long to comply with the equal protection clause. *Id.* at 334.

Importantly, however, the Court explained what was *not* at issue. The Court emphasized that it was not ruling on whether Tennessee could "restrict the vote to bona fide Tennessee residents." *Id.* The plaintiff-challenger was, without dispute, a Tennessee resident "when he attempted to register" to vote. *Id.* The issue, as the Court stated, was not Tennessee's bona fide residency requirement, but the durational part of the residency requirement. *Id.* It's only the durational residency requirement that penalizes someone who has recently moved into the state from elsewhere. *Id.* Indeed, the Court emphasized that its prior precedent had already established the constitutionality of "bona fide residence requirements":

> We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. But durational residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard.

Id. at 343-44 (citations and footnotes omitted).

Our Supreme Court has considered the impact of *Dunn* on the residency requirement of our own state constitution and determined that the bona fide residency requirement continues to apply. Our Supreme Court explained that *Dunn* drew a "careful distinction . . . between durational residence requirements and bona fide residence requirements." *Lloyd*, 296 N.C. at 439, 251 S.E.2d at 858. Thus, "[a]ppropriately defined and

[u]niformly applied bona fide residence requirements are permissible" under the federal constitution. *Id.* at 440, 251 S.E.2d at 859. And although those "who reside in a community and are subject to its laws must be permitted to vote there," the corollary is that those who do *not* reside in a community are not permitted to vote. *Id.* Citing *Dunn*, the Court held that "[t]he power of the state to require that voters be bona fide residents is unquestioned." *Id.*; *accord id.* at 441, 251 S.E.2d at 860 ("In both *Carrington* and *Dunn*, the Supreme Court made it clear that the states could classify persons as residents and non-residents and forbid non-residents from voting.").

The continued viability of the state constitution's bona fide residency requirement was already confirmed twice in 2024. In *Bouvier*, our Supreme Court confirmed that "non-residents" are "categorically ineligible to vote" under the residency clause of the state constitution. *Bouvier*, 386 N.C. at 4 n.2, 900 S.E.2d at 843 n.2 (citing N.C. Const. art. VI, §§ 1-2). And a federal district court held that, under *Dunn*, North Carolina can enforce a 30-day residency requirement consistent with the federal constitution. *N.C. All. for Retired Americans v. Hirsch*, No. 5:24-CV-275-D, 2024 WL 3507677, at *13 (E.D.N.C. July 19, 2024) (Dever, J.) (to be published).

As these points show, *Dunn* does not invalidate the state constitution's bona fide residency requirement.

Nor can *Dunn* operate to invalidate the residency clause in its entirety, as *Lloyd* itself demonstrated. It is not unusual for federal law to limit the applicability of electoral provisions of the state constitution. When such conflict occurs, the state constitution necessarily

defers to federal law, but our courts still require that state constitutional provisions be enforced as much as federal law will permit.

Consider, for example, the "whole county" provisions of the state constitution. *See* N.C. Const. art. II, § 3(3), 5(3). Under these redistricting provisions, "[n]o county shall be divided in the formation of" a senate or representative district. *Id.* But the "one-person-one-vote" principles of the federal constitution require population equality among legislative districts. *Stephenson v. Bartlett*, 355 N.C. 354, 363, 562 S.E.2d 377, 384 (2002). In *Stephenson*, the State Board argued that this federal law rendered the whole county provisions totally unenforceable. *Id.* at 369, 562 S.E.2d at 388.

Our Supreme Court disagreed. Rather than seek to render state constitutional provisions totally preempted by federal law, "North Carolina courts should make every effort" to reconcile state and federal law and avoid "strik[ing] State provisions as wholly unenforceable." *Id.* at 370, 562 S.E.2d at 389. Although "an inflexible application of the [whole county provisions] is no longer attainable," those provisions must still be applied where they serve "beneficial purposes" not inconsistent with federal law. *Id.* at 371, 562 S.E.2d at 389. The *Stephenson* Court then found the state legislative districts unconstitutional because they failed to conform to the whole county provisions "to the maximum extent possible." *Id.* at 374-75, 562 S.E.2d at 391-92.

