STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV040619-910
JEFFERSON GRIFFIN, Petitioner, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, Respondent.	**STATE BOARD'S RESPONSE IN OPPOSITION TO PETITIONER'S PETITION FOR JUDICIAL REVIEW**

NOW COMES Respondent, the North Carolina State Board of Elections, to respond in opposition to the Petition for Judicial Review filed by Petitioner Judge Jefferson Griffin on December 20, 2024. For the reasons explained below, the Court should affirm the agency decision challenged by the Petition and deny the Petition for Judicial Review.

This petition involves Petitioner's protest challenging 266 overseas voters who have a statutory right to vote in state elections because, even though they have never lived in North Carolina, they have a parent or legal guardian who last voted in North Carolina. This petition fails at the threshold for the same reasons that also defeat his petition seeking review of his protests concerning other voters. And, because his other petitions fail, this petition fails for an additional threshold reason: the category of votes Petitioner challenges is too small to alter the results of the election.

If this Court were to overlook all of these threshold defects and proceed to the merits of the petition, it would not have jurisdiction to grant the requested relief. Specifically, Petitioner claims that the state statute authorizing these voters to vote violates the state constitution—a

result that would lead to the statute's facial invalidation. But that is an act that can only be done by a three-judge panel.

No three-judge panel would credit Petitioner's claim though. Nothing in the state constitution creates a durational residency requirement to vote, and so the General Assembly's policy choice to enfranchise this small group of overseas citizens was constitutional.

Petitioner has accused the Board of being a "super-legislature" that is "mak[ing] up its own rules," and "rewrit[ing] the state constitution" by counting the votes of inherited residents. Br. at 2. These accusations are baseless. They overlook that the Board has merely implemented a *specific statutory enactment* that directs the Board to count these votes. Petitioner insinuates that the proper course would have been for the Board to disregard a state statute that has never before been questioned by any party or court throughout the previous 43 elections during which it has been in effect. It is therefore *Petitioner* that claims that the Board should act as a super-legislature and make up its own rules—solely on Petitioner's say-so that the statute is unconstitutional. Because this is a role that must be performed by a court and not by the Board—and, pursuant to the *Purcell* principle, well in advance of an election—the petition should be denied.

DISCUSSION[1]

I. The Petition Should Be Denied Because It Cannot Affect the Result of the Election.

Petitioner originally challenged the votes of 266 overseas citizens who the General Assembly has explicitly allowed to vote even though they have never resided in North Carolina. Br. at 5 n.2. As of November 19, 2024, the final canvassed results showed Justice Riggs 734

[1] For the Court's convenience, the Board incorporates by reference the Statement of Facts and Standard of Review outlined in its Response in Opposition to the Petition for Judicial Review in the related case of *Griffin v. North Carolina State Board of Elections*, No. 24CV040620-910 (Wake Cnty. Sup. Ct.).

votes ahead of Judge Griffin. *Id.* Because Petitioner's other challenges are invalid, as a threshold matter, this petition should be denied because this category of voters, standing alone, is too small to alter the results of the election.

North Carolina law requires that the Board dismiss a protest if "there is not substantial evidence of any violation, irregularity, or misconduct sufficient to cast doubt on the results of the election." N.C. Gen. Stat. § 163-182.11(d)(2)(c). Even crediting Petitioner's claim that none of the challenged ballots should be counted, this claim alone would not change the outcome of the race. As a result, the Board was correct to dismiss the protest—and this Court should do so too.[2]

Petitioner reports that after he filed the protests, 35 counties responded to his requests for information with "additional data" allegedly showing that there were at least 138 more voters who also fell into this category. Br. at 5 n.2. And because he lacks data from 60 other counties entirely, Petitioner claims "it's unknown exactly how many [inherited residents] voted in the election, and whether that figure is more or less than the current vote margin in the protested election." *Id.* But that is not the Board's or this Court's problem to solve. The administrative record in this matter is closed. Petitioner cannot now expand the universe of votes challenged on an ad hoc basis as he uncovers "additional data," months after the election-protest deadline, as a means of manufacturing jurisdiction. *See Ragland v. Nash-Rocky Mount Bd. of Education*, 247 N.C. App. 738, 748, 787 S.E.2d 422, 429 (2016) ("Once the administrative record was closed,

