No. 281P24 DISTRICT 10

SUPREME COURT OF NORTH CAROLINA

****

REPUBLICAN NATIONAL COMMITTEE and NORTH CAROLINA REPUBLICAN PARTY,

Plaintiffs-Petitioners,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, JEFF CARMON, KEVIN N. LEWIS, SIOBHAN O'DUFFY MILLEN, STACY "FOUR" EGGERS IV, in Official Capacity as Members of NCSBE, and KAREN BRINSON BELL, in Official Capacity as Executive Director of NCSBE,

Defendants-Respondents,

DEMOCRATIC NATIONAL COMMITTEE,

Defendant-Intervenor-Respondent.

From Wake County
24CV031557-910

COA P24-735

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THE DEMOCRATIC NATIONAL COMMITTEE'S RESPONSE TO PETITIONERS' PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners' request for discretionary review fails on two levels. First, a petition for discretionary review under N.C. Gen. Stat. § 7A-31(c) and Rule 15(a) of the North Carolina Rules of Appellate Procedure in this case's posture is the wrong vehicle at the wrong time. The Court can, and should, deny the petition on the basis of this procedural flaw alone.

But even if the Court were nonetheless to consider Petitioners' request, the petition should be denied on its merits. The Court of Appeals correctly denied a writ of supersedeas and accompanying mandatory injunction, recognizing that Petitioners' extraordinary request (renewed here) suffers from a host of defects. These include procedural infirmities, grossly inequitable timing, proximity to election day, and substantive deficiencies. Moreover, the generalized, non-cognizable harm Petitioners claim they will suffer absent review is far outweighed by the significant harm to voting-age children of North Carolinians serving abroad in military and civilian capacities that the mandatory injunction Petitioners seek would inflict.

REASONS WHY DISCRETIONARY REVIEW SHOULD BE DENIED

Petitioners do not cite any authority (and the DNC is not aware of any authority) holding that a petition under N.C. Gen. Stat. § 7A-31(c) is the proper vehicle to seek review of the Court of Appeals' denial of a petition for writ of supersedeas. By its plain terms, § 7A-31(c) may be invoked "after determination of the cause by the Court of Appeals." But the Court of Appeals has made no "determination of the cause" in this matter; it has simply denied a petition for writ of supersedeas. Petitioners' appeal to the Court of Appeals from the trial court's order

denying their motion for preliminary injunction remains pending.[1] And notably, Petitioners have *not* sought discretionary review by this Court *prior to* review by the Court of Appeals under § 7A-31(b).

This reveals the illogic of Petitioners' request—they have asked this Court to grant a writ of supersedeas reversing the Court of Appeals' denial of their petition, and they have also asked this Court to take discretionary review of that same denial. Put simply, that is not the purpose or function of discretionary review.

Moreover, Petitioners make no attempt in their petition to show this Court that failure to grant discretionary review "would cause a delay in final adjudication which would probably result in substantial harm." *See* N.C. Gen. Stat. § 7A-31(c). They cannot make such a showing because they are not even seeking "final adjudication" of the case with this appeal. Tellingly, despite the supposed "emergency" nature of their request, Petitioners waited three days after the Court of Appeals' decision to file their petition in this Court.

The Court should deny the petition for discretionary review because it is both procedurally and legally deficient.

[1] The DNC does not concede that the trial court's order is properly appealable, and Petitioners have never offered any basis for appellate jurisdiction. Among its many other flaws, Petitioners' request effectively asks this Court to grant them a win on the merits of their lawsuit without ever explaining how this Court has jurisdiction in the first place. "It is the appellant's burden to present appropriate grounds for acceptance of an interlocutory appeal, and not the duty of this Court to construct arguments for or find support for appellant's right to appeal." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218 (2016) (cleaned up).

THE COURT SHOULD NOT OTHERWISE GRANT REVIEW

Even if the Court were to look past the above-detailed procedural flaws and treat Petitioners' request as if it were a petition for writ of certiorari under North Carolina Rule of Appellate Procedure 21(a), the Court still should deny the request. "A writ of certiorari is intended 'as an extraordinary remedial writ to correct errors of law.'" *Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 465 (2022) (citation omitted).

