

No. 51P25

TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

TELIA KIVETT, et al.,

Petitioners-Appellants,

v.

NORTH CAROLINA STATE BOARD
OF ELECTIONS, et al.,

Respondents-Appellees,

and

DEMOCRATIC NATIONAL
COMMITTEE

Intervenor-Respondent-
Appellees.

From Wake County
No. 24CV041789-10
No. P25-30

**STATE BOARD RESPONDENTS'
RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF SUPERSEDEAS
AND PETITION FOR WRIT OF CERTIORARI**

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State Board Respondents respectfully submit this response in opposition to Petitioners' Petition for Writ of Supersedeas and Petition for a Writ of Certiorari. For the reasons set out below, this Court should deny the petitions.

INTRODUCTION

The relief Petitioners seek is procedurally improper. They are asking this Court to issue a writ of supersedeas—a writ intended to maintain the status quo—to instead upend the status quo by dissolving a stay that the Court of Appeals below entered to pause proceedings before that court in light of the ongoing litigation in *Griffin v. N.C. State Board of Elections*. *Griffin* is an appeal from an election protest decision by the State Board concerning the validity of the same votes challenged by this, later-filed litigation.

Apart from the procedural deficiency of the Petition, Petitioners' request to dissolve the Court of Appeals' stay order should be denied because that order was the proper judicial response to the posture of this case. The facts and legal issues here and in *Griffin* are materially identical. Moreover, the *Griffin* litigation is proceeding on an expedited basis in the Court of

Appeals, with a bypass petition for discretionary review also pending in this Court. The Court of Appeals' stay properly ensured the orderly resolution of the legal dispute underlying both this action and the *Griffin* litigation by allowing the *Griffin* litigation to proceed expeditiously, without interference from a later-filed case raising duplicative claims.

The one major difference between the claims in this litigation and those in *Griffin* is the scope of the relief requested: for the Court of Appeals' stay to be reversed and so an injunction can be entered to invalidate over 60,000 votes cast in elections for *all state and local offices* on the November 2024 general election ballot. But those contests were certified months ago, all except for the Supreme Court contest which is already at issue in *Griffin* and for which this Court has already issued a stay of certification. Thus, whatever harm Petitioners allege that they face beyond what is at issue in *Griffin* has become moot.

Furthermore, this case is a poor vehicle for addressing the merits of the issues that have already been squarely presented for review to our state appellate courts in *Griffin*. Unlike in *Griffin*, this case does not involve the actual candidates in the elections at issue. This lawsuit also suffers from

several threshold flaws. Most notably, Petitioners did not exhaust the available administrative remedies, thereby depriving the courts of jurisdiction over these claims. And the existence of those adequate remedies also bars their claims brought directly under the North Carolina Constitution. Petitioners took no part in the election protest process, which is the correct procedural vehicle to challenge the results of an election.

Finally, the equities weigh against Petitioners. Although Petitioners seek to plead around their prior complaint in *RNC*,¹ the two lawsuits involve the same claim with the same law and facts. *Compare* Appendix to the Petition (Pet. App.), pp 1-25, *with* Appendix to this Response (Resp. App.), pp 1-22; *see also* Resp. App. pp 91-134. This duplicative litigation does not warrant this Court's premature intervention.

For these reasons and additional ones argued below, Petitioners' petitions for writs of supersedeas and certiorari should be denied.

BACKGROUND

On 31 December 2024, eight weeks after the 2024 general election, the

¹ *RNC, et al. v. N.C. State Bd. of Elections, et al.*, No. 5:24-cv-547 (E.D.N.C.).

present action was filed by Petitioners in the Superior Court, Wake County. Pet. App. pp 1-25. Petitioners sought to invalidate thousands of votes cast in the election for every non-federal contest on the ballot. *Id.* State Board Respondents removed the action to federal district court, which remanded to state court. *Id.* at 37-111. That court found that the case was “substantially identical to that in” *Griffin v. N.C. State Bd. of Elections*, No. 24-cv-724, D.E. 50 (E.D.N.C.) (*Griffin I*), and “[h]aving concluded in that case that abstention and remand under *Burford* and *Louisiana Power*² [were] warranted,” the court found its “conclusion” in *Griffin I* “operat[ed] with equal force [in the present case].” Pet. App. p 111.