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[2] The Board dismissed three other categories of protests that Petitioner filed contemporaneously with this one, in part, for the same reason. Petitioner did not seek further review of that order. *See In re Election Protests of Jefferson Griffin, Ashlee Adams, Frank Sossamon, and Stacie McGinn*, Decision and Order at 13-14 (Dec. 27, 2024), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Protest%20Appeals/Griffin-Adams-McGinn-Sossamon%20II_2024.pdf.

petitioner had no right to request additional discovery or to subpoena additional witnesses before the Superior Court.").

Petitioner's protest challenged the ballots of 266 voters and sought to have those votes cancelled. That is the universe of votes in this category that is before this Court. Unless Petitioner prevails on his other petitions, this category of protests will not change the outcome of the race. Thus, even if Petitioner prevails in this petition and this Court overturns the Board's decision in its entirety, it will not change the outcome of the race. This petition should be denied on that basis alone.

II. Granting the Petition Would Offend the *Purcell* Principle.

The Board incorporates by reference the arguments in Part I of its response to Petitioner's brief concerning voters with allegedly incomplete registrations. *See* State Board's Response in Opposition to Petitioner's Petition for Judicial Review, *Griffin v. North Carolina State Board of Elections*, No. 24CV040620-910 (Wake Cnty. Sup. Ct.) at 13-23. As explained in that brief, the *Purcell* principle bars litigants, when an election is underway, from trying to make "substantial challenges to election rules" through "last-minute litigation." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). As a result, when *Purcell* applies, litigants can seek only prospective relief for future elections, regardless of the merits of their claims.

Here, Petitioner's challenge to the inherited residents' ballots concerns a statute passed by the General Assembly in a bipartisan fashion more than 13 years ago and under which North Carolinians have voted without incident in more than 43 elections. The time to consider his

request to cancel these votes—especially since the election has already occurred and those votes have already been cast and counted—has long passed.[3]

III. Retroactively Changing Election Rules Would Violate the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act.

The Board incorporates by reference the arguments in Part II of its response to Petitioner's brief concerning voters with allegedly incomplete registrations. *See* Bd. Resp. 23-29.

As explained in that brief, the Due Process Clause prohibits states from refusing to count votes cast in accordance with "the instructions of the officials charged with running the election," even if doubts arise after an election about the correctness of those instructions. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). Refusing to count those votes, contrary to voter's expectations, introduces "patent and fundamental unfairness" into an election that denies voters due process. *Id.*

That unfairness is precisely what Petitioner attempts to introduce here. He seeks to have the votes of certain voters cancelled—*after* an election has taken place—even though those voters followed all the rules in place at the time of the election. What is more, Petitioner seeks to accomplish this demand by asking this Court to *strike down a statute* that has been followed, without complaint or controversy, for over a decade. The Fourteenth Amendment does not countenance this result because it is patently unfair.

As also shown in the Board's other brief, the Equal Protection Clause prohibits states from "valu[ing] one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05

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[3] *James v. Bartlett* clearly does not apply here. 359 N.C. 260, 607 S.E.2d 638 (2005). In *James*, the Board deviated from historical practice to misapply state law. *Id.* at 267-68, 607 S.E.2d at 642-43. Here, on the other hand, Petitioner complains that the Board *followed* state law as it was supposed to and has done for more than a decade. The posture of this case and *James* could not be more different.

(2000). Under this principle, the "standards for accepting or rejecting contested ballots" may not, consistent with equal protection, vary "from county to county." *Id.* at 106.

