NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 24CV040620-910

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 that were cast by people who did not lawfully register to vote. Since 2004, state law has required voter applicants to provide their drivers license

or social security number before lawfully registering to vote. However, the State Board chose to ignore this law for decades. Thus, approximately 60,000 people cast votes in the protested judicial race without providing that statutorily required information on their voter applications. These voters were not allowed to cast a ballot in this race because they were not "'legally registered' to vote." *Bouvier v. Porter*, 386 N.C. 1, 4 n.2, 900 S.E.2d 838, 843 n.2 (2024) (quoting N.C. Gen. Stat. § 163-54).

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 registration statutes required drivers license or social security numbers back in 2004. 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 individual who were not properly registered 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. It's Unlawful to Count the Votes of People Who Did Not Lawfully Register to Vote.

Before someone can vote for in a state race in North Carolina, he must be lawfully registered to vote. To lawfully register, a person must, by statute, provide his drivers license or social security numbers in his voter registration application. This information is used to verify the voter's residence and identity via government databases. But our election boards have been registering to vote people who never provided this statutorily required information for decades. The ballots cast by these improper registrants lack statutory authorization because no one can vote if he is unlawfully registered.

A. State law prohibits anyone from voting unless he has provided a drivers license or social security number when registering to vote.

Under state law, a person must provide his drivers license or social security number at the time of registration before he can lawfully cast a ballot.

Lawful registration is a prerequisite to voting. Under article VI of the state constitution, "[e]very person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law." N.C. Const. art. VI, § 3(1). That's also true by statute: "No person shall be permitted to vote who has not been registered under" the state's registration statutes. *See* N.C. Gen. Stat. § 163-82.1(a) (making registration a "prerequisite to voting"); *see also id.* § 163-54 ("Only such persons as are legally registered shall be entitled to vote in any primary or election held under this Chapter.").

The protests here involve people who were not legally registered to vote in a manner provided by law, per section 163-82.4, because they failed to provide statutorily required application information. Since January 2004, state law has required people applying for voter registration to provide their drivers license or social security number in their applications. N.C. Sess. Law 2003-226, § 9 (amending N.C. Gen. Stat. § 163-82.4), § 22 (amendment effective 1 January 2004). This information is used with a statewide computer registration system to verify the voter's identity and important details about the voter. *See, e.g.*, N.C. Gen. Stat. § 163-82.11.

The State Board of Elections is required to create an application form for voter registration. *Id.* § 163-82.3(a). From 2004 onward, the General Assembly commanded that the

form require an applicant to provide his "[d]rivers license number or, if the applicant does not have a drivers license number, the last four digits of the applicant's social security number." *Id.* § 163-82.4(a)(11). A board can accept an application without a drivers license or social security number, but only if the applicant "has *not been issued* either a current and valid drivers license or a social security number." *Id.* § 163-82.4(b) (emphasis added).

There's a statutory cure process for somebody who omits their drivers license and social security numbers, but the omissions raised in these protests have never been cured by this process. If a person has a drivers license or social security number, but fails to provide those numbers on their voter application, then the election board shall not allow the person to vote unless the voter cures the deficient application before the county canvass deadline. *Id.* § 163-82.4(f). The statutory cure procedure applies to a voter who "fails to complete any required item on the voter registration form." *Id.* The board shall notify the voter of the omission and request completion of a corrected application before the county canvass. *Id.* Only if the required information is delivered by that time will the voter's ballot be counted. *Id.* ("If the correct information is provided to the county board of elections by at least 5:00 P.M. on the day before the county canvass, the board shall count any portion of the provisional official ballot that the voter is eligible to vote."). No state law, however, permits a board of elections to count a ballot for a person who never provided a drivers license or social security number on his voter registration form.

Mandating such information from voter registrants is not unique to North Carolina. For elections to federal offices, Congress, through HAVA, also requires the states to collect

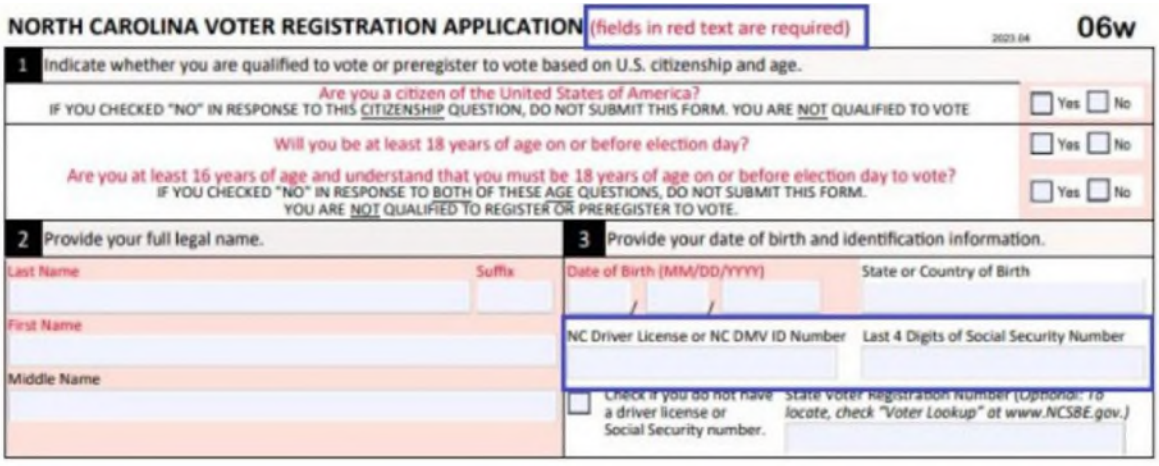
the drivers license or social security number from registrants. 52 U.S.C. § 21083(a)(5)(A)(i). If a person with a drivers license or social security card fails to provide those identifiers on a voter application form, then the application "may not be accepted or processed by a State." *Id.*

Although HAVA and federal law don't apply to elections for state offices—such as the election at issue here—this federal prerequisite to voting in federal elections corroborates the importance of collecting such information from would-be voters. In other words, the information required by the General Assembly is not some new law designed to burden voters but a decades-old feature of election law that protects the integrity of our elections.

B. The State Board admits that it broke the law.

No one thinks that the State Board actually complied with the law. Instead, it's clear that the Board broke the law for twenty years.

Despite the clarity in the law since enactment in 2003, the State Board did not require voters to provide a drivers license or social security number when people registered to vote. Before December 2023, the voter application form appeared like this:



NORTH CAROLINA VOTER REGISTRATION APPLICATION (fields in red text are required) 2023.04 06w

1 Indicate whether you are qualified to vote or preregister to vote based on U.S. citizenship and age.

Are you a citizen of the United States of America? ☐ Yes ☐ No
IF YOU CHECKED "NO" IN RESPONSE TO THIS CITIZENSHIP QUESTION, DO NOT SUBMIT THIS FORM. YOU ARE NOT QUALIFIED TO VOTE

Will you be at least 18 years of age on or before election day? ☐ Yes ☐ No

Are you at least 16 years of age and understand that you must be 18 years of age on or before election day to vote? ☐ Yes ☐ No
IF YOU CHECKED "NO" IN RESPONSE TO BOTH OF THESE AGE QUESTIONS, DO NOT SUBMIT THIS FORM.
YOU ARE NOT QUALIFIED TO REGISTER OR PREREGISTER TO VOTE.

2 Provide your full legal name.

Last Name | Suffix
First Name
Middle Name

3 Provide your date of birth and identification information.

Date of Birth (MM/DD/YYYY) / / | State or Country of Birth
NC Driver License or NC DMV ID Number | Last 4 Digits of Social Security Number
☐ Check if you do not have a driver license or Social Security number.
State Voter Registration Number (Optional: To locate, check "Voter Lookup" at www.NCSBE.gov.)

As this image reveals, the application did not tell registrants that these identifiers were required because it was not in red text. Yet this information is required. N.C. Gen. Stat. § 163-82.4(a)(11).

The Board admitted that it allowed voters to register in violation of the law when it entered an order on an administrative complaint from 2023 that raised the issue. In that order, the Board concluded that similar provisions of HAVA could be violated "as a result of the current North Carolina voter registration application form failing to require an applicant to provide an identification number or indicate that they do not possess such a number." Order at 4, *In re HAVA Complaint of Carol Snow* (N.C. State Bd. of Elections Dec. 6, 2023) (Attached as **Exhibit A** to Brief). The Board ordered its staff to revise the form going forward.[3] *Id.* But the Board refused to remedy its past legal violations.

Now, however, the issue has changed the outcome of an election.

