

No. P25-30

TENTH JUDICIAL DISTRICT

\*\*\*\*\*  
NORTH CAROLINA COURT OF APPEALS  
\*\*\*\*\*

TELIA KIVETT, et al.,

Plaintiffs-Petitioners,

v.

NORTH CAROLINA STATE BOARD  
OF ELECTIONS, et al.,

Defendants-Respondents,

and

DEMOCRATIC NATIONAL  
COMMITTEE,

Intervenor- Defendant-  
Respondent.

From Wake County  
24 CVS 041789-910

\*\*\*\*\*  
**PLAINTIFFS-PETITIONERS' RESPONSE IN OPPOSITION TO  
DEFENDANTS-RESPONDENTS' MOTION TO STAY PROCEEDINGS AND  
REQUEST FOR AN EXPEDITED CONSIDERATION OF THE SAME**  
\*\*\*\*\*

**TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:**

The North Carolina State Board of Elections' ("NCSBE") motion to stay proceedings and request for an expedited consideration of the same should be denied in full. This motion is the latest iteration of the NCSBE's attempts to frustrate and delay the rights of those who seek redress from the NCSBE's unlawful registering and counting of unregistered persons in the November 5, 2024 state general election. Contrary to the NCSBE's assertions, this matter presents unique allegations, causes of action, and claims for relief which are found in none of the other cases cited. Plaintiffs are not parties to the state Supreme Court action the NCSBE cites. To the extent a tangential issues arising from the NCSBE's initial removal of this matter is pending in a federal appellate court, it has no bearing on Plaintiffs' claims here. The NCSBE can cite to no authority requiring this court to stay its own proceedings when a federal appellate court is considering unrelated issues to the ones at bar. The NCSBE has already asked the Fourth Circuit Court of Appeals to stay this matter's proceedings in state court and the Fourth Circuit effectively declined to do so. This court should do the same and instead reach the merits of Plaintiffs' Petition for Writ of Certiorari, Writ of Supersedeas, Temporary Stay, and Temporary Injunction ("Petition").

The NCSBE's motion tellingly omits the unique claims and allegations which permeate this matter. Instead, the motion is premised upon speculation as to what might happen at some unknown date. But as Plaintiffs have made clear, the passage of time only serves to exponentially increase the irreparable harm they face. Should

this court stay Plaintiffs’ petition and the resolution of any of the cases the NCSBE cites not resolve all of the underlying issues presented in Plaintiffs’ petition—indeed, they almost certainly will not—then Plaintiffs risk losing access to certain statutory rights. This alone proves why the NCSBE’s motion should be denied.

### **PROCEDURAL HISTORY**

Plaintiffs filed their verified complaint in Wake County Superior Court on December 31, 2024. On January 2, 2025, Plaintiffs filed an emergency motion for a temporary restraining order and a preliminary injunction. Later that day, the NCSBE removed the matter to federal court using virtually the same template for removal they have employed in practically every piece of litigation brought regarding their administration of the November 5, 2024 general election. The next day, Plaintiffs filed an emergency motion to remand to state court. On January 6, 2025, Chief Judge Richard E. Myers II issued an order remanding the matter to state court based upon two doctrines of federal abstention. Judge Myers then divested himself of jurisdiction and issued the remand order to the Wake County Superior Court.

#### **I. Plaintiffs Expeditiously Proceed in State Court**

On January 7, 2025, Plaintiffs filed a notice of remand in Wake County Superior Court, along with a request to be heard on their previously-filed emergency motion for injunctive relief. That motion was heard on January 10, 2025 in front of the Honorable Judge William R. Pittman. After a hearing on the motion Judge Pittman announced that he would deny Plaintiffs’ requests for emergency injunctive relief.

Upon receipt of the signed order by Judge Pittman, Plaintiffs timely filed a Petition for Writ of Certiorari, Writ of Supersedeas, Motion for Temporary Stay, and Motion for Temporary Injunctive Relief with this Court. That petition is the subject of the NCSBE's present motion.

## II. The NCSBE Appeals to the Fourth Circuit Court of Appeals

On January 6, 2025, the NCSBE filed a notice of appeal to the Fourth Circuit Court of Appeals arising from Judge Myers' election to abstain and remand the matter to state court.<sup>1</sup> The NCSBE then immediately asked the Fourth Circuit for an emergency stay of the remand and progression of the matter in state court.<sup>2</sup> On January 8, 2025, the Fourth Circuit requested that Plaintiffs submit an expedited brief on the NCSBE's motion for a stay, and Plaintiffs filed a comprehensive brief in opposition by noon that same day.<sup>3</sup> Although the NCSBE asked for expedited relief from the Fourth Circuit the court has, to date, not acted on the request. The Fourth Circuit has, however, set a briefing schedule for the matter, with the NCSBE's opening appellate brief not due until February 18, 2025.<sup>4</sup>

---

<sup>1</sup> *Kivett, et al. v. N.C. State Board of Elections, et al.*, 5:25-cv-00003, at D.E. 21 (E.D.N.C. Jan. 6, 2025).