But were Petitioner to prevail, "the standards for accepting or rejecting" ballots would "vary" for wholly arbitrary reasons. *Id.* at 106. For one thing, Petitioner strangely insists that he is not challenging the votes of military inherited-resident voters. Br. at 24-25. But he offers no explanation for how his challenge to subsection (1)(e) could plausibly be read to exclude members of the military. By its terms, subsection (1)(e) covers *any* "overseas voter"—which, of course, includes any covered voters who are serving abroad in the military. And even if this Court were to credit Petitioner's position, that would only give rise to an equal-protection violation, as he would challenge only *some* inherited residents (those not serving in the military) while leaving the votes of other inherited residents (those in the military) untouched. More broadly, Petitioner admits that he has information sufficient to lodge protests of votes of inherited residents from certain counties. Br. at 5 n.2. As a result, he has not identified to the Board the full scope of his challenge other than in one footnote in his brief to this Court. *See id.* As a result, granting his requested relief would appear to require discounting identically situated ballots from only certain counties, in violation of equal protection.

Finally, in the Board's other brief, it also showed that the Voting Rights Act (VRA) bars election officials from failing "to tabulate, count, and report" the vote of "any person" who is "entitled" or "qualified" to vote. 52 U.S.C. § 10307(a). Here, the Board has determined that the voters whose ballots are being challenged *are* qualified to vote and that they followed all of the laws in place at the time to ensure that their votes can be counted and reported. The VRA thus prohibits the Board from refusing to count their votes.

IV. Petitioner's Failure to Adequately Notify Voters of His Protests Violates Procedural Due Process.

The Board incorporates by reference the arguments in Part III of its response to Petitioner's brief concerning voters with allegedly incomplete registrations. *See* Bd. Resp. 29-33. As shown there, when a voter's "ballot [is] challenged," due process requires that voters be "given notice," so they can take steps to protect their vote. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 228 (M.D.N.C. 2020).

Here, as shown in the other brief, Petitioner failed to give challenged voters notice that was "reasonably calculated, under all the circumstances, to apprise" them of his challenges. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Petitioner therefore failed to provide adequate notice to these voters, denying them procedural due process.

V. The Petition Fails on the Merits.

This petition fails for the reasons explained above. But if this Court were to reach the merits of his petition, there are other independent reasons why this Court should deny relief. For one, this petition raises a facial challenge. As a result, if this Court disposes of the threshold challenges to the petition in Petitioner's favor, leaving only the facial challenge to decide, this Court would not have jurisdiction to grant Petitioner his requested relief. N.C. Gen. Stat. §§ 1-267.1, 1A-42(b)(4).

In any event, the facial challenge will ultimately fail because Petitioner cannot establish "beyond a reasonable doubt" that the challenged state statute is unconstitutional. *Harper v. Hall*, 384 N.C. 292, 324, 886 S.E.2d 393, 414-15 (2023).

A. Petitioner has failed to satisfy the standards to succeed on his facial challenge.

This petition has several fatal flaws, any one of which is sufficient for this Court to dismiss it: the protest does not include a sufficient number of votes to alter the result of the

election, it is barred by *Purcell*, Petitioner failed to adequately notify challenged voters, and Petitioner's requested relief would violate the Fourteenth Amendment of the U.S. Constitution and the VRA. But if this Court were to overlook all of those defects, then only the merits of Petitioner's claim would remain. At that point, this Court could not proceed because Petitioner's challenge is a facial one and, as a result, must be decided by a three-judge panel.

The inherited-resident statute allows an overseas voter who has never lived in the United States to vote in North Carolina elections if they have never registered in another state and their parent or legal guardian last lived in North Carolina. N.C. Gen. Stat. § 163-258.2(1)(e). Petitioner claims that this statute violates our state constitution because, in his view, the constitution requires a voter to have "resided in the State of North Carolina for one year" before the election. Br. at 15-16 (quoting N.C. Const. art. VI, § 2).