C. The unlawful registrations haven't been "cured."

The State Board said nothing in its final decision to suggest it followed the law. Instead, the State Board sought to excuse its lawlessness by reimagining the election laws. The Board reasoned that any error by a voter was harmless because the people who did not properly register cured their defects by providing additional documents as allowed by state

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3 In light of this order, the Board's counsel has advised county boards that they cannot register new voter applicants who fail to provide a drivers license or social security number and who also fail to "state in writing that they lack these numbers." Email of Paul Cox, N.C. State Bd. of Elections, to Directors of County Bds. of Election (Sept. 4, 2024). (A.R. pp 311.)

law. (A.R. pp 5385-86.) The Board's logic is rejected by the relevant statutes' plain language.

First, there is no state law permitting a "cure" by providing additional documents. The only state law which the State Board could possibly cite would be subsections (a) and (b) of N.C. Gen. Stat. § 163-166.12.[4] Both of these provisions plainly require a person "who *has registered* to vote by mail" to provide additional documentation when they actually vote. N.C. Gen. Stat. § 163-166.12(a), (b) (emphasis added); *see Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1169 (11th Cir. 2008) (holding that HAVA's identical requirements "impos[e] additional restrictions on those individuals who registered by mail before they can vote either a regular or a provisional ballot"). Again, to be registered, a person must first provide a drivers license or social security number. *See* N.C. Gen. Stat. § 163-82.4(a)(11). A statute that places an additional obligation on a voter who is registered (by mail) cannot be a "cure" for somebody who failed to register properly.

Moreover, subsections (a) and (b) cannot be a cure for somebody who failed to provide a drivers license or social security number because the additional documentation required by these subsections is not a substitute for providing a drivers license or social security number. At the time of registration, the State Board is supposed to verify the identity of the registrant by matching the registrant's drivers license or social security number to

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4 Strangely, the State Board cited the provisions of HAVA—which govern federal elections, *e.g.*, 52 U.S.C. § 21081(a)—rather than the similar provisions found in North Carolina law—which govern this state election. (A.R. p 5385.)

other government databases. *See id.* § 163-82.12(6), (8), (9). And if the drivers license or social security numbers don't result in a match, the Board must take additional steps to verify the applicant's identity. *Id.* § 163-166.12(d).[5] In contrast, subsections (a) and (b) let a registered voter provide ***any*** of the following documents: current and valid photo identification, a current utility bill, bank statement, government check, paycheck, or other government document showing the voter's address. *Id.* § 163-166.12(a)-(b). The mere presentation of those documents is not the equivalent of an identity match with government databases. They are apples and oranges. The people who cast the ballots at issue here never went through that verification procedure, and the fact that they might have provided additional documents when they voted does nothing to cure the registration defect.

This is also why Justice Riggs was wrong to argue to the State Board that the unlawful registrants cured their registration defects when they presented a photo identification in 2024. *See generally id.* § 163-166.16. This theory fails for at least two reasons. First, although voter identification laws were in place in 2024, the laws allowed a plethora of alternative forms of photo identification (e.g., student, teacher, and tribal identification cards) and even permitted voters to provide *no identification at all* in certain circumstances. *See id.* § 163-166.16(a), (d). Second, photo identification guards against voter impersonation (i.e., an imposter claiming to be a person who is a registered voter); it does not guard against

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5 Subsection (d) can't carry the weight Justice Riggs wishes to put on it. It only applies to people who actually provided these digits when they registered to vote, and Judge Griffin is not challenging such voters—he's only challenging voters who never provided either number.

somebody registering by manufacturing a fake identity. Absent a drivers license or social security number, the State Board simply cannot verify the identity of somebody registering to vote. Photo identification requirements are not a substitute for providing a drivers license or social security number.

Indeed, even if a voter provided a drivers license when voting, *see id.* § 163-166.16(a)(1)(a), the poll worker simply looked at the picture and handed the voter a ballot. The poll worker certainly did not write down the drivers license number, turn the number over to the State Board, and wait for the State Board to perform a match against government databases.

Nor did the General Assembly provide that these provisions can cure an improper voter registration. The General Assembly has decided that there is precisely one way to cure an improper registration. *See id.* § 163-82.4(f). The individuals challenged by Judge Griffin did not use this statutory cure process. The State Board doesn't have the authority to reinvent state law to create its own "cure" procedures. It has a duty to follow the law, not make law.

D. The Board tried to cast doubts about its own data.

In its decision, the Board cast doubt on the unrebutted evidence offered in support of Judge Griffin's protests. Namely, the Board questioned whether the 60,000 voters identified in the protests had failed to provide their drivers license or social security numbers. (A.R. p 5382.)

As a threshold matter, the affidavits that accompany Judge Griffin's protest explain that the list identifying the incomplete registrants was **provided by the State Board itself** in response to a public records request. (A.R. pp 313-14 ¶¶ 9-11.) The fact that the Board attempted to impeach its own data should make the Court suspicious of the Board's purported factual concerns. But the Court can also quickly dispense with these concerns on the merits.

To try to create doubt about the list provided by the State Board, the Board now speculates that the list could be overinclusive.

The State Board first speculates that the list might include individuals who were never issued a drivers license or social security number. (A.R. pp 5382-83.) But the Board—which certainly knows the answer to its own question—stops short of alleging that a single individual on the list falls within this category.

Second, the Board theorizes that some individuals might appear on the Board's list because, despite providing a drivers license or social security number with their application, the number was removed from "the voter's registration record" after the number failed the validation process. (A.R. pp 5383-84.) But the Board concedes that, while the number is no longer in the "voter's registration record," "the *data is still retained* elsewhere in the system." (A.R. p 5384 (emphasis added).) The Board, moreover, provided a list of voters for which the Board's records did "not contain **data**" of either a drivers license number or

social security numbers. (A.R. pp 313-14 (emphasis added).)[6] According to the Board itself, the Board provided a list of voters for which the Board had no data of a drivers license or social security numbers. Notably, the Board never alleges that a single individual on the list provided a drivers license or social security number.

None of the Board's speculation undermines the reality that Judge Griffin's incomplete-registration protests provide substantial evidence of an outcome-determinative election-law violation.

E. Judge Griffin's protests do not implicate federal election laws.

The State Board plainly rejected Judge Griffin's interpretation of state laws and, therefore, dismissed his protests on that basis alone. However, as an alternative ground for the Board's outcome, the Board attempted to inject federal law—the Help America Vote Act (HAVA) and the National Voter Registration Act (NVRA)—into a state-law election issue. (A.R. 5384-87.) But HAVA and the NVRA have nothing to do with this case.

1. HAVA has no bearing on state elections.

Judge Griffin has protested ballots cast in a *state election* by people who sought to register in violation of *state law*, as the above discussion showed. The State Board, however, attempts to rely on HAVA as justification for flouting state law. Invoking HAVA makes no sense here because HAVA does not apply to elections for state offices, as the Supreme

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6 Mr. Bonifay explains in his affidavit that he screened the Board's list for individuals who lacked data for both a drivers license number and a social security number, and then he matched that subset against a list of individuals who voted by absentee or provisional ballot. (A.R. p 314.)

Court has held. *James*, 359 N.C. at 268, 607 S.E.2d at 643 ("HAVA, ***which does not apply to state and local elections***, was initiated in the wake of allegations of irregularity and fraud in the 2000 presidential election." (emphasis added)); *accord Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 436 (E.D. Mich. 2004); *Broyles v. Texas*, 381 F. App'x 370, 373 n.1 (5th Cir. 2010). The plain language of HAVA leaves no doubt. The registration systems mandated by HAVA apply only to "an election for Federal office." 52 U.S.C. § 21081(a); *id.* § 21083(A)(1)(a)(viii). Thus, no one can claim a HAVA violation related to an election for state office. *James*, 359 N.C. at 268, 607 S.E.2d at 643. As in *James*, the issue is controlled by "state law." *Id.*

Even setting aside the plain language, it's impossible for these federal laws to apply to this case. Congress enacted HAVA under the federal constitution's elections clause. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 15 (2013) (NVRA); H.R. Rep. No. 107-329, pt. 1, at 57 (2001), 2001 WL 1579545 (explaining the constitutional authority for HAVA); *Colon-Marrero v. Velez*, 813 F.3d 1, 19 (1st Cir. 2016) (same). But under the elections clause, Congress can only create rules for elections to federal office, not state office. *See* U.S. Const. art. I, § 4, cl. 1; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (elections clause makes clear that states have "control over the election process for state offices").

This confirms the only reasonable reading of HAVA's text: the statute does not apply to state elections. Judge Myers reached that same conclusion when he remanded this

case: "this matter involves a state election, so HAVA, even if practically relevant, is legally irrelevant." Remand Order at 13 (Attached as **Exhibit B** to the brief).

2. The NVRA has no bearing on votes counted in state elections.

The State Board also reasons that, as an alternative basis for its ruling, the NVRA prohibits Judge Griffin's election protests. *See* (A.R. pp 5392-94.) But the NVRA has nothing to do with this case because this federal law doesn't apply to elections for state offices, nor does it apply to election protests.