This Court's precedent "establishes a two-factor test to assess whether certiorari review … is appropriate." *Cryan v. National Council of Young Men's Christian Ass'ns of United States*, 384 N.C. 569, 572 (2023). First, "a writ of certiorari should issue only if the petitioner can show merit or that error was probably committed below." *Id.* at 572 (quotation marks and citations omitted). "This step weighs the likelihood that there was some error of law in the case." *Id.* Second, "a writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Id.* at 572–73 (quotation marks and citations omitted). Importantly, a writ of certiorari "is not intended as a substitute for a notice of appeal," so, to satisfy this second step, petitioners generally must show "substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake." *Id.* at 573 (quotation marks and citations omitted).

Here, Petitioners cannot make either required showing. The Court of Appeals did not err in denying a writ of supersedeas and a mandatory injunction. Nor have Petitioners identified extraordinary circumstances here—and they plainly want their petition to serve as a substitute for their pending appeal in the Court of Appeals.

Certiorari and supersedeas (along with the mandatory injunction Petitioners seek) should all therefore be denied.

I. THE COURT OF APPEALS' RULINGS WERE CORRECT.

The Court of Appeals properly denied Petitioners a writ of supersedeas and dismissed their motion for a stay and injunction. The DNC's response to Petitioners' petition for writ of supersedeas in this Court explains in detail why the Court of Appeals got it right. However, several points bear emphasis here.

First, Petitioners ask this Court to disrupt the status quo so as to disenfranchise the families of military and civilian personnel living abroad. That clashes irreconcilably with the purpose of supersedeas, which is "to preserve the status quo pending the exercise of appellate jurisdiction." *Craver v. Craver*, 298 N.C. 231, 237-38 (1979); *see also* N.C. R. App. P. 23(a)(1); *City of New Bern v. Walker*, 255 N.C. 355, 356 (1961). And because Petitioners do not seek a *stay* but instead ask for entry of the very mandatory injunction that was denied by the trial court and Court of Appeals below, they must show a "great likelihood, approaching near certainty, that [they] will prevail when [their] case finally comes to be heard on the merits[.]" *Ogden v. Dep't of Transp.*, 430 F.2d 660, 661 (6th Cir. 1970) (quoting *Greene v. Fair*, 314 F.2d 200, 202 (5th Cir. 1963) (per curiam)); *see also Benoit v. Gardner*, 345 F.2d 792, 793 (1st Cir. 1965) (per curiam). Petitioners cannot meet this high bar.

Second, the extreme untimeliness of Petitioners' lawsuit makes it inequitable to grant preliminary relief that would transform the rules governing the 2024 general election while that election is ongoing. "A party is guilty of laches if he has failed to

assert an equitable right for such time as materially prejudices the adverse party." *Franklin Cnty. v. Burdick*, 103 N.C. App. 496, 498 (1991). *See also Pender County v. Bartlett*, 361 N.C. 491, 510 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009) (refusing to order unconstitutional districts to be redrawn because of proximity to the election).

Here, the North Carolina General Assembly passed the Uniform Military and Overseas Voters Act ("UMOVA") in 2011. That statute—and in particular the provision Petitioners' challenge—*expressly* allows children of military and civilian personnel born overseas to vote if a parent was eligible to vote in North Carolina before heading abroad. If they believed this enfranchisement conflicted with the North Carolina Constitution, Petitioners could have brought their facial challenge to this provision any time over the past 13 years. Instead, they waited until scarcely a month before this year's general election to do so, with six general elections passing without any objection to the provision at issue from Petitioners or anyone else.

During this decade-plus passage of time, scores of military and overseas voters have registered and voted in conformity with UMOVA—including the provision that Petitioners now challenge as unconstitutional. And these voters have already received and cast thousands of ballots in the current, ongoing election. As of the date of this response, that includes 7,020 military and 18,025 overseas voters. Disenfranchising those voters at the eleventh hour, solely because Petitioners decided not to raise their claims anytime over the last 13 years when these issues could have

been considered and determined without affecting a live election or ballots already cast, would be grossly inequitable. Petitioners do not argue otherwise.