The same is true of *Dunn* and the residency clause. It could be true that, under *Dunn*, the full *durational* portion of the residency clause cannot be enforced. But *Dunn* certainly does not stop states from enforcing a bona fide residency requirement. By its own

terms, *Dunn* validates bona fide residency requirements. 405 U.S. at 343-44. And, at a minimum, our residency clause requires a person to be a resident when they register to vote in the state or actually vote in a state election. Indeed, whether looked at as domicile or residence, a person must at a minimum prove that he has been physically present in the state before voting in our elections. *See Lloyd*, 296 N.C. at 444, 251 S.E.2d at 861 ("The requisites for domicile are legal capacity, *physical presence* and intent to acquire domicile." (emphasis added)); *accord id.* at 446, 251 S.E.2d at 862 ("[A person] resides where he has his established home, the place where he is habitually present . . . ." (quoting *Berry v. Wilcox*, 62 N.W. 249, 251 (Neb. 1895)).

The preemption analysis in *Stephenson* is controlling. That mode of analysis requires the residency clause to be enforced "to the maximum extent possible." *Stephenson*, 355 N.C. at 374, 562 S.E.2d at 391. Enforcement of that clause, in the context of this case, requires that persons be bona fide residents of North Carolina when they register to vote or vote in a state election. The voters at issue with this protest have already told the election boards that they have *never* resided in North Carolina or anywhere else in the United States. They've never been bona fide state residents. Therefore, counting the votes of these "Never Residents" violates the North Carolina Constitution.

D. If UMOVA permits these votes to be counted, it is unconstitutional as applied to these circumstances.

The State Board turned to a state statute, UMOVA, to let it count unconstitutional ballots of Never Residents. Of course, if the statute permits voting by those ineligible to

vote under the constitution, it violates the constitution. UMOVA, therefore, should not be read to conflict with the state constitution.

In 2011, the General Assembly enacted UMOVA. N.C. Sess. Law 2011-182 (enacting N.C. Gen. Stat. §§ 163-258.1 to -258.20). The bill was originally drafted by the Uniform Law Commission, which recommended its adoption among the states.

UMOVA lets a "covered voter" register to vote in various ways for elections to federal and state offices. *See* N.C. Gen. Stat. § 163-258.3 (defining elections covered by UMOVA); *id.* § 163-258.6 (setting out methods of registration). At issue here is who counts as a "covered voter." The relevant definition is provided here in full:

> (1) "Covered voter" means any of the following:
>
> a. A uniformed-service voter or an overseas voter who is registered to vote in this State.
>
> b. A uniformed-service voter defined in subdivision (7) of this section whose voting residence is in this State and who otherwise satisfies this State's voter eligibility requirements.
>
> c. An overseas voter who, before leaving the United States, was last eligible to vote in this State and, except for a State residency requirement, otherwise satisfies this State's voter eligibility requirements.
>
> d. An overseas voter who, before leaving the United States, would have been last eligible to vote in this State had the voter then been of voting age and, except for a State residency requirement, otherwise satisfies this State's voter eligibility requirements.
>
> e. An overseas voter who was born outside the United States, is not described in sub-subdivision c. or d. of this subdivision, and, except for a State residency requirement, otherwise satisfies this State's voter eligibility requirements, if:

> 1. The last place where a parent or legal guardian of the voter was, or under this Article would have been, eligible to vote before leaving the United States is within this State; and
>
> 2. The voter has not previously registered to vote in any other state.

Id. § 163-258.2(1).

Judge Griffin is challenging ballots cast by overseas voters who identified themselves as United States citizens who have never resided in the United States. Such voters could only plausibly count as UMOVA "covered voters" under subsection (1)(e).

UMOVA doesn't define the phrase "State residency requirement" that such a voter needs to comply with. The term is not defined anywhere in the Act. As it stands, the phrase is ambiguous as to whether it means a durational residency requirement or a bona fide residency requirement. If the ambiguous phrase were interpreted to mean just a durational residency requirement, it's possible that UMOVA would, at least in some circumstances, be constitutional under the residency clause, as that clause is limited by *Dunn*. But if, on the other hand, the ambiguous clause were interpreted to let someone vote who has *never* been a resident, it would be unenforceable under the bona fide residency requirement of the state constitution.