The NVRA, by its own terms, applies only to elections for federal offices and not elections to state offices. The stated purpose of the law is just to affect participation in "elections for Federal office." 52 U.S.C. § 20501(b)(1)-(2). Like HAVA, Congress enacted the NVRA under the federal constitution's elections clause. Many courts have therefore acknowledged the only reasonable conclusion from the text of the NVRA and the federal it constitution: The NVRA cannot apply when the argument is about an election to a state office. *See, e.g.*, *Young v. Fordice*, 520 U.S. 273, 275 (1997) ("The NVRA requires States to provide simplified systems for registering to vote in federal elections, i.e., elections for federal officials, such as the President, congressional Representatives, and United States Senators."); *Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1028 (D. Neb. 2000); *Broyles v. Texas*, 618 F. Supp. 2d 661, 691 (S.D. Tex. 2009), *aff'd*, 381 F. App'x 370 (5th Cir. 2010);

Pree v. D.C. Bd. of Elections & Ethics, 645 A.2d 603, 605 (D.C. 1994). That is also the conclusion reached by Judge Myers. *See* Remand Order at 7-8 (Attached as **Exhibit B**).[7]

Relying on the NVRA presents another threshold problem: the statute applies only to state efforts to remove voters from the voter rolls. 52 U.S.C. § 20507(a)(3), (c). But Judge Griffin has not requested in his protests for anyone to be removed from the voter rolls. Indeed, his election protest challenges only the outcome of *his* election—it doesn't even affect an ineligible voter's vote in *another* race in 2024 elections, much less cause that voter to be removed from the voter rolls.

The function of an election protest is to challenge the results of an election, not to remove anyone from the voter rolls. By law, a successful election protest does not result in anyone being removed from the voter rolls. Instead, it results in inaccurate results being corrected, or the vote being recounted. N.C. Gen. Stat. § 163-182.10(d)(2)(e)(1)-(2).

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.

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7 In its order, the State Board explained that the NVRA "restricts the removal of voters from 'the official list of eligible voters' in an election." (A.R. p 5392 (quoting 52 U.S.C. § 20507(a)(3)).) The State Board knowingly omitted that these restrictions apply "to voter registration for elections **for Federal office**." 52 U.S.C. § 20507(a) (emphasis added). Judge Griffin did not stand for election to a federal office.

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)").[8]

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

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

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 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.

Below, Justice Riggs argued that additional federal statutes preclude Judge Griffin's protests from succeeding. The Board did not address these statutes because they are irrelevant to the protests at issue.

A. The Civil Rights Act does not affect the protests.

Justice Riggs argued to the State Board that the "materiality provision" of the federal Civil Rights Act of 1964 barred Judge Griffin's election protests based on ballots cast by people with incomplete voter registrations. But her same argument has been rejected by other courts.

The Civil Rights Act's materiality provision prohibits any "person acting under color of law" from denying an individual's vote due to an error or omission "if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). The Eleventh Circuit has already determined that a drivers license or social security number is material in determining whether an individual is qualified by law to vote. *See Browning*, 522 F.3d at 1174 n.22 ("because Congress required the identification numbers [drivers license numbers or partial

social security numbers] to be on voter registration applications, they are *per se* material under [the Civil Rights Act's materiality provision]").

Indeed, the materiality provision only applies to the provision of "trivial information" that serves no purpose other than "inducing voter-generated errors that could be used to justify rejecting applicants." *Id.* at 1173. The General Assembly has determined that some information on the voter application form is immaterial and can be lawfully omitted—like "race, ethnicity, gender, or telephone number." N.C. Gen. Stat. § 163-82.4(a). But drivers license and social security numbers are far from immaterial. This information is used to validate the identity of the applicant. *Id.* § 163-82.12(8), (9). Thus, the Eleventh Circuit described such information as "per se" material under the Civil Rights Act. *Browning*, 522 F.3d at 1174 n.22. The court was skeptical that the government "would mandate the gathering of information—indeed, that it would make that a precondition for accepting registration application—that it also deems immaterial." *Id.* at 1174.

B. The Voting Rights Act does not affect 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.[9]

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

---

9 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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was electronically filed and served this day by email, addressed as follows:

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This the 29th day of January, 2025.

/s/ Craig D. Schauer
Craig D. Schauer

EXHIBIT A

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN RE: HAVA COMPLAINT OF CAROL SNOW	)	**ORDER**

Carol Snow (Petitioner) filed a Help America Vote Act (HAVA) Complaint with the State Board of Elections on October 6, 2023, pursuant to procedures set forth in 52 U.S.C. § 21112, N.C.G.S. § 163-91, and the State Board's adopted HAVA Administrative Complaint Procedure.

Petitioner alleged a violation of Section 303(a)(5)(a) of HAVA, contending that North Carolina's voter registration form—on the face of the form and in its instructions—does not clearly state that a voter registration applicant is required to provide their driver's license number or last four digits of their Social Security number if they have been issued such a number, for their registration to be processed. She also asserts that a State Board informational video on YouTube regarding the registration form fails to explain that one of these identification numbers must be provided by the applicant.

Petitioner requests that the voter registration form be revised "to use red colored text and red tinted background for all required personal identifying information, including the Driver License number if issued, or if no Driver License, the last 4 digits of their Social Security Number if issued," and for a voter without one of those numbers to be required to verify that they lack those numbers on the form. She also requests that the associated YouTube video be revised accordingly. She also requests that no current voter registration applications in

circulation be accepted; only forms as revised per her request. Finally, she requests that any registered voters for whom there is no driver's license or last four digits of their Social Security number listed on their voter registration record be asked to provide this information, if possessed.

The relevant provision of HAVA states as follows:

> **52 U.S.C. § 21083. Computerized statewide voter registration list requirements and requirements for voters who register by mail**
>
> **(a) Computerized statewide voter registration list requirements**
> . . .
> **(5) Verification of voter registration information**
> **(A) Requiring provision of certain information by applicants**
> **(i) In general**
> Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes—
> (I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or
> (II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.
> **(ii) Special rule for applicants without driver's license or social security number**
> If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.
> **(iii) Determination of validity of numbers provided**
> The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.
> . . .

A separate provision of the same section of HAVA addresses how an applicant for registration is to have their identity verified, before they are allowed to vote a regular ballot, if they do not provide a driver's license number or last four digits of a Social Security number than can be verified. That provision states as follows:

> **52 U.S.C. § 21083. Computerized statewide voter registration list requirements and requirements for voters who register by mail**
>
> . . .
>
> **(b) Requirements for voters who register by mail**
>
> **(1) In general**
>
> Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4(c)) [now 52 U.S.C. 20505(c)] and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if—
>
> (A) the individual registered to vote in a jurisdiction by mail; and
>
> (B)(i) the individual has not previously voted in an election for Federal office in the State; or
>
> (ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).
>
> **(2) Requirements**
>
> (A) In general
>
> An individual meets the requirements of this paragraph if the individual—
>
> (i) in the case of an individual who votes in person—
>
> (I) presents to the appropriate State or local election official a current and valid photo identification; or
>
> (II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or
>
> (ii) in the case of an individual who votes by mail, submits with the ballot—
>
> (I) a copy of a current and valid photo identification; or
>
> (II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 21082(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 21082(a) of this title.

. . . .

The State Board met on November 28, 2023, and concluded that a violation of Section 303 of HAVA could occur as a result of the current North Carolina voter registration application form failing to require an applicant to provide an identification number or indicate that they do not possess such a number, and that the appropriate remedy is to implement changes recommended by staff to the voter registration application form and any related materials.

The State Board did not approve the request that county boards refuse to accept any voter registration forms currently in circulation, since HAVA can be complied with by instructing the county boards of elections to require an applicant to complete the required information before processing the voter registration application in its existing form.

The State Board did not approve the requested remedy to contact all existing registered voters whose electronic records do not show a driver's license number of last four digits of a Social Security number, since that remedy, when applied to an existing registered voter (as opposed to registration applicants), is not specifically authorized in HAVA. Importantly, the law's purpose of identifying the registrant upon initial registration is already accomplished because any voter who did not provide a driver's license number or the last four digits of a Social Security number would have had to provide additional documentation to prove their identity

before being allowed to vote, by operation of the separate provision of HAVA identified above. In other words, no one who lacked this information when registering since the enactment of HAVA would have been allowed to vote without proving their identity consistent with HAVA.

It is so ordered.

This 6th day of December, 2023.

Alan Hirsch, Chair
STATE BOARD OF ELECTIONS

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Case No. 5:24-CV-00724-M

JEFFERSON GRIFFIN,

Plaintiff,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendant,

ALLISON RIGGS,

Intervenor-Defendant, and

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS et al.,

Intervenor-Defendants.