Third, Petitioners have rightly conceded that the UMOVA provision they challenge—N.C. Gen. Stat. § 163-258.2(1)(e)—is facially constitutional. App. 61, 66-67, 101. They have disputed that their claim is a facial one, but that is wrong. As this Court recently explained, "when courts distinguish between facial and as-applied challenges, the 'label is not what matters.'" *Singleton v. N.C. Dep't of Health & Hum. Servs.*, 2024 WL 4524680, at *1 (N.C. Oct. 18, 2024) (per curiam) (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010)). Rather, "[w]hen the 'plaintiffs' claim and the relief that would follow' could 'reach beyond the particular circumstances of these plaintiffs,' then that claim becomes 'a facial challenge to the extent of that reach.'" *Singleton*, 2024 WL 4524680, at *1 (quoting *Reed*, 561 U.S. at 194). Here, Petitioners' request a ruling that § 163-258.2(1)(e) "violates Article VI, § 2 of the North Carolina Constitution." *See* Compl. ¶¶ 1–3, 5–6, 29, 31–43, 76–78, 81, 84.a., 84.b. They also ask that the ballots of *all* military and overseas voters registered under § 163-258.2(1)(e) be "segregated" and not be counted in the 2024 general election until some further, unspecified, extra-statutory process runs its course. That is a facial challenge—one that necessarily fails given Petitioners' acknowledgement that the statute is facially constitutional.

Fourth, even if Petitioners' claim were construed as seeking "as-applied" relief, they still could not show that the Court of Appeals erred. Petitioners' claim attacks the franchise of children of military and civilian North Carolinians who were born

abroad and have never lived in North Carolina, contending these U.S. citizens are not residents eligible to vote in North Carolina elections. But this theory wrongly conflates "living" and "residing" in North Carolina, which are distinct legal concepts.

This Court has held that "[r]esidence as used in Article VI of the North Carolina Constitution . . . mean[s] domicile." *Hall v. Wake Cnty. Bd. of Elections*, 280 N.C. 600, 605 (1972), *modified by Lloyd v. Babb*, 296 N.C. 416 (1979); *accord Owens v. Chaplin*, 228 N.C. 705, 708–09 (1948). Under UMOVA, and consistent with common-law principles, the children of military and overseas families can (and do) inherit their parents' North Carolina domicile by operation of law. *See Thayer v. Thayer*, 187 N.C. 573, 574 (1924). Furthermore, a "domicile once acquired is presumed to continue until it is shown to have changed," and the burden rests on Petitioners to show that a voter's domicile has changed. *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 419 (1919). Thus, "it is entirely logical that on occasion, a child's domicile . . . will be in a place where the child has never been." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). Consistent with these principles, courts outside this jurisdiction have likewise rejected similar challenges to military and overseas voters. *See Guy Reschenthaler, et al. v. Schmidt, et al.*, No. 1:24-CV-1671, 2024 WL 4608582, at *1 (M.D. Pa. Oct. 29, 2024) (granting motion to dismiss); *RNC et al. v. Benson et al.*, No. 24-000165-MZ (Mich. Ct. Cl. Oct. 21, 2024) (granting motion for summary disposition).

And even if Petitioners' proposed definition of "residence" were the law, their claims would *still* fail. The North Carolina Constitution allows the General Assembly

to reduce the state's residency requirement. Specifically, Article VI, § 2(2) recognizes the General Assembly's authority to "*reduce* the time of residence for persons voting in presidential elections." (emphasis added). Courts "look to the plain meaning of the [word] to ascertain its intent," *Town of Boone v. State*, 369 N.C. 126, 132–33 (2016), and the plain meaning of "reduce" is "to diminish in size, amount, extent, or number." *Webster's Third New International Dictionary* 1905 (2002). The General Assembly did just that in § 163-258.2(1)(e), reducing (from 30 days to 0) the time of residence required to vote for President and Vice-President for children of North Carolinians born outside the United States who meet all other voter-eligibility requirements in the state and have not previously registered to vote in any other state.

Fifth, as discussed more fully below, Petitioners will suffer no cognizable injury if denied the extraordinary remedy they seek, while many military and civilian families abroad would be harmed by that relief, including via the loss of their fundamental right to vote. Additionally, the public has a compelling interest in protecting the right to vote and ensuring the orderly administration of elections in North Carolina.

In short, the Court of Appeals had a multitude of independently sufficient reasons to deny Petitioners' request for a writ of supersedeas and a mandatory injunction. As no error of law was committed, neither certiorari nor any other form of review, emergency or otherwise, is warranted here.

II. PETITIONERS CANNOT SHOW EXTRAORDINARY CIRCUMSTANCES.

Certiorari is independently unwarranted because Petitioners have not shown "extraordinary circumstances" here, such as "substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake." *Cryan*, 384 N.C. at 573.