<sup>2</sup> *Kivett, et al. v. N.C. State Board of Elections, et al.*, 25-1021, at D.E. 21 (4<sup>th</sup> Cir. Jan. 7, 2025).

<sup>3</sup> *Id.* at D.E. 22 and 23.

<sup>4</sup> *Id.* at D.E. 3.

## **REASONS WHY THE MOTION SHOULD BE DENIED<sup>5</sup>**

The NCSBE has known that it unlawfully registered tens, if not hundreds of thousands of people in North Carolina since at least 2023. These allegations are not a surprise to the NCSBE. Yet every time a party has asked that the NCSBE remedy their actions, beginning almost a year before the November 5, 2024 general election, the NCSBE has refused to do so. Now, yet again, the NCSBE is attempting to drag its feet and effectively block the ability of parties who seek to vindicate their constitutional rights.

The NCSBE's motion should be denied for three reasons. **First**, the NCSBE's characterizations aside, a plain reading of the allegations and claims for relief in this matter and those in the *Griffin v. NCSBE*<sup>6</sup> case the NCSBE cites reveals that the two are not the identical beings the NCSBE wishes them to be. To the contrary, this matter and the Petition itself present unique claims that *Griffin* does not. Thus, the Supreme Court's resolution of *Griffin* will not dispose of Plaintiffs' claims here. **Second**, the Fourth Circuit's resolution of the appeal involving either the present parties or those in *Griffin v. NCSBE*<sup>7</sup> will have no bearing on the claims presented in this matter. The appeal the NCSBE cites involves a discrete issue of federal abstention doctrines, the resolution of which will have no impact on the emergent relief Plaintiffs request from this court. **Third**, a stay here will exponentially increase

---

<sup>5</sup> Plaintiffs do agree that this motion should be decided on an expedited basis in order to continue the expeditious resolution of the matter.

<sup>6</sup> *Griffin v. N.C. State Board of Elections*, 320P24 (N.C. Sup. Ct.).

<sup>7</sup> *Griffin v. N.C. State Board of Elections*, Nos. 24-1018, 24-1019, 24-1021 (4<sup>th</sup> Cir.).

the irreparable harm Plaintiffs are facing, including leading to a potential loss of statutory rights. The generalities espoused by the NCSBE in support of a stay pale in comparison to the severe harm and prejudice that granting their motion would have on Plaintiffs.

**I. This Matter is Unique from the *Griffin* Matter Being Considered by the State Supreme Court**

Try as they might, the NCSBE cannot escape the fact that the present matter has unique allegations and claims to that which is pending in front of the state Supreme Court in *Griffin v. NCSBE*.<sup>8</sup> As a threshold distinction, *Griffin* is solely focused on a singular contest—the Associate Justice Seat 6 for the North Carolina Supreme Court. In contrast, this matter focuses on all state election contests for the November 5, 2024 contest.<sup>9</sup> Additionally, *Griffin* arises from a wholly distinct posture, namely, a candidate’s election protest and subsequent writ of prohibition to the state Supreme Court. The present matter began in normal course litigation and motions practice, followed by Plaintiffs’ Petition which seeks four separate avenues for review and relief that are distinct from those in *Griffin*.

Perhaps most critically, in the context of the approximately sixty-thousand individuals who voted in the November 5, 2024 state general election contest despite being unregistered under North Carolina law, *Griffin* and the present case ask for different relief. *Griffin* asks the Supreme Court to order the NCSBE to remove these

---

<sup>8</sup> *Griffin v. N.C. State Board of Elections*, 320P24 (N.C. Sup. Ct.).

<sup>9</sup> *Kivett, et al. v. N.C. State Board of Elections, et al.*, 24 CVS 041789-910, at D.E 3, Prayer for Relief ¶ 2(c) (Wake Super. Ct.).

votes solely from the contest at issue. Plaintiffs ask this court to either remove those votes from all affected state office contests, or to implement an expedited cure process akin to what is outlined in the statute the NCSBE refused to follow—N.C.G.S. § 163-82.4(f). While Plaintiffs also bring unique state Constitutional claims and requests for mandamus and declaratory relief, the distinction in the immediate relief sought renders this case and *Griffin* sufficiently distinct. Should the Supreme Court in *Griffin* decline to outright remove the unregistered votes from the vote totals, Plaintiffs' claims for an emergent judicially-created cure process would remain, but as explained *infra*, that passage of time, no matter how long it may be, would severely erode Plaintiffs' rights under North Carolina law.