ORDER

This matter comes before the court on Plaintiff Jefferson Griffin's ("Griffin") motion for preliminary injunction [DE 31]. In this removed state action, a sitting state court judge seeks a writ of prohibition (a form of judicial relief authorized by the state constitution) from the state supreme court that would enjoin the state board of elections from counting votes for a state election contest that were cast by voters in a manner allegedly inconsistent with state law. Should a federal tribunal resolve such a dispute? This court, with due regard for state sovereignty and the independence of states to decide matters of substantial public concern, thinks not. For that reason, the court abstains from deciding Griffin's motion under *Burford*, *Louisiana Power*, and their progeny and remands this matter to North Carolina's Supreme Court. *See Burford v. Sun Oil Co.*,

319 U.S. 315, 332 (1943); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959).

I. Introduction and Procedural History

Griffin is a Judge on North Carolina's Court of Appeals (the state's intermediate appellate court) and candidate for Seat 6 on North Carolina's Supreme Court (the state's court of last resort). DE 1-4 at 16.[1] Griffin ran in the 2024 general election as a Republican against Allison Riggs ("Riggs"), the Democratic candidate who is currently a sitting Justice on the North Carolina Supreme Court. *Id.* at 17. After a full count of votes, machine recount, and partial hand recount, the canvassed results show Riggs leading Griffin by 734 votes, but Defendant North Carolina State Board of Elections (the "State Board") has not yet certified the results. *See* DE 32 at 3; DE 39 at 7.

Griffin indicates that he "became aware of numerous irregularities with ballots cast during the election." DE 32 at 3. As a result, he "filed election protests" with county boards of election "in each of North Carolina's 100 counties." DE 1-4 at 18. Three protests are the subject of this action:

1. First, Griffin challenges the votes of over 60,000 individuals who, at some point over the past 20 years, registered to vote in North Carolina without providing either their driver's license numbers or the last four digits of their social security numbers. *Id.* at 19. According to Griffin, this past registration error contravenes state law and renders illegitimate the resulting votes from these individuals. *See id.* (citing N.C.G.S. §§ 163-82.1 & 163-82.4 for proposition that "unless someone is lawfully registered to vote, he cannot vote").

[1] All pin cites to materials in the record will refer to the page numbers that appear in the footer appended to those materials upon their docketing in the CM/ECF system, and not to any internal pagination.

2. Second, Griffin challenges absentee ballots cast by 267 individuals who admittedly have never resided in North Carolina (or anywhere in the United States). *Id.* at 20. Notwithstanding state law granting this group of individuals (whose parents are either uniformed-service or overseas voters) the right to vote in North Carolina, *see* N.C.G.S. § 163-258.2(e), Griffin asserts that counting their votes violates the North Carolina Constitution, DE 1-4 at 19-20.
3. Third, Griffin challenges the votes of approximately 5,500 overseas absentee voters who did not provide copies of their photo identification with their absentee ballots, which he contends violates state law. *Id.* at 20-21; *see also* N.C.G.S. § 163-230.1.

The State Board subsequently assumed jurisdiction over Griffin's three protests. *Id.* at 21. After a public hearing on December 11, 2024, the State Board issued a written decision that rejected Griffin's challenges on various grounds:

1. The State Board concluded that Griffin failed to properly serve potentially affected voters because, instead of serving them with copies of his protests, he mailed them postcards with the message that their "vote may be affected by one or more protests" and a QR code that linked to a website containing the hundreds of protests ongoing in North Carolina, at which point the voter would have to sift through spreadsheets of names attached to each protest to determine whether their vote had been challenged and in which protest. DE 1-5 at 46-50. The State Board found that this method of service violated a rule that it had promulgated as well as the procedural due process rights of voters. *Id.* at 50-54.
2. The State Board found that even if it credited Griffin's state law arguments in connection with his first challenge, which targets the 60,000 voters who had allegedly

registered to vote without providing their driver's license numbers or the last four digits of their social security numbers, granting him relief by discarding that group of votes would violate the voters' substantive due process rights, state law, and federal statutory law, including the Help America Vote Act ("HAVA") and the National Voter Registration Act ("NVRA"). *Id.* at 60-67.

3. The State Board also rejected each of Griffin's challenges on its merits. *Id.* at 54-60, 69-79.

North Carolina law provides that a party aggrieved by a decision of the State Board "has the right to appeal the final decision to the Superior Court of Wake County within 10 days of the date of service" of the State Board's decision. N.C.G.S. § 163-182.14(b). "Unless an appealing party obtains a stay of the certification from the Superior Court of Wake County within 10 days after the date of service," the election results "shall issue." *Id.* Rather than follow the appeal process provided by state law, Griffin filed this action directly in the North Carolina Supreme Court, seeking a writ of prohibition that would enjoin "the State Board [] from counting unlawful ballots cast in the 2024 general election." DE 1-4 at 14.

In his petition for a writ of prohibition, Griffin addresses his three challenges on their merits, each of which entail alleged violations of either state election law or the state Constitution. *See id.* at 33-40, 44-45, 47-50, 53-59. Griffin next argues that the State Board and Riggs' invocation of various federal laws in defense to his challenges are inapposite. *Id.* at 40-46, 50-51, 59-60, 67-74. He also responds to the procedural defects raised by the State Board. *Id.* at 60-67.

Griffin seeks various forms of relief, including the discarding of votes from voters covered by each of his three challenges and declaratory relief rejecting various conclusions of the State Board. *Id.* at 83-84. He sought this relief directly from the North Carolina Supreme Court, rather

than file an appeal in the Superior Court of Wake County, because of his concern that the State Board would "try to strip [that court] of jurisdiction to decide this case by improperly removing it to federal court." *Id.* at 24. The day after Griffin filed his petition, the State Board removed it to this court. DE 1.

In its notice of removal, the State Board invokes this court's subject-matter jurisdiction under 28 U.S.C. § 1441(a), which permits removal of claims arising under federal law, and 28 U.S.C. § 1443(2), which authorizes removal when a party has been sued for refusing to act on the ground that performing the act would contravene federal civil rights law. *Id.* at 1-2. The day after the State Board removed this matter to federal court, Griffin filed a motion for temporary restraining order ("TRO"), which sought a court order prohibiting the certification of the results for Seat 6. DE 13; DE 14. This court denied Griffin's motion because the alleged harm he described was not so immediate that he required a TRO "before [the State Board could] be heard in opposition." Text Order dated December 20, 2024.

Riggs promptly sought intervention in this matter and, after denial of the TRO, so did the North Carolina Alliance for Retired Americans, VoteVets Action Fund, Tanya Webster-Durham, Sarah Smith, and Juanita Anderson (the "NCARA parties"). DE 7; DE 8; DE 24; DE 25. The court granted both motions for intervention. *See* Text Order dated December 26, 2024.

On December 23, Griffin filed the instant motion for preliminary injunction, along with a consent motion to expedite briefing on the preliminary injunction motion. DE 31; DE 33. The court granted the consent motion and ordered expedited briefing, and additionally ordered the State Board, in responding to Griffin's motion, to show cause why this matter should not be remanded to the North Carolina Supreme Court for lack of subject-matter jurisdiction. *See* Text Order dated

December 26, 2024. The court also offered Griffin the opportunity to respond to the State Board's arguments regarding subject-matter jurisdiction in his reply. *Id.*

All parties complied with the court's briefing schedule. DE 39; DE 40; DE 42; DE 47; DE 48; DE 49.[2] In addition, Former Senate Majority Leader Thomas Daschle, former House Majority Leader Richard Gephardt, and former Representatives Christopher Shays, Jim Greenwood, Robert Wexler, Wayne Gilchrest, and Steve Israel (the "Former Members of Congress") moved the court for leave to file an amicus brief, DE 37, as did the North Carolina League of Women Voters, DE 41. The court grants those motions for leave, has considered the respective briefs, and notes the extent to which they aided in the court's decisional process.

Unless this court (or another) issues an order enjoining the State Board from certifying the election for Seat 6, those results will issue on January 10, which will render moot Griffin's protests. *See* DE 39 at 2. Griffin's motion for preliminary injunction is fully briefed, the court has considered each filing, and this matter is ready for disposition.[3]

II. Legal Framework

This matter, which involves a state, not federal, election, involves potential practical implications but a crucial theoretical distinction, which has in turn led some of the parties (and amici) to at times conflate what precisely is at issue. In the context of a federal election, the States and Congress enjoy dual sovereignty. U.S. CONST. art 1 § 4, cl. 1. The "States have a major role to play in structuring and monitoring the [national] election process." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). They must "prescribe the time, place, and manner of

[2] In lieu of incorporating his arguments pertaining to subject-matter jurisdiction into his reply, DE 47, Griffin separately filed a motion to remand (and supporting memorandum), DE 48; DE 49. For practical purposes, the court considers these as one filing, and not a new motion to which the State Board must be offered an opportunity to respond, because the State Board has already briefed its position on subject-matter jurisdiction in response to the court's show cause order. DE 39.