As in *James*, the canon of constitutional avoidance requires the Court to interpret N.C. Gen. Stat. § 163-258.2(1)(e) as exempting overseas voters only from a durational residency requirement, and not a bona fide residency requirement. *See James*, 359 N.C. at 266-69, 607 S.E.2d at 642-44. Only such an interpretation could save the statute from being

invalidated. "[W]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *N.C. State Bd. of Educ. v. State*, 371 N.C. 149, 160, 814 S.E.2d 54, 62 (2018) (quoting *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977)).

Below, Judge Griffin asked the Board to apply the canon of constitutional avoidance to this subsection of UMOVA. But the State Board just misconstrued that as a request to find the provision unconstitutional. (A.R. p 5396.) The State Board held that it was incompetent to hold a state statute unconstitutional. (A.R. pp 5398-99.) The Board then decided to opine on the constitutional question anyway, stating in one sentence that, if this subsubsection of UMOVA violated the state constitution, then the federal constitution's doctrine of substantive due process would reinstate the state law. (A.R. p 5399.) The theory appears to be that applying our state constitution to this election would be applying a "newly announced rule of law." (A.R. p 5392.) The Board, however, has confused the chronology. The residency requirement in the state constitution has existed and persisted since the Revolutionary War. UMOVA was enacted 235 years later. Not exactly a new rule.

Alternatively, if the Court does not believe section 163-258.2(1)(e) is reasonably susceptible to Judge Griffin's proposed interpretation, then the Court should refuse to enforce the statute as it applies to Never Residents. When "there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior

rule of law in that situation." *In re Chastain*, 909 S.E.2d 475, 482 (N.C. 2024) (Riggs, J.). And the constitution is clear: only bona fide residents can vote for state offices.

E. This argument has no impact on votes cast for federal elections, military voters, or North Carolina residents living overseas.

To be clear, Judge Griffin is not challenging the votes of military voters, nor is he challenging any vote cast for federal contests.

Judge Griffin was not a candidate for federal office. And federal statutory law, which imposes duties on states for uniformed services voters and other overseas voters, applies only to "elections for Federal office." *See* 52 U.S.C. § 20302(a). Besides, it's highly unlikely the Never Residents includes servicemembers because Never Residents were born abroad and have never lived anywhere in the United States.[3]

UMOVA also distinguishes between, on one hand, uniformed-service voters and overseas voters who have resided in this state, N.C. Gen. Stat. § 163-258.2(1)(a)-(d), and, on the other hand, overseas voters who were born abroad and have never resided in this state, *id.* § 163-258.2(1)(e). Judge Griffin has challenged the votes of this latter group ***only***.

Anyway, a servicemember who previously resided in North Carolina but is deployed overseas does not lose his North Carolina residency. Unless a servicemember leaves the state and never intends to return, he remains a resident of the state. *See Lloyd*, 296 N.C. at

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3 Because this case does not involve an election for a federal office, other provisions of the state constitution are not implicated. Article VI of the North Carolina Constitution lets the General Assembly reduce the residency requirement, but such short-term residents can only vote for president and vice president. N.C. Const. art. VI, § 2(2).

444, 251 S.E.2d at 861 (student who leaves for college becomes resident at the place of his college unless he intends to return to his former home after graduation). The servicemember remains a resident here for voting purposes so long as he has hasn't "abandoned" his home in North Carolina. *Id.* at 449, 251 S.E.2d at 864. By contrast, the Never Residents never had a home in North Carolina that they could abandon.

F. Residency isn't inheritable under the state constitution's voter qualifications.

Justice Riggs has argued that Never Residents inherit the residencies of their parents. She analogizes to the law of domiciliary for infants. Yet the analogy crumbles upon inspection because infants can't vote. N.C. Const. art. VI, § 1 (voting rights limited to those at least "18 years of age"). Unlike an infant, an 18-year-old *chooses* where he resides. If he wishes to become a member of North Carolina's political community, he must decide, as an adult, to reside in North Carolina. Otherwise, he is not a member of our political community entitled to vote in state elections. There is no such thing as "birthright residency" for purposes of voting in our state.