## **II. The Resolution of the NCSBE's Fourth Circuit Appeals Will Have No Impact on This Matter**

Judge Myers remanded this matter based on the significant federalism concerns he foresaw in a federal court deciding novel questions of state law at their first impression. In so doing, Judge Myers abstained from ruling under two doctrines of federal abstention, neither of which are at issue in the Petition. The NCSBE's appeal to the Fourth Circuit involves the narrow issue of those doctrines. It does not implicate the emergent relief sought in Plaintiffs' Petition. Assuming *arguendo* that the Fourth Circuit—which, based on the parties' briefing schedule, will not act for several months—determined that the abstention was improper here, that would do nothing to divest this Court of its jurisdiction, nor would it have any bearing on the relief Plaintiffs seek here.

The NCSBE previously asked the Fourth Circuit to stay state court proceedings in this matter, but the NCSBE could cite to no binding authority requiring the Fourth Circuit to stay the state court's proceedings. Similarly, they cannot identify any precedent dictating that this court should stay its own proceedings on state law claims in a state law petition, in favor of a federal court who is confronting a narrow and incidental question of federal law. The Fourth Circuit's resolution of the NCSBE's appeal, whenever it may occur, will not have any impact on the questions presented to this court. A stay on that faulty presumption is unwarranted.

For much the same reason, the Fourth Circuit's resolution of the appeal in *Griffin*,<sup>10</sup> which is dealing with the same question of federal abstention as this matter, will also have no impact on the claims and requests in Plaintiffs' Petition. While that matter is admittedly poised for a sooner resolution than Plaintiffs', the unrelated nature of the questions for this court and those for the Fourth Circuit remains the same.

### **III. A Stay Here Would Severely and Irreparably Prejudice Plaintiffs**

In both this motion and their arguments to the trial court, the NCSBE has argued that contests which have already been certified cannot be reopened or challenged under any circumstances. This position is contrary to North Carolina law. In fact, state law provides the very mechanism which Plaintiffs point to as the risk of irreparable harm and why immediate relief is necessary. Specifically, the writ of *quo*

---

<sup>10</sup> *Griffin v. N.C. State Board of Elections*, Nos. 24-1018, 24-1019, 24-1021 (4<sup>th</sup> Cir.)



*warranto*, codified in Article 41 of the North Carolina General Statutes, provides North Carolinians, including individual Plaintiffs here, a vehicle to challenge a state officeholder who is unlawfully holding their office. *See, e.g.*, N.C.G.S. §§ 1-515 and 516. As Plaintiffs explained both to the trial court and in their Petition to this court, this statutory scheme proves that the NCSBE's interpretation of election certification is not the insurmountable roadblock to relief they claim it to be.

This statute further proves why immediate redress is necessary on Plaintiffs' Petition, and why the trial court erred when it declared that it could discern no irreparable harm. Should this matter either be stayed or the Petition denied, the passage of time will continue to erode Plaintiffs' rights. Indeed, the *quo warranto* statutes themselves only prove this point—a person only has ninety days to bring such an action once the officeholder assumes office. *See* N.C.G.S. § 1-522. If the Petition were stayed or denied and later discovery revealed that a margin of unlawful votes decided a state office contest, Plaintiffs will have effectively lost certain statutory rights to challenge that outcome. The NCSBE's preference that this court wait and see how other courts resolve cases with a tenuous relation to the issues presented in the Petition is far less compelling an interest than the prejudice Plaintiffs would face should the motion be granted.

### **CONCLUSION**

The NCSBE has failed to establish why a stay of proceedings is warranted. A stay would only exacerbate the harm Plaintiffs have already suffered and are

continuing to face. As such, Plaintiffs respectfully request that this Court deny the motion in full.

Respectfully submitted this, the 16<sup>th</sup> day of January, 2025

**NELSON MULLINS RILEY &  
SCARBOROUGH LLP**

By: /s/ Phillip J. Strach

Phillip J. Strach

North Carolina State Bar No. 29456

Jordan A. Koonts

North Carolina State Bar No. 59363

301 Hillsborough Street, Suite 1400

Raleigh, North Carolina 27603

Ph: (919) 329-3800

phil.strach@nelsonmullins.com

jordan.koonts@nelsonmullins.com

*Counsel for Plaintiffs-Petitioners*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Response in Opposition to Motion to Stay and for Expedited Consideration was served upon the persons indicated below via electronic mail addressed as follows:

Terence Steed  
Mary Carla Babb  
tsteed@ncdoj.gov  
mcbabb@ncdoj.gov

*Counsel for Defendants-Appellees*

Shana L. Fulton  
William A. Robertson  
James W. Whalen  
sfulton@brookspierce.com  
wrobertson@brookspierce.com  
jwhalen@brookspierce.com

*Counsel for Intervenor-Defendant-Appellee*

This, the 16<sup>th</sup> day of January, 2025.

/s/ Phillip J. Strach

Phillip J. Strach