[3] Considering the short timeline between now and certification, as well as the lack of factual disputes presented by this matter, the court finds that a hearing is not necessary.

electing Representatives and Senators" for the national Congress. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013). But this grant of authority to States for federal elections only goes "so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997).

Elections for state office are different because "the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise." *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (opinion of Black, J.). Put another way, "Article I, Section IV does not give Congress the power to directly regulate state voter registration procedures in state elections or state ballot issues." *Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1028 (D. Neb. 2000). And "[a]bsent the invocation by Congress of its authority under the Fourteenth [or Fifteenth] Amendment[s]," the states retain "the power to fix the time, place, and manner of the election of [their own] officials." *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995). Due respect for States' authority to set forth rules governing their own elections reflects the constitutional (and commonsense) principle that "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." *Mitchell*, 400 U.S. at 125 (opinion of Black, J.).[4]

Pursuant to its authority under the Civil War Amendments, Congress has passed laws that apply in the context of *both* state and federal elections, including the Civil Rights Act and the Voting Rights Act. 52 U.S.C. § 10101; 52 U.S.C. § 10301. Congress has also enacted a series of

[4] Of course, state regulation of state and local elections remains subject to federal constitutional constraints. *E.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986).

laws that govern *only* federal elections, notably here the NVRA and HAVA. 52 U.S.C. § 20501; 52 U.S.C. § 21081. "The NVRA requires States to provide simplified systems for registering to vote in *federal* elections, i.e., elections for federal officials, such as the President, congressional Representatives, and United States Senators." *Young v. Fordice*, 520 U.S. 273, 275 (1997) (emphasis in original). Likewise HAVA, which seeks to establish minimum standards of election administration, "applies only to federal elections." *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 436 (E.D. Mich. 2004); *accord Broyles v. Texas*, 381 F. App'x 370, 373 n.1 (5th Cir. 2010).

After passage of HAVA, North Carolina's General Assembly enacted a series of laws to implement HAVA and adopt equivalent requirements in the context of state and local elections. *E.g.*, N.C.G.S. §§ 163-82.4, 162-82.11, & 163-166.12. As a result, and as a practical matter, "North Carolina has a unified registration system for both state and federal elections." *Republican Nat'l Comm. v. N. Carolina State Bd. of Elections*, 120 F.4th 390, 401 (4th Cir. 2024) ("*RNC*"). But that unified system is a choice that the people of North Carolina made through their elected representatives; nothing in federal law compels North Carolina to adopt HAVA's procedures for state and local elections. *See Mitchell*, 400 U.S. at 125; *Dobrovolny*, 100 F. Supp. 2d at 1028. Thus, to the extent North Carolina election law for state and local elections mirrors or parallels federal law, that symmetry "is state-created, not federal." *Crowley v. Nevada ex rel. Nevada Sec'y of State*, 678 F.3d 730, 735 (9th Cir. 2012).

III. Analysis

a. Subject-Matter Jurisdiction

As the court previously explained in a recent election-related lawsuit, "[t]here exist two possible paths to establishing subject matter jurisdiction in this action. First, the claims could raise

a federal question under 28 U.S.C. § 1331, which would permit removal under 28 U.S.C. § 1441(a). Second, the action could implicate a federal law providing for equal rights in terms of racial equality, which would authorize removal under 28 U.S.C. § 1443(2)." *Republican Nat'l Comm. v. N. Carolina State Bd. of Elections*, No. 5:24-CV-00547, 2024 WL 4523912, at *2 (E.D.N.C. Oct. 17, 2024), *rev'd and remanded*, 120 F.4th 390 (4th Cir. 2024). Extensive repetition of the relevant history of subject-matter jurisdiction is unnecessary here. *See id.* at *2-7.

b. Removal under 28 U.S.C. § 1441

This court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. If a plaintiff initiates a civil action "in a State court of which" a federal district court has "original jurisdiction," that action "may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Where a plaintiff's claims all arise under state law, those claims will only present a federal question over which a district court may maintain original jurisdiction "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013); *see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 (1986); *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 13 (1983).

In assessing whether a plaintiff's claim necessarily raises an issue of federal law, the court follows the well-pleaded complaint rule: "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). In this context, *complaint* really means *claim*; a federal question is not

presented on the face of a complaint unless it is an "essential element[] of the plaintiff's—and only the plaintiff's—claim." *Capitol Broad. Co., Inc. v. City of Raleigh, N. Carolina*, 104 F.4th 536, 540 (4th Cir. 2024). In other words, "[i]t is *not* enough that federal law becomes relevant by virtue of a defense." *Burrell v. Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019) (emphasis in original) (internal quotation mark omitted). This is true even where a plaintiff "'goes beyond a statement of [his] cause of action and anticipates or replies to a probable defense,' even if that defense itself raises a federal question." *Capitol Broadcasting*, 104 F.4th at 539–40 (quoting *Gully v. First Nat. Bank*, 299 U.S. 109, 113 (1936)).

At the outset, the court finds that Griffin's petition in the North Carolina Supreme Court constitutes a "civil action" within the meaning of Section 1441. Review of dictionaries, both contemporaneous with passage of Section 1441 and more recent, reflect a capacious definition of the term: a civil action is a judicial proceeding in which a party seeks a decree to redress a private right. *E.g.*, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (concluding that "action" meant "any proceeding in a court of justice") (quoting Black's Law Dictionary 1488, 1603 (4th ed.1951) (internal ellipses omitted)); *In Re Teter*, 90 F.4th 493, 499 (6th Cir. 2024) (observing that civil action "is a generous term" and "encompass[es] the old categories of actions at law and suits in equity," i.e., "all types of actions other than criminal proceedings") (quoting Black's Law Dictionary (5th ed. 1979)); *Black v. Black*, No. 1:22-CV-03098, 2023 WL 3976422, at *3 (D. Colo. Apr. 5, 2023) (noting that a "civil action is simply a civil judicial proceeding") (quoting Black's Law Dictionary (11th ed. 2019) (cleaned up)).

Griffin's petition for a writ of prohibition squares with that definition: it is an original civil (not criminal) judicial proceeding through which he seeks to vindicate his private (not public) rights. The petition therefore qualifies as a civil action subject to removal under Section 1441.

See City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (1997) (holding that state court proceeding created by state law that entailed quasi-appellate review of administrative board decision was removable where claims in proceeding included federal constitutional challenge); *Casale v. Metro. Transp. Auth.*, No. 05-CV-4232, 2005 WL 3466405, at *7 (S.D.N.Y. Dec. 19, 2005) (explaining that "technicalities of local procedure, such as what an action or pleading is called, do not affect federal question jurisdiction and removability").[5]

Although the court finds that the form of Griffin's petition permits removal to federal court under Section 1441, it concludes that the substance of the petition does not, in that it could not "have been brought in federal court originally." *Sonoco Prod. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 370 (4th Cir. 2003). The State Board contends that Griffin's petition to the North Carolina Supreme Court presents a federal question, but Griffin's "claims" (such as they are) falter at the first step of the *Gunn* test: no issue of federal law is *necessarily* raised.

Griffin seeks a writ of prohibition, a form of judicial relief authorized by the North Carolina Constitution. N.C. CONST. art. IV, § 12(1). To obtain such a writ, he must show that the State Board is poised to act in a manner "at variance with . . . the law of the land." *State v. Allen*, 24 N.C. 183, 189 (1841).[6] As recounted previously, Griffin's theory is that the State Board's

[5] The court notes Griffin's reliance on *Barrow v. Hunter*, 99 U.S. 80 (1878), but agrees with the Fifth Circuit that *Barrow's* distinction between actions "tantamount to the common-law practice of moving to set aside a judgment for irregularity" and actions "tantamount to a bill in equity to set aside a decree for fraud," *Barrow*, 99 U.S. at 83, may no longer be "good law for the purposes of 28 U.S.C. § 1441" because the basis for that distinction "relied on an interpretation of removal which may well be no longer valid" and does not reflect "the modern view of removal," *Matter of Meyerland Co.*, 910 F.2d 1257, 1261 (5th Cir. 1990). In addition, *Barrow* on its facts does not control this scenario, where Griffin filed an original action directly in North Carolina's Supreme Court rather than follow the appellate procedure designated by state law. *See* N.C.G.S. § 163-182.14(b).