At the outset, this is a classic facial constitutional challenge. Petitioner claims that subsection (1)(e) is unconstitutional in all circumstances. *See Cooper v. Berger*, 371 N.C. 799, 803, 822 S.E.2d 286, 291 (2018) (holding that a challenge to a statute requiring gubernatorial appointees to the Cabinet to be subject to advice and consent under all circumstances was facial). The test for whether a challenge is facial is whether the "claim and the relief that would follow *could* reach beyond the particular circumstances" of a given case. *Singleton v. N.C. Dep't of Health & Hum. Servs.*, 906 S.E.2d 806, 808 (N.C. 2024) (cleaned up) (emphasis added). Here, there is no question that if Petitioner's arguments are correct, then the entire statutory provision is unconstitutional and therefore, *any* votes of inherited residents—even those whose votes Petitioner did not challenge—are invalid.

Because Petitioner's challenge to this statute is a facial one, it must be decided by a three-judge panel in the Superior Court of Wake County. Under North Carolina law, "[a]ny action that

is a facial challenge to the validity of an act of the General Assembly" must be "heard and determined by a three-judge panel of the Superior Court of Wake County." N.C. Gen. Stat. § 1-267.1(a). However, as a general matter, North Carolina courts "should determine the constitutionality of a statute . . . only to the extent necessary to determine that controversy." *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974). As a result, even in a case involving a facial challenge, a case is transferred to a three-judge panel only "if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly *must* be made in order to completely resolve any matters in the case." N.C. Gen. Stat. § 1A-42(b)(4) (emphasis added). Thus, this Court must first address the structural defects in the petition on case-specific grounds. If the Court resolves all of those issues in Petitioner's favor, then only his facial challenge would remain and it would be proper for a three-judge panel to resolve whether the inherited-residents statute conflicts with the North Carolina Constitution.[4]

B. Even if this Court could reach the substance of the petition, it fails on its merits.

As just explained, this Court lacks jurisdiction to decide the substance of Petitioner's constitutional challenge to section 163-258.2(1)(e). But even if this Court could reach the merits, Petitioner's challenge fails.

Petitioner accuses the Board of "permitt[ing] people to vote in the general election who have never resided in North Carolina" "[d]espite the constitution's plain language." Br. at 15.

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[4] Petitioner claims that the Board has changed its position on whether his petition should be referred to a three-judge panel. Br. at 14-15. This assertion is based on a misunderstanding of the above procedural rules surrounding facial challenges. The Board's position has always been that, consistent with section 1A-42(b)(4), his facial challenge should be directed to a three-judge panel if, and only if, the Board's threshold defenses are resolved in his favor and only the facial challenge remains.

But of course *the Board* has not granted any such permission. Rather, the Board is faithfully implementing a duly enacted statute that the General Assembly passed more than a dozen years ago. Petitioner's argument is that this statute is invalid.

This Court is required to presume that subsection (1)(e)—like all "laws duly enacted by the General Assembly"—is valid. *Fearrington v. City of Greenville*, 386 N.C. 38, 54, 900 S.E.2d 851, 867 (2024) (cleaned up). A challenged law can only be unconstitutional where it is "plainly and clearly the case." *Id.* And as our Supreme Court recently held, "a claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt." *Harper*, 384 N.C.at 324, 886 S.E.2d at 414-15. Petitioner fails to meet this high bar.

The North Carolina Constitution does not contain a durational residency requirement. It instead provides that "[a]ny person who has resided in the State of North Carolina for one year . . . *shall be entitled to vote* at any election held in this State." N.C. Const. art. VI, § 2(1) (emphasis added). Petitioner reads this clause as a durational residency requirement—that a person may not vote unless she has resided in North Carolina for at least a year. That interpretation misreads the provision's text: The text confers an affirmative *guarantee*—a constitutional entitlement—that otherwise-qualified citizens who reside here for at least a year "shall be entitled to vote." *Id.* But nothing in the provision's text forecloses the General Assembly from choosing to extend the franchise beyond this group by statute. *See Harper*, 384 N.C. at 323, 886 S.E.2d at 414 (holding that the legislature is authorized to pass laws unless the constitution expressly forecloses it from doing so).