Inherited voting rights also make no sense when applied to the circumstances of the Never Residents. Under Justice Riggs' theory, a child's residence or domicile is the same as his parents'. But recall that the Never Residents were born abroad and have never lived in the United States. That means that the parents of the Never Residents have been abroad for all eighteen years of the Never Resident's childhood. But a person can only establish residency in a place in which they have actually lived. When the Never Resident turned 18,

his residence was where his parents had set up their international abode. Wherever that was, it wasn't in North Carolina.

By its own terms, UMOVA doesn't care whether the Never Residents' parents set up a fixed habitation somewhere abroad. Instead, it ascribes to the parent a North Carolina residency, even when the parent settled down in a foreign country eighteen years ago. *See* N.C. Gen. Stat. § 163-258.2(1)(e). Justice Riggs argues that this is constitutional because the legislature can ascribe a fictional residency to a person by statute. That is true when the residency matters for other statutory or common law purposes. But the legislature is powerless to rewrite the meaning of "residency" as it's set out in the North Carolina Constitution. The ratifiers of our constitution would not have imposed a residency requirement in our charter of government just so the legislature can override it. The word "residency" continues to carry the original public meaning that it has carried through our state's history. To suggest that the legislature could ignore this meaning or change it by statute is an affront to judicial review. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

* * *

The original public meaning of "residency" as used of voting rights in our constitution has always required the would-be voter to, at a minimum, live in North Carolina. That commonsense requirement of physical presence cannot be eliminated by statute. It is fundamental to the identity of our political community, and our constitution does not let the

General Assembly revolutionize our political community by granting voting rights to Never Residents. UMOVA doesn't do that because doing so would be unconstitutional.

If the Board counts the votes of people who have *never* been members of our political community, it will violate our state constitution. That harms not only Judge Griffin, but also the true members of our state's political community.

III. The State Board Manufactured Procedural Defects.

To reject Judge Griffin's protests, the State Board not only misconstrued North Carolina law, but also tried to disqualify the protests on procedural technicalities. It is clear, however, that Judge Griffin's protests complied with all relevant procedural requirements.

A. The protests should not have been filed as voter challenges.

The Board reasoned that it should dismiss the protests because they were untimely voter challenges. (A.R. pp 5394-96.) But the State Board had already rejected its own argument in 2016, and the Supreme Court said the same thing in 2024.

In 2016, an election protest was filed by the Pat McCrory campaign in the governor's race, challenging the eligibility of certain voters to cast ballots in that election. *Bouvier*, 386 N.C. at 5-6, 900 S.E.2d at 843-44. McCrory's opponent, Roy Cooper, argued that the protests should be dismissed because they merely challenged the eligibility of certain voters, and therefore should have been brought as voter challenges instead. *See Bouvier v. Porter*, 279 N.C. App. 528, 542, 865 S.E.2d 732, 741-42, *rev'd in part and remanded*, 386 N.C. 1, 900 S.E.2d 838 (2024); *In re Consideration of Certain Legal Questions Affecting the Authentication of the 2016 General Election* (N.C. State Bd. of Elections Nov. 28, 2016) [hereinafter

2016 Order], *available at* https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2016-11-22/Final_Order_11_28_2016.pdf.

The State Board rejected Cooper's argument. *See* 2016 Order. In an order on Cooper's request to dismiss the protests, the Board explained that an election protest "must prove the occurrence of an outcome-determinative violation of election law, irregularity, or misconduct." *Id.*, ¶ 3. Although an election protest "may not merely dispute the eligibility of a voter," an election protest may challenge a voter's eligibility if the "claims regarding the eligibility of certain voters" are presented "as evidence that an outcome-determinative violation of election law, irregularity, or misconduct has occurred." *Id.*, ¶ 5. Thus, an election board may "discount a ballot cast by an unqualified voter" if an election protest shows "that ineligible voters participated in number sufficient to change the outcome of the election." *Id.*, ¶ 7.

The McCrory election protest spun off collateral litigation that wound up at the Supreme Court as *Bouvier v. Porter*, 386 N.C. 1, 900 S.E.2d 838 (2024). One of the issues in *Bouvier* continued to be whether an election protest can challenge the eligibility of certain voters. The Court affirmed the logic of the Board's 2016 order, explaining that "an election protest may address any 'irregularity' or 'misconduct' in the election process, including the counting and tabulation of ballots cast by ineligible voters." *Id.* at 4, 900 S.E.2d at 843 (citations omitted). Such ineligible voters, who could be targeted by an election protest, include "nonresidents," who are "categorically ineligible to vote." *Id.* at 4 n.2, 900 S.E.2d

at 843 n.2. It also includes people who are not "'legally registered' to vote." *Id.* (quoting N.C. Gen. Stat. § 163-54).