[6] This showing is necessary but not sufficient; Griffin also must show that his grievance could not be "redressed, in the ordinary course of judicial proceedings, by appeal." *State v. Whitaker*, 114 N.C. 818, 19 S.E. 376, 376 (1894); *see also State v. Inman*, 224 N.C. 531, 542, 31 S.E.2d 641, 646–47 (1944) (explaining that state Supreme Court "uniformly denie[s]" petitions for writs of prohibition "where there is other remedy," such as an appeal); *Mountain Retreat Ass'n v. Mt. Mitchell Dev. Co.*, 183 N.C. 43, 110 S.E. 524, 525 (1922) (emphasizing that state Supreme Court will not 'allow a litigant . . . to withdraw his case from the tribunal where the statute has placed it" by filing writ when alternative remedy is available). This is a merits issue that the court need not reach at this point.

imminent certification of the election results for Seat 6 entail its disregard of the state Constitution and several state laws, which he raised in his three protests to the State Board (and which he restates in his petition for a writ of prohibition). *See generally* DE 1-4; DE 33.

First, Griffin challenges the votes of voters who initially registered to vote in North Carolina without providing their driver's license numbers or the last four digits of their social security numbers, in alleged violation of state law. *See* N.C.G.S. § 163-82.4. Next, Griffin challenges the votes of voters who have never resided in North Carolina, which involves an apparent conflict between state law and the North Carolina Constitution. N.C. CONST. art. VI, § 1; N.C.G.S. § 163-258.2(e). Lastly, he contests the votes of absentee voters who failed to include a copy of their photo ID with their absentee ballot, which he argues contravenes state law. *See* N.C.G.S. § 163-230.1.

An issue of federal law is not "a necessary element" of Griffin's first challenge, and his right to relief does not "necessarily turn[] on some construction of federal law." *Franchise Tax Bd.*, 463 U.S. at 9, 14. That challenge can be resolved with exclusive reference to state law. *See* N.C.G.S. § 163-82.4. The relevant provision of North Carolina law states that a voter registration form "shall request the applicant's . . . [d]rivers license number or, if the applicant does not have a drivers license number, the last four digits of the applicant's social security number." N.C.G.S. § 163-82.4(a)(11). Per Griffin, if individuals do not provide one of those numbers, they have not been "lawfully registered" and therefore "cannot vote." DE 1-4 at 19 (citing in addition N.C. CONST. art. VI, § 3(1)). This first challenge does not reference or require consultation of federal law.[7]

[7] Section 163-82.4 is distinguishable in a key respect from the state statute at issue in *RNC*, which incorporated by express reference a federal standard. *See RNC*, 2024 WL 4523912, at *9 (evaluating N.C.G.S. § 163-82.11(c), which required State Board to "update the statewide computerized voter registration list and database to meet the requirements of section 303(a) of [HAVA]").

The State Board asserts that Griffin's challenge to voters' registrations would "require[] this [c]ourt to construe HAVA," DE 39 at 11, but that is incorrect. After Congress passed HAVA, North Carolina's General Assembly enacted parallel legislation, establishing a uniform system of registration for both state and federal elections. *See RNC*, 120 F.4th at 401. But that uniform system does not eliminate the legal distinction between federal elections, which Congress may regulate (*see* 52 U.S.C. § 21081), and state elections, which Congress (with limited exception) may not (*see Mitchell*, 400 U.S. at 125). And this matter involves a state election, so HAVA, even if practically relevant, is legally irrelevant.

As the Fourth Circuit observed under analogous circumstances in *Vlaming*, the fact that relevant provisions of state law may be "coextensive with [] analogous federal [] provisions" does not mean that a state law argument necessarily raises an issue of federal law. *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300, 307 (4th Cir. 2021). "Although [North Carolina] courts may rely on federal law to decide a state [law] question, there is no requirement that they must" and "[n]othing prevents [Griffin] from prevailing on his state [law arguments] on exclusively state grounds." *Id.* at 308. Thus, because North Carolina's Supreme Court "is not required to rely on federal law" to resolve Griffin's first challenge, "no federal question is necessarily raised." *Id.*

As other courts have concluded, "[t]he fact that State law may look to federal law does not mean that federal law is a necessary element," and "the fact that the same set of alleged facts could trigger federal issues [], does not mean that a substantial question of federal law is *necessarily* raised; it only points to parallel federal and state cases arising from the same set of facts." *Sage v. Tacoma Sch. Dist. No. 10*, No. 3:17-CV-5277, 2017 WL 6033015, at *2 (W.D. Wash. Dec. 6, 2017) (emphasis in original); *accord Beavers v. City of Jackson*, 439 F. Supp. 3d 824, 829 (S.D. Miss. 2020). Phrased another way, "[w]hether a state court will adopt as the meaning of the state's

[law] the federal courts' interpretation of parallel language in the United States Co[de] is a matter of state law." *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 13 (1st Cir. 2004).

In this regard, the court appreciates but disagrees with the considered view of the amici Former Members of Congress. DE 37; DE 37-1. Amici concede that HAVA "only applies to federal elections," but contend nonetheless that because the State Board "uses a single voter form," the outcome of Griffin's challenge "will also dictate whether [the 60,000 voters] can vote in federal elections." DE 37-1 at 7-8. This contention conflates a potential practical implication with an important legal distinction. The people of North Carolina have chosen to implement a uniform system for both state and federal election registration. *RNC*, 120 F.4th at 401. But that legislative choice, itself a creature of state law, does not transform state law issues with state elections into federal questions for federal courts merely because resolution of the state law issues, by implication, could also inform litigation in the context of a federal election. Any symmetry between North Carolina law (for state elections) and HAVA (for federal elections) "is state-created, not federal," *Crowley*, 678 F.3d at 735, and no court's interpretation of Section 163-82.4 would *control* or *bind* future unrelated proceedings involving analogous provisions of HAVA.

A case from the Fifth Circuit is instructive. *See American Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539 (5th Cir. 2012). There, the plaintiff sued the defendant in both federal and state court. *Id.* at 541. The federal case alleged antitrust "violations of Sections 1 and 2 of the Sherman Act," whereas the state case involved a state law antitrust claim alleging "monopolization in violation of [] the Texas Free Enterprise and Antitrust Act of 1983." *Id.* The Texas antitrust law provided that its provisions "shall be construed to accomplish [its] purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with [its] purpose." *Id.* at 542 (citing Tex. Bus. & Com. Code § 15.04). The defendant removed

the state case to federal court, the plaintiff sought remand, and the federal district court remanded the matter. *Id.* at 541.

In affirming the decision of the district court, the Fifth Circuit observed that, notwithstanding the plaintiff's parallel lawsuits and parallel claims under federal and state law, "nothing in the plain language of the [Texas antitrust law] requires that federal law control Texas's interpretation of its state antitrust statute." *Id.* at 542. The Fifth Circuit also rejected an argument (similar to that made by amici) about the practical implications: even if a federal court's conclusion on the Sherman Act claims suggested that the plaintiff's "parallel state antitrust case would suffer a similar fate," that does not compel the conclusion that the plaintiff somehow "g[a]ve up or alter[ed] its particular rights to pursue its state-law remedies in state court." *Id.* at 544. In sum, the Fifth Circuit agreed with the district court that "the mere fact that a federal standard is to be referenced [] in determining whether there has been a state-law violation" does not "cause[] a state-law claim to 'necessarily raise a stated federal issue.'" *Id.* at 543 (quoting *Grable*, 545 U.S. at 314).

The same is true here. Nothing in Section 163-82.4 "requires that [HAVA] control [North Carolina's] interpretation of its state [election] statute." *Id.* at 542. Further, the practical implications of a state court's interpretation of Section 163-82.4, or even its "reference[]" to HAVA in making such an interpretation, does not cause Griffin's first challenge "to necessarily raise a stated federal issue." *Id.* at 543 (internal quotation marks omitted). Because Griffin's first challenge does not require resort to HAVA, it does not necessarily raise a question of federal law. *See Grable*, 545 U.S. at 314.

Griffin's second challenge also does not raise an issue of federal law. That challenge, targeting voters who have never resided in North Carolina, involves an apparent conflict between

state law (which grants this group of individuals the right to vote) and the state Constitution (which includes a bona fide residency requirement). DE 1-4 at 44-45 (citing N.C. CONST. art. VI, § 1); *see also* N.C.G.S. § 163-258.2(e). No party (including the State Board, Riggs, the NCARA parties, or amici) have argued that Griffin's second challenge involves an issue of federal law, and the court discerns none. *See* DE 37-1; DE 39; DE 40; DE 41-1; DE 42.

That leaves Griffin's third challenge, which contests approximately 5,500 overseas absentee ballots that voters submitted without including a copy of their photo IDs. DE 1-4 at 53-57. The State Board argues that this challenge raises an issue of federal law because a state law addressing overseas absentee voting incorporates by reference a federal requirement found in a federal statute. DE 39 at 12 (citing N.C.G.S. § 163-258.6(b), which references 52 U.S.C. § 20303). But the State Board's argument represents a defense to Griffin's claim, which is that counting the votes of these voters would violate a separate state statute, which does not reference federal law. *See* DE 1-4 at 54; DE 49 at 15 (both addressing N.C.G.S. § 163-230.1).