Bouvier v. Porter, 386 N.C. 1, 900 S.E.2d 838 (2024), is not to the contrary. In that case, our Supreme Court held that those involved in an election protest have an absolute privilege from defamation claims. *Id.* at 2, 900 S.E.2d at 842. In the course of describing the general background law, the Court noted that the Constitution and state statutes generally deem "[c]ertain categories of individuals . . . ineligible to vote," including nonresidents. *Id.* at 4 n.2, 900 S.E.2d at 843 n.2. But that general statement was clearly not intended to be determinative. After all, the Court's list included "convicted felons"—who are explicitly *not* barred from voting in North Carolina elections, so long as their rights have been restored by law. *See* N.C. Const. art. VI, § 2(3); N.C. Gen. Stat. § 163-275(5). As with felons, it is up to the General Assembly to determine residency requirements, and it has done so in section 163-155. And again, there is no dispute that the legislature expressly granted the franchise to the challenged voters here.

Finally, interpreting the state constitution to include a one-year durational residency requirement would violate the federal constitution. In *Dunn v. Blumstein*, the U.S. Supreme Court considered a Tennessee statute that imposed a one-year durational residency requirement for voting. 405 U.S. 330, 334 (1972). The Court held that this requirement violated the Equal Protection Clause because it impermissibly discriminated against new residents. *Id.* at 360.

It is true that the Supreme Court left open a state's ability to restrict the franchise to "bona fide" residents. *Id.* at 343-44. Our supreme court has likewise recognized the State's right to impose bona fide residency requirements that are "appropriately defined and uniformly applied." *Lloyd v. Babb*, 296 N.C. 416, 440, 251 S.E.2d 843, 859 (1979). But subsection (1)(e), which grants the franchise to certain overseas voters, does just that—it defines the term "resident" to cover these inherent residents. And again, nothing in the text of our state

constitution forecloses the legislature from extending the franchise to citizens who inherit their residence from their parents.

That is the basic principle Petitioner misunderstands. Under Petitioner's view, the constitutional provision's use of the term "residency" requires a person to have lived within North Carolina for *some* duration, if not for one year. Br. at 18-19. That understanding is completely atextual. Nothing in the text of our state constitution defines the term "residency" and, as such, it is the legislature's role to enact statutes that provide the ground rules for what constitutes "residency" for purposes of voting. Here, the legislature has done so by allowing a specific group of inherited residents to claim residency in North Carolina for voting purposes. In this way, the legislature established that inherited residents meet the bona fide residency requirement of the constitutional provision.

This is why Petitioner's analogy to *Stephenson v. Bartlett* is misplaced. 355 N.C. 354, 562 S.E.2d 377 (2002). Again, our state constitution is best read as *guaranteeing* the franchise for anyone who has lived in North Carolina for at least a year—and as leaving to the legislature the ability to define the term "resident" so long as that constitutional guarantee is respected. And adopting these readings of the state constitution best comports with *Stephenson*'s admonition to conform the statute with the constitutional provision "to the maximum extent possible." *Stephenson*, 355 N.C. at 374-75, 562 S.E.2d at 391-92.

In sum, more than a decade ago, the General Assembly made a conscious decision to allow the small category of challenged voters to vote in state elections. Petitioner cannot meet his heavy burden to show that this statute is unconstitutional beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, this Court should deny Petitioner's petition for judicial review.

Electronically submitted this the 3rd day of February, 2025.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day electronically filed the foregoing document with the Wake County Clerk of Court using the NC eCourts efile and serve system, which will send notification of such filing to Counsel of Record; and further served on this day, a copy of same upon Counsel by electronic mail transmittal, pursuant to N.C. R. Civ. P. 5(b)(1)(a), addressed as follows:

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This the 3rd day of February, 2025.

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