The Board's final decision on Judge Griffin's protests made no effort to reconcile its reasoning with its prior 2016 order or *Bouvier*. *State ex rel. Utilities Comm'n v. Va. Elec. & Power Co.*, 381 N.C. 499, 531–32 & n.2, 873 S.E.2d 608, 629 & n.2 (2022) (Barringer, J., dissenting) (agency acts arbitrarily and capriciously when it departs from recent precedent without a reasoned explanation). It is but another example of the State Board ignoring the law and exercising power untethered to principle.

B. The Board wrongly dismissed the protests for lack of service.

Before addressing the merits of the three categories of protests, the State Board alternatively dismissed Judge Griffin's protests because he did not properly serve the protests on affected voters. The State Board's ruling is wrong because (1) the Board does not have statutory authority to impose a service obligation on protestors and (2), even if it did, Judge Griffin's service satisfied the Board's service demands.

Through rulemaking, the State Board promulgated a protest template that includes a demand that protestors "must serve copies of all filings on every person with a direct stake in the outcome of this protest." 8 N.C. Admin. Code § 02.0111 (the protest-form template). The service can be accomplished by "transmittal through U.S. Mail" and has to "occur within one (1) business day" of filing a protest. *Id.*

But there is no statutory authority for the Board to force protestors to serve copies of protests on affected parties. The State Board claims that it can compel protestors to serve

parties because the Board has the power to "prescribe forms for filing protests." (A.R. pp 5373-74 (citing N.C. Gen. Stat. § 163-182.9(c)).) But the power to merely create a "form" for a protest does not include the power to burden protestors with providing notice to affected parties.

That is especially so when the protest statutes explicitly burden someone else with the duty to provide notice to affected parties: the county boards. *See* N.C. Gen. Stat. § 163-182.10(b). The General Assembly requires county election boards to serve interested parties with copies of election protests. *Id.* The General Assembly never authorized the State Board to outsource the county boards' notice obligations to protestors and then penalize protestors for failing to do the county boards' jobs for them. The Board acted far beyond its authority in dismissing protests on service grounds.

Second, Judge Griffin nevertheless complied with the Board's service demand by mailing a postcard by U.S. First-Class Mail to over 60,000 voters at the voters' addresses of record. The postcard stated the following:

* * * NOTICE * * *

> [[First Name]] [[Middle Name]] [[Last Name]], your vote may be affected by one of more protests filed in the 2024 general elections. Please scan this QR code to view the protests 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).

(A.R. p 3722.)

The State Board criticized Judge Griffin's service efforts as "junk mail" because it was (1) a postcard that (2) didn't announce that the protests were "challenging the voter's eligibility" and (3) used a QR code to provide access to the filed materials. (A.R. pp 5375-81.) The Board concluded that such postcards did not properly inform voters of the protests and provide them an opportunity to object. (A.R. p 5379.)

The Board's critique of Judge Griffin's service efforts is misplaced. First, the State Board cannot belittle postcards as "junk mail" when the Board itself routinely mails similar cards to voters. *See* N.C. Gen. Stat. § 163-82.8(c) (mailing of voter registration cards); *id.* § 163-82.14(d)(2) (confirming address by mailing cards). Second, the postcard states that "your vote may be affected by one of more protests" and instructs voters to contact their county boards for information on "a hearing on this matter." (A.R. p 3722.) The postcard, thus, notifies voters that their vote is being implicated by a legal proceeding and, appropriately, directs them to find more information on the proceeding. Finally, the Board's distrust of QR codes is belied by the Board's own use of QR codes in the "Voter Photo ID" mailers that it recently distributed across the state. *See* N.C. State Bd. of Elections, *Press Release: State Board Launches Photo ID Educational Campaign* (Feb. 13, 2024), *available at* https://www.ncsbe.gov/news/press-releases/2024/02/13/state-board-launches-photo-id-educational-campaign (visit the link "Voter Photo ID Mailer (PDF)").[4]