Under the well-pleaded complaint rule, a state law claim only raises an issue of federal law if it "is a necessary element" of the state claim. *Franchise Tax Bd.*, 463 U.S. at 13; *Caterpillar*, 482 U.S. at 392. "It is *not* enough that federal law becomes relevant by virtue of a defense." *Burrell*, 918 F.3d at 381 (emphasis in original) (internal quotation mark omitted). Here, the State Board's invocation of state law (that references federal law) only becomes relevant by way of its defense, so it is not a necessary element of Griffin's third challenge.

The last argument for federal question jurisdiction, raised by the State Board and the NCARA parties, is that Griffin's petition raises a federal question because he seeks a declaration that the State Board's "arguments under the NVRA, HAVA, the VRA, and the Civil Rights Act against the relief requested by Judge Griffin are rejected." DE 1-4 at 83; see also DE 39 at 13; DE

42 at 35-36. This argument fails for the same reason: the State Board's arguments about federal laws were invoked as defenses to Griffin's protests. *See* DE 1-5 at 60-67. By raising those same arguments in his petition, and seeking a declaration that they "are rejected," DE 1-4 at 83, Griffin is merely "anticipat[ing] or repl[ying] to a probable defense" that the State Board would also make before the state Supreme Court. *Capitol Broadcasting*, 104 F.4th at 540. Plaintiffs may "go[] beyond a statement of the[ir] cause of action" and anticipate federal defenses in their pleadings without converting their state law claims into federal questions. *Gully*, 299 U.S. at 113.

Under the circumstances, it was understandable that Griffin would raise the State Board's federal defenses in his petition: the State Board had just cited them as bases for rejecting his protests. DE 1-5 at 60-67. By attempting to "anticipate[] and rebut[those] defense[s]," Griffin did not inject a federal question into his petition. *Pressl v. Appalachian Power Co.*, 842 F.3d 299, 302 (4th Cir. 2016). "[E]ven if the complaint begs the assertion of [federal] defense[s] . . . that does not" transform Griffin's protests into claims "arising under federal law." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 446 (4th Cir. 2005).

In sum, the court finds that none of the three challenges in Griffin's petition necessarily raise an issue of federal law, and his request for a declaration rejecting the State Board's federal law arguments is simply an anticipatory effort at rebutting predictable federal defenses. Therefore, Griffin's petition does not arise under the laws of the United States, this court would not have had original jurisdiction over it, and removal under Section 1441 was improper. *See* 28 U.S.C. § 1331; 28 U.S.C. § 1441(a).

c. 28 U.S.C. § 1443(2)

Removal is independently authorized for any civil action that involves an "act under color of authority derived from any law providing for equal rights," or the refusal "to do any act on the

ground that it would be inconsistent with such law." 28 U.S.C. § 1443(2). The second portion of that provision is relevant here, known as the refusal clause. *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 785 (E.D.N.C. 2001) (explaining that refusal clause "provides that state officers can remove to federal court if sued for refusing to do any act on the ground that it would be inconsistent with any law providing for civil rights") (internal brackets and quotation marks omitted).

Although the plain terms of Section 1443(2) appear to capture any number of recognized civil rights, "[t]he Supreme Court has limited the meaning of a 'law providing for equal rights' in § 1443 to only those concerning racial equality." *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300, 309 (4th Cir. 2021). In *Rachel*, the Supreme Court concluded that the statutory language "must be construed to mean any law providing for specific civil rights *stated in terms of racial equality*." *State of Ga. v. Rachel*, 384 U.S. 780, 792 (1966) (emphasis added). On the other hand, laws that "are phrased in terms of general application available to all persons or citizens," and not in "specific language of racial equality," do not grant removal jurisdiction under Section 1443. *Id.* Although "the plain text of the statute suggests a broader interpretation," this court "must take the Supreme Court at its word and faithfully apply its precedent." *Vlaming*, 10 F.4th at 310. The Fourth Circuit has recently clarified that the NVRA "provides a proper basis for removal under Section 1443(2)." *RNC*, 120 F.4th at 408.

The court first finds that, contrary Griffin's primary argument against removal under Section 1443(2), he did seek a writ of prohibition against the State Board because of its "refus[al]" to do something: the refusal to sustain his challenges and discard the votes of tens of thousands of voters. *See* DE 49 at 26. Had the State Board adopted Griffin's arguments and removed the in-question votes from the current tally, i.e., had the State Board taken affirmative action, Griffin would not have sought a writ of prohibition from the state Supreme Court. Thus, it is the State

Board's "inaction," not its "action," that prompted Griffin's petition. *City & Cnty. of San Francisco v. Civ. Serv. Comm'n of City & Cnty. of San Francisco*, No. 02-CV-03462, 2002 WL 1677711, at *4 (N.D. Cal. July 24, 2002); *see also id.* (noting that "the remand suit must challenge a failure to act or enforce state law").

Having concluded that the State Board refused to act within the meaning of Section 1443(2), the court turns next to whether that refusal was based on the State Board's belief that, had it acted, it would have violated federal civil rights law stated in terms of racial equality. 28 U.S.C. § 1443(2); *Rachel*, 384 U.S. at 792. The State Board rejected Griffin's challenges in part based on its position that "[r]etroactively removing these voters from the list of voters eligible to cast a ballot in the election would violate [the NVRA]." DE 1-5 at 67. The NVRA "provides a proper basis for removal under Section 1443(2)." *RNC*, 120 F.4th at 408. Accordingly, the State Board refused to "act on the ground that [action] would be inconsistent with [federal civil rights] law," and removal is permitted. 28 U.S.C. § 1443(2).

In reaching this conclusion, the court notes that it does not agree with the State Board that the NVRA precludes it from acting in the context of a state election. *See Young*, 520 U.S. at 275 (explaining that NVRA establishes procedures for federal elections). But that is ultimately a merits (not jurisdictional) issue; defendants seeking removal under Section 1443(2) must only make a "colorable claim" based on their "good faith belief" that their "conduct, if violative of state law," was required by a "federal statutory duty." *White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980)[8]; *see also Cavanagh v. Brock*, 577 F. Supp. 176, 180 (E.D.N.C. 1983) (holding that a "colorable federal defense in the removal papers suffices to make removal—and therefore jurisdiction—proper pursuant to § 1443(2)"). And in analogous circumstances, the Fourth Circuit and Supreme

[8] By operation of North Carolina law, the court presumes the State Board acts in good faith. *City of Raleigh v. Riley*, 64 N.C. App. 623, 636, 308 S.E.2d 464, 473 (1983).

Court have indicated that a defendant's invocation of federal law will only fail to provide a jurisdictional basis on removal if the theory is "so attenuated and unsubstantial as to be absolutely devoid of merit; wholly insubstantial; obviously frivolous; plainly unsubstantial; or no longer open to discussion." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 206 (4th Cir. 2022) (citing *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974)); *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction."). The court may not agree with the State Board as to the applicability of the NVRA, but considering North Carolina's unified system of registration and election administration, the State Board's argument in favor of removal is not absolutely devoid of merit or insubstantial. The court therefore finds that removal under Section 1443(2) is permitted on that basis and does not reach the State Board's arguments related to the Voting Rights Act or Equal Protection Clause.

d. *Burford & Louisiana Power*[9]

"Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, . . . refuse to enforce or protect legal rights" out of "proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943). This form of judicial "abstention is an exception to the general rule that federal courts must decide cases over which they have jurisdiction." *Air Evac EMS, Inc. v. McVey*, 37 F.4th 89, 96 (4th Cir. 2022). The doctrine is grounded in two considerations: (1) the flexibility inherent in "traditional equity practice," but more importantly

[9] Griffin raises *Pullman* as a basis for abstention. DE 49 at 6-8. The court finds that doctrine is relevant, but that *Burford* and *Louisiana Power* provide more compelling bases for abstention under the circumstances. Such a conclusion is fully consistent with the principle of party presentation, meaning that the court must "address only the issues raised by the parties," *Short v. Hartman*, 87 F.4th 593, 604 (4th Cir. 2023), because once "an issue [such as abstention] is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.* (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)).

(2) "the notion of comity," meaning the "'belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'" *Erie Ins. Exch. v. Maryland Ins. Admin.*, 105 F.4th 145, 149 (4th Cir. 2024) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

Distilled to its essence, the doctrine of *Burford* abstention instructs that "[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (internal quotation marks omitted) ("*NOPSI*").