First, Petitioners have not established that they will suffer *any* harm, much less "substantial harm," from the counting of ballots duly cast in the 2024 general election by children of military and overseas voters pursuant to rules and processes in place since 2011. Petitioners claimed in the trial court and Court of Appeals that allowing military and overseas families to vote would "dilute" Petitioners' votes, though they omitted that argument from their petition to this Court. See Compl. ¶¶ 7, 52, 79, 80. Petitioners thereby tacitly admit what this Court's case authorities demonstrate, namely that "vote dilution" is not a cognizable harm, let alone a substantial one, under North Carolina law. In *Harper v. Hall*, 384 N.C. 292 (2023), this Court held that such a claim lies only where one voter's vote does not "have the same weight" as another voter's vote. *Id.* at 364; *see also State ex rel. Martin v. Preston*, 325 N.C. 438, 455 (1989) ("[O]nce the right to vote is conferred, the *equal right* to vote is a fundamental right." (emphasis added)). Petitioners do not allege that their votes are being weighed differently at all, which is the essence of a vote-dilution claim. Petitioners' claim is a textbook example of the type of generalized grievance that affects all voters equally and thus cannot constitute the "personal, direct and irreparable injury" required to obtain declaratory or injunctive relief, let alone

establish substantial harm. *E.g., American Equitable Assur. Co. of N.Y. v. Gold*, 248 N.C. 288, 292 (1958); *Leonard v. Maxwell*, 216 N.C. 89, 97 (1939).

Second, Petitioners offer no evidence that judicial resources will be wasted by denying the writ. Petitioners are free to proceed in the trial court with their claims on the constitutionality of UMOVA, on a normal litigation schedule and in due course. Indeed, they are required to do so for a judgment to issue in this case. In contrast, judicial resources will be wasted by hasty, extraordinary review of Petitioners' case.

Again, the extreme posture in which Petitioners have placed the parties and the Court bears emphasis. They ask the Court to enter an injunction, the particulars of which Petitioners have never articulated, that will disrupt an ongoing election. *See* App. 56-57, 68, 72-73, 103. Petitioners have never explained how Defendants would even identify all ballots cast by military and overseas voters who have never lived in the United States (including those not made with a postcard voter's application indicating that the voter had never lived in the United States). Nor have Petitioners explained on what basis some adjudicator would differentiate—within the group of UMOVA ballots that Petitioners say should be "segregated"—between those whose votes Petitioners contend should count and those Petitioners contend should not. These failings all underscore the ill-conceived nature of Petitioners' request.

Third, to the extent any "wide-reaching issues of justice and liberty" are at stake, they counsel strongly against granting certiorari. "[P]rotect[ing] voters from interference . . . in the voting process" is the bedrock of our free elections. *Harper*, 384 N.C. at 361. "By definition, '[t]he public interest . . . favors permitting as many

qualified voters to vote as possible.'" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). That means actually counting those votes, because the "right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). Indeed, "the right to have one's vote counted has the same dignity as the right to put a ballot in a box." *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

Petitioners cannot deny they seek to take this right away from thousands of military and overseas voters, *see* App. 103-05, many of whom intend to vote (or have already cast their votes) in the 2024 general election. Taking away "one of the most cherished rights in our system of government," *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009), from military and overseas voters without notice and a meaningful opportunity for those voters to be heard would violate the constitutional rights of those who serve our country and their loved ones. *See* U.S. Const. amend. XIV; N.C. Const. art. I, §§ 10, 19. Even worse, Petitioners' suit improperly seeks declaratory and injunctive relief against military and overseas voters without them first being joined in this lawsuit. N.C. Gen. Stat. § 1-260 ("When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.").

Petitioners' request for relief in this Court improperly seeks to bypass the normal litigation process and appropriate channels for appellate review of the denial of a preliminary injunction as a shortcut to an outright victory on the merits.

However, as this Court has explained, the writ of certiorari "is not intended as a substitute for a notice of appeal." *Cryan*, 384 N.C. at 573. Because Petitioners have not shown extraordinary circumstances warranting immediate review, the Court should deny review of this matter, whether through writ of certiorari, discretionary review, or otherwise.

CONCLUSION

The petition for discretionary review should be denied, and the petition for writ of supersedeas and accompanying request for a mandatory injunction should be dismissed and denied.

Respectfully submitted this the 4th day of November, 2024.

Electronically Submitted
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing document was served upon the parties by email on November 4, 2024, addressed as follows:

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