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4 The Board's press release boasted that its new voter ID "campaign is designed to *reach every corner of North Carolina*, including rural and urban areas, in as many ways as possible." *Id.* (emphasis added). The Board posted the "Voter Photo ID Mailer

To be clear, the constitutional standard for notice is that it be "reasonably certain to inform those affected." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). The standard does not demand perfection. *See id.* at 319 ("We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable."). Moreover, Judge Griffin served over 60,000 voters. The interests of each voter "is identical with that of a class" and, therefore, "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any sustained would inure to the benefit of all." *Id.* Given that Judge Griffin's service on 60,000 voters replicates the State Board's own methods of notifying voters, the Board had no grounds to claim his method of service was deficient.

C. Judge Griffin timely filed his protests.

In its final decision, the Board mentioned, in passing, that some of Judge Griffin's protests might have been untimely filed and, therefore, could be subject to dismissal. (A.R. p. 5373 n. 4.) This is a baseless and unsupported allegation. The General Statutes are explicit that only "substantial compliance" is required with the filing deadlines for election protests; and Judge Griffin's protests substantially complied with the protest-filing deadline.

Section 163-182.9 sets forth the requirements of an election protest. In addition to a protest being in writing and containing certain information, the section sets forth deadlines

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(PDF)" at https://s3.amazonaws.com/dl.ncsbe.gov/Voter%20ID/Voter-ID-Mailer.pdf.

for filing a protest. N.C. Gen. Stat. § 163-182.9(b). "If the protest concerns an irregularity other than vote counting or result tabulation, the protest shall be filed no later than 5:00 P.M. on the second business day after the county board has completed its canvass and declared the results." *Id.* § 163-182.9(b)(4)(c).

The next statute, section 163-182.10, dictates an election board's review of whether a protest complies with these requirements. Section 163-182.10 explicitly states that a board shall "determine whether the protest *substantially complies* with G.S. 163-182.9 and whether it establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred." *Id.* § 163-182.10(a)(1) (emphasis added). Therefore, for a protest to proceed to a review of its merits, the protest must substantially comply with the 5:00 P.M. filing deadline.

The affidavit of Kyle Offerman, submitted to the Board, established that all of Judge Griffin's protests were submitted via email to the county board before the 5:00 P.M. deadline. (A.R. p 3719 (Offerman Aff. ¶¶ 8-9).) The possibility that some of these protests might have hit election officials' inboxes a few minutes after 5:00 P.M. is irrelevant. The protests would have nonetheless been filed in substantial compliance with the statutory filing deadline.

North Carolina courts have, for decades, explained what is required when a statute demands only substantial compliance with certain requirements. In such statutes, substantial means "[i]n a substantial manner, in substance, essentially. It does not mean an accurate or exact copy." *Graham v. Nw. Bank*, 16 N.C. App. 287, 291, 192 S.E.2d 109, 112 (1972)

(cleaned up). In other words, substantial compliance with a requirement is something less than precise satisfaction of the requirement.

This lenient standard is not uncommon; it also appears in litigation. For example, the Court of Appeals applies a substantial compliance standard to the application of the appellate rules: "[T]his court has held that when a litigant exercises 'substantial compliance' with the appellate rules, the appeal may not be dismissed for a technical violation of the rules." *Pollock v. Parnell*, 126 N.C. App. 358, 362, 484 S.E.2d 864, 866 (1997). Thus, a substantial-compliance standard precludes a judicial body from dismissing a filing for mere failure to comply with the technical rules.

A filing made by 5:00 P.M. and received by the board of elections within minutes of that deadline is in "substantial compliance" with the deadline. The filing of a protest within minutes of a deadline would be "essentially" or "in substance" complying with the deadline, even if it is not technically complying with the deadline. Under section 163-182.10(a)(1), any such protest must, as a matter of law, be allowed to proceed to the merits.

IV. No Other Federal Statute Bars the Protests.

At the State Board, Justice Riggs claimed that the Voting Rights Act of 1965 (VRA) prevents the State Board from enforcing the election laws identified in Judge Griffin's protests. That is wrong.