"Another doctrine . . . allows abstention in cases raising issues intimately involved with the State's sovereign prerogative." *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007). In *Louisiana Power*, the Supreme Court recognized that certain "decisive issues of state law" that are "intimately involved with sovereign prerogative" should be decided in the first instance by the State's courts. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28–29 (1959). Rather than make "a dubious and tentative forecast" on unsettled questions of state law that implicate state sovereignty, the court should abstain and defer to state courts on the question. *Id.* at 29. Such a course of action "does not constitute abnegation of judicial duty" but rather constitutes "a wise and productive discharge of it." *Id.*

To be sure, *Burford* and *Louisiana Power* are not talismanic incantations that free a federal district court of its "virtually unflagging" obligation to exercise subject-matter jurisdiction when it has it. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Just as a court "will not take jurisdiction if it should not," the court "must take jurisdiction if it should." *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821). Abstention is therefore reserved for the rare and exceptional cases.

Determining whether a matter represents one of those rare cases for which abstention is warranted is no easy task. What is a *difficult* question of state law? A policy problem of *substantial* public import? How *intimately* involved must a state law issue be with considerations of sovereignty? As these nebulous terms suggest, there exists no "formulaic test for determining when dismissal [or remand] under *Burford* [or *Louisiana Power*] is appropriate." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727 (1996). And "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 n.9 (1987). "Overlapping rationales motivate these doctrines and considerations that support abstaining under one will often support abstaining under another." *Martin*, 499 F.3d at 364. With that said, abstention doctrines do not permit "*ad hoc* judicial balancing of the totality of state and federal interests in a case" and a court must tether its analysis to "specific doctrines that apply in particular classes of cases." *Id.* (italics in original).

Considering the relevant standards, the court finds that abstention under *Burford* and *Louisiana Power* is appropriate in this case for four reasons: (1) the issues raised in Griffin's protests reflect unsettled questions of state constitutional and statutory law and bear directly on North Carolina's right to self-government, (2) there is an existing dispute resolution process designated by state law, which a federal court should be hesitant to disrupt, (3) Griffin's claims

arise purely under state law, and (4) the federal interest in this case is tenuous, and a state tribunal is competent to protect federal constitutional rights. Taken together, those factors counsel in favor of abstention.

First, Griffin's protests raise unsettled questions of state law: whether individuals who registered to vote without providing either their driver's license numbers or the last four digits of their social security numbers may vote in state elections, whether state law granting the right to vote to individuals who have never resided in North Carolina (Section 163-258.2(e)) conflicts with the state Constitution's bona fide residency requirement, and whether North Carolina's voter ID law applies to absentee ballots submitted by overseas voters in state elections. *See* DE 1-4 at 19-21 (summary of three challenges). In responding to Griffin's motion for preliminary injunction, the State Board has identified one trial court-level decision addressing the same substance as Griffin's second protest. DE 39 at 27. That hardly reflects a consensus view on the issues raised by the petition. *See Wise v. Circosta*, 978 F.3d 93, 101 (4th Cir. 2020) (finding that "*close* issue of state law involving competing interpretations of North Carolina's statutes governing election procedures" that "state courts" have not "settled . . . conclusively" supported abstention under *Pullman*) (emphasis in original); *see also Martin*, 499 F.3d at 364 (observing that abstention doctrines often contain "[o]verlapping rationales").

In *Johnson v. Collins Entertainment*, the Fourth Circuit found that it would "contravene[] *Burford* principles" for a federal district court to attempt to answer "disputed questions of state [] law that so powerfully impact the welfare of [the State's] citizens." *Johnson v. Collins Ent. Co.*, 199 F.3d 710, 720 (4th Cir. 1999). *Johnson* involved state gambling regulations, which "lie[] at the heart of the state's police power." *Id.* This matter involves the right to vote in a state election and the outcome of a state contest for a seat on the state supreme court, which lie at the heart of

state sovereignty and right to self-government. *Mitchell*, 400 U.S. at 125. The court finds that a citizen's right to participate in electing representatives for state government and a state's right to interpret state law in that context is no less (and likely more so) inextricably intertwined with a citizenry's welfare than the gambling regulations at issue in *Johnson*.

Likewise in *Louisiana Power*, Justice Frankfurter admonished that federal judges should hesitate to make "a dubious and tentative forecast" on unsettled questions of state law that implicate state sovereignty. *Louisiana Power*, 360 U.S. at 29. That advice maps onto this case: Griffin's protests raise novel questions of state law, and the answers to those questions could sway the outcome of a state election and affect the right to vote for tens of thousands of individuals in future *state* elections. *See NOPSI*, 491 U.S. at 361 (where "importance" of state law issues "transcends the result in the case then at bar," *Burford* abstention may be appropriate).

Second, North Carolina law designates an appellate procedure for disputes over decisions of the State Board. N.C.G.S. § 163-182.14(b). That procedure reflects the view of the General Assembly that election disputes should, after review by the State Board, proceed to the Superior Court of Wake County. *See id.* Because in these circumstances "timely and adequate state-court review is available," this court should refrain from "interfer[ing] with the [] orders of state administrative agencies," such as the State Board. *NOPSI*, 491 U.S. at 361. As the Fourth Circuit similarly concluded in *Johnson*, "[f]ederal equitable intervention" in this case "risks the disruption of state efforts to establish a coherent policy with respect to [state elections]" and "threatens the creation of a patchwork of inconsistent" interpretations of state election law. *Johnson*, 199 F.3d at 723.

Taking the third and fourth factors together, the court further finds that the primacy of state law issues in this matter, and the relatively tenuous federal interest, militate in favor of abstention

as well. *See Johnson*, 199 F.3d at 723 (explaining that "the predominance of state law issues affecting state public policy" should "counsel[] caution on the part of federal court"). As the court summarized previously, Griffin's challenges consist of contentions that arise exclusively under state law. *See supra* at 9-17. A federal court is poorly positioned to resolve those contentions in the first instance, particularly where such resolution (even if practically relevant) would not legally implicate federal elections. *See Moore v. Sims*, 442 U.S. 415, 429 (1979) ("State courts are the principal expositors of state law.").

The federal interest in this action also pales in comparison with the predominance of state law issues. The State Board has cited the NVRA as a basis for removal, which the court has credited. *See supra* at 17-20. But the NVRA's connection to this state election is somewhat dubious. *See Young*, 520 U.S. at 275. The State Board has also invoked federal constitutional concerns such as procedural and substantive due process, but a state court is competent to enforce federal constitutional rights. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609, n.21 (1975). Just as importantly, a state court could resolve Griffin's protests on the merits of their state law arguments, obviating the need for disposition of the federal constitutional issues. That consideration also tilts the scales towards abstention. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941); *see also Martin*, 499 F.3d at 364 (observing that abstention doctrines often contain "[o]verlapping rationales").[10]

If our system of federalism is to exist in more than name only, it means that this court should abstain in this case, under these circumstances. "As every schoolchild learns, our

[10] In weighing these third and fourth factors, the court is cognizant that it may not engage in "*ad hoc* judicial balancing of the totality of state and federal interests in a case." *Martin*, 499 F.3d at 364. Rather than engage in such ad hoc balancing, the court finds that those respective interests are directly relevant to answering whether the state law questions are difficult, the manner in which they transcend the case at bar, and whether they reflect substantially important state policy. *See NOPSI*, 491 U.S. at 361; *Louisiana Power*, 360 U.S. at 29; *Johnson*, 199 F.3d at 723.

Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This dual-system reflects that "the perpetuity and indissolubility of the Union[] by no means implies the loss of distinct and individual existence, or of the right of self-government by the States." *Texas v. White*, 74 U.S. 700, 725 (1868). The right of self-government must include "all the functions essential to separate and independent existence"; otherwise "there could be no such political body as the United States." *Lane Cnty. v. State of Oregon*, 74 U.S. 71, 76 (1868).

The court ends as it began: a sitting state court judge seeks a writ of prohibition (a form of judicial relief authorized by the state constitution) from the state supreme court that would enjoin the state board of elections from counting votes for a state election contest that were cast by voters in a manner allegedly inconsistent with state law. A federal tribunal should "wise[ly] and productive[ly] discharge" its "judicial duty" by abstaining in such circumstances, *Louisiana Power*, 360 U.S. at 29, because "timely and adequate state-court review is available," *NOPSI*, 491 U.S. at 361; N.C.G.S. § 163-182.14(b). The issues of state law raised in this action are not just difficult and "disputed," *Johnson*, 199 F.3d at 720, they also go to the heart of North Carolina's sovereign right "to establish and maintain [its] own separate and independent government[]," *Mitchell*, 400 U.S. at 125. At bottom, the court finds that abstention under *Burford* and *Louisiana Power* is warranted.

IV. Conclusion

The court has removal jurisdiction under 28 U.S.C. § 1443(2) but abstains from reaching the merits of Griffin's motion for preliminary injunction and remands this matter to the North Carolina Supreme Court.

SO ORDERED this 6th day of January, 2025.

RICHARD E. MYERS II
CHIEF UNITED STATES DISTRICT JUDGE