The Voting Rights Act prohibits refusing to count the vote of anyone "who is entitled to vote under any provision of this Act or is otherwise qualified to vote." 52 U.S.C. § 10307(a). Justice Riggs never pointed to any provision of the Act that the election protests

purportedly violate. Indeed, the enforcement provision of the VRA exists just to enforce "the Act's comprehensive scheme to eliminate racial discrimination in the conduct of public elections." *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970). Absent racial discrimination, "the Act provides no remedy." *Id.* at 87. As the U.S. Supreme Court has recently explained, the VRA is Congress's effort to bring to "an end to the denial of the right to vote based on race." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 655 (2021). There is no basis to suggest that this case involves racial discrimination—it quite obviously doesn't. So the Voting Rights Act is irrelevant.

V. All Protests Filed by Judge Griffin Comport with Substantive Due Process.

Finally, the State Board reasoned it could not provide Judge Griffin any relief because the Substantive Due Process Clause of the U.S. Constitution shielded illegal votes from being challenged after an election had concluded. (A.R. pp 5390, 5399, 5406.) The right to vote is fundamental. But like all fundamental rights, voting is not an absolute right. The U.S. Supreme Court has established a test that balances the right to vote with a state's interest in ensuring election integrity. The protests, which seek to enforce laws that go to the heart of election integrity, satisfy this balancing test.

A. The *Anderson-Burdick* test.

Voting is a fundamental right. *E.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Yet, the U.S. Supreme Court has recognized that "[t]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The U.S. Supreme Court has established the *Anderson-Burdick* test to strike a balance between the right to vote and the need for fair elections. *See Libertarian Party of N.C. v. State*, 365 N.C. 41, 47-48, 707 S.E.2d 199, 203-04 (2011) (discussing test). The test requires that a regulation imposing a severe burden on voting be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). Severe burdens are defined as invidious restrictions that "are unrelated to voter qualifications." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008).

The test also accounts for non-severe burdens, which include "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *Id.* at 189-90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). These lesser burdens are subject to a flexible balancing standard, which "weigh[s] 'the character and magnitude of the asserted injury'" against "'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Such burdens are usually justified by "a State's important regulatory interests." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 351 (1997).

B. The protests do not seek to impose severe limitations on voting.

Judge Griffin is not asking the State Borad to enforce laws that would severely burden voting.

To start, the North Carolina Constitution establishes that both lawful registration and residency are voter qualifications. N.C. Const. art. VI, §§ 2(1), 3(1). And anybody who wants to vote in North Carolina must be a resident and lawfully registered—no exceptions

are allowed. Judge Griffin's request that the State Board enforce this *evenhanded* pair of voter *qualifications* cannot, as a matter of law, severely burden the right to vote. *See Crawford*, 553 U.S. at 189-90.

The other law that Judge Griffin asked the State Board to enforce (overseas voters providing photo identification) is enshrined in the General Statutes. Like registration and residency, this requirement is also evenhanded—applying to all voters equally. Indeed, Judge Griffin filed the protest because the State Board unlawfully exempted one demographic of voters—those living overseas—from this universal requirement. The U.S. Supreme Court has already concluded that reasonable photo-identification requirements do not impose "a substantial burden on the right to vote." *Crawford*, 553 U.S. at 191-98.

The State Board never mentions the *Anderson-Burdick* test anywhere in its order. Rather, in discussing the incomplete-registration protests, the Board defends its dismissal of those protests on the grounds that the individuals "did everything they were told to do to register." (A.R. p 5378.) The Board then relies on the Supreme Court's decisions in *Overton v. Mayor & City Commissioners of City of Hendersonville*, 253 N.C. 306, 116 S.E.2d 808 (1960), and *Woodall v. W. Wake Highway Commission*, 176 N.C. 377, 97 S.E. 226 (1918), for the Board's conclusion that "error by election officials in the processing of voter registration cannot be used to discount a voter's ballot." (A.R. pp 5389-90.) But the decisions in *Woodall* and *Overton* do not hold such. Rather, those decisions 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 Overton*,

253 N.C. at 315, 116 S.E.2d at 815; *Woodall*, 176 N.C. 377, 97 S.E. at 232. The voters themselves had taken every step required of them by statute to register.

Here, in contrast, North Carolina statutes impose a duty on all absentee voters to provide photo identification, *e.g.*, N.C. Gen. Stat. § 163-230.1(a)(4), (b)(4), (e)(3), (f1), and on all applicants to provide a drivers license or social security number that validates the applicants' identities, *see id.* § 163-82.4(a)(11), (d), (f). The Board's willingness to allow individuals to vote without satisfying these statutory requirements does not excuse individuals of their duty to comply with them. Moreover, *Woodall* and *Overton* cannot stand for an absolute rule that an election-official's errant instructions can never result in the disqualification of voters because the Court plainly held otherwise in *James*, 359 N.C. at 270, 607 S.E.2d at 644, where the Court disqualified thousands of voters who (unlawfully) voted out of precinct *at the instruction of poll workers*. *James* even cited to *Burdick* to justify its result, seeing no conflict with this remedy and the *Anderson-Burdick* framework. *Id.*

Unlike in *Woodall*, *Overton*, and *James*, this is not an instance in which an election official affirmatively instructed a voter to violate the law. This is an instance in which, after the State Board failed to facilitate an individual's compliance with the law, the individual failed to take the steps necessary to become eligible voters as required by the election laws. As courts have often held, "ignorance of the law is no excuse for a failure to comply with the law." *Orange Cnty. v. N.C. Dep't of Transp.*, 46 N.C. App. 350, 377, 265 S.E.2d 890,

908 (1980). It's not unconstitutional to require the public to be as knowledgeable of election laws as other laws.[5]

C. The laws at issue are tailored to compelling state interests.

Even if the Court were to find that the enforcement of the laws at issue severely burdened the right to vote, North Carolina is well justified in enforcing these laws.

The State has an undeniable interest in restricting voting to only those who are eligible to vote, thereby ensuring that the votes of eligible voters are not diluted by ineligible ballots. *Bush v. Gore*, 531 U.S. 98, 105 (2000). Indeed, counting only eligible ballots is the ultimate means of accomplishing the State's "compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (cleaned up). Demanding that only qualified voters—those lawfully registered, residing in North Carolina, and producing photo identification—be allowed to cast a ballot is perfectly tailored to protecting eligible voters from vote dilution.

The State's compelling interest in election integrity also empowers the States to enact protections against possible voter fraud, because such protections assuage the public's

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5 Even assuming citizens could blame the State Board for their failure to become eligible to vote, human error by government employees does not automatically create a constitutional violation. *See Pettengill v. Putnam Cnty. R-1 Sch. Dist., Unionville, Mo.*, 472 F.2d 121, 122 (8th Cir. 1973) (holding no constitutional violation absent "aggravating factors such as denying the right of citizens to vote for reasons of race, or fraudulent interference with a free election by stuffing of the ballot box, or other unlawful conduct which interferes with the individual's right to vote" (citations omitted)); *Powell*, 436 F.2d at 88 (holding that neither the Equal Protection and Due Process Clauses of the Fourteenth Amendment "guarantee against errors in the administration of an election").

"fear [that] legitimate votes will be outweighed by fraudulent ones." *Id.* Moreover, the *Anderson-Burdick* standard does not demand an "elaborate, empirical verification" of efforts to counteract voter fraud. *Timmons*, 520 U.S. at 364. Rather, the State is free to protect against voter fraud "with foresight rather than reactively," so long as the protections are "reasonable" and don't "significantly impinge" constitutional rights. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

It is no longer debatable that universal photo-identification requirements are a constitutionally acceptable way to guard against impersonation of registered voters. *See Crawford*, 553 U.S. at 194-97 (Stevens, J.); *see also id.* at 209 (Scalia, J., concurring) ("The universally applicable requirements of Indiana's voter-identification law are eminently reasonable.").

It is equally established that North Carolina's requirement that individuals, in order to be qualified to vote, verify their identities via a drivers license or social security number guards against fraudulent registrations. *See Browning*, 522 F.3d at 1168 (describing HAVA's mirror requirement for such information as being "Congress's attempt to . . . prevent[] voter impersonation fraud"). "'The electoral system cannot inspire public confidence if no safeguards exist . . . to confirm the identity of voters.'" *Crawford*, 553 U.S. at 194 (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005)).

CONCLUSION

Judge Griffin respectfully requests that the Court reverse the decision of the State Board and order the State Board to retabulate the vote with the unlawful ballots excluded.

This the 29th day of January, 2025.

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