The district court’s remand orders in this case and in *Griffin I* and *II* were appealed to the U.S. Court of Appeals for the Fourth Circuit.³

After the district court’s remand of the present case to state court, on 13 January 2025, the Superior Court entered an order denying both a TRO

² See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

³ See *Griffin I*, No. 5:24-cv-00724-M, D.E. 52; *Griffin v. N.C. State Bd. of Elections*, No. 24-cv-00731-M, D.E. 26 (E.D.N.C.) (*Griffin II*); *Kivett, et al., v. N.C. State Bd. of Elections, et al.*, No. 5:25-cv-00003-M, D.E. 21 (E.D.N.C.) (*Kivett*).

and PI, concluding that “after a careful balancing of the equities, [it could] not conclude by the greater weight of the evidence that a preliminary injunction is necessary to prevent immediate and irreparable harm.” Pet. App. p 145.

On 14 January 2025, Petitioners noticed an appeal to the state Court of Appeals, alternatively seeking certiorari review. *Id.* at 146-79. They also filed a petition and motion seeking an appellate injunction which would have granted the ultimate relief Petitioners sought in their Complaint—the invalidation of thousands of ballots cast for state contests in the November 2024 general election. *Id.* at 149-79.

Respondent moved the Court of Appeals for a stay of proceedings in that court on 15 January 2025 arguing that this case was not the proper vehicle to resolve these issues, which the court granted on 17 January 2025. *Id.* at 189-99, 211-12. It is that Court of Appeals’ stay order that Petitioners are now asking this Court to dissolve despite there being no change in the status quo. *Id.* at 211-12.

After the Court of Appeals stayed its proceedings in the present action,

this Court dismissed the petition for writ of prohibition pending in *Griffin I*.⁴ It also extended a previously imposed stay of the certificate of election for the Supreme Court contest until the Superior Court issued its rulings in *Griffin II* and until any appeals from those ruling are exhausted. That stay remains in place.⁵

The Fourth Circuit subsequently consolidated *Griffin I* and *II* and issued its opinion in those cases on 4 February 2025.⁶ The court dismissed the appeal in *Griffin I* but modified the federal district court's remand order in *Griffin II*. The court concluded that abstention was proper under *Pullman*,⁷ not *Burford* and *Louisiana Power* as the district court had found, and directed the district court "to modify its order to expressly retain jurisdiction of the federal issues identified in the State Board's notice of removal should those issues remain after the resolution of the state court proceedings, including any appeals."⁸

⁴ Order, *Griffin I*, No. 320P24 (N.C. Jan. 22, 2025).

⁵ *Id.*

⁶ See *Griffin v. N.C. State Bd. of Elections*, Nos. 25-1018, 25-1019, 25-1020 & 25-1024 (4th Cir. Feb. 4, 2025) (per curiam) (attached as Resp. App. pp 241-51).

⁷ *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

⁸ *Griffin*, Nos. 25-1018, 25-1019, 25-1020 & 25-1024, slip op. at 10.

The appeal of the district court's remand order in the present case remains pending in the Fourth Circuit.⁹ State Board Respondents have moved the federal district court to issue an indicative ruling, asking whether the court would modify its remand order in the present case based on the Fourth Circuit's decision in *Griffin* if it regains jurisdiction upon remand. That motion remains pending.¹⁰

State Board Respondents also filed a Motion to Dismiss the present case in the Superior Court on 5 February 2025.¹¹

That same day, Petitioners filed petitions for writ of supersedeas and certiorari in this Court, asking the Court to dissolve the state Court of Appeals' stay order, and to review that stay order or, in the alternative, to review the Superior Court's order denying their TRO and PI.¹²

Since Petitioners filed their petitions in this Court, the Superior Court, Wake County, heard and denied relief in *Griffin II* on 7 February 2024,

⁹ See *Kivett*, No. 24-1021 (4th Cir.).

¹⁰ See *Kivett*, No. 5:25-cv-00003-M, D.E. 24, 25 (E.D.N.C., filed Feb. 13, 2025).

¹¹ See Mot. to Dismiss, *Kivett*, No. 24CV041789-910 (N.C. Super. Ct., Wake Co., filed Feb. 5, 2025).

¹² See Pet., *Kivett*, No. 51P25 (N.C. Sup. Ct., filed Feb. 5, 2025).

affirming the State Board's decisions and concluding that it did not err in dismissing all three election protests.¹³ An appeal has been noticed, and the Court of Appeals has ordered the appeal expedited.¹⁴ The State Board has also filed a petition in this Court for review in the cause prior to review by the Court of Appeals.¹⁵

REASONS WHY THE WRIT OF SUPERSEDEAS SHOULD NOT ISSUE

Petitioners ask this Court to issue a writ of supersedeas to dissolve the Court of Appeals' order staying that court's proceedings in this case. Petitioners claim this will maintain the status quo. In support of this request, they contend that the basis for the stay—the potential for a resolution in *Griffin I* by this Court and the Fourth Circuit—is now moot, given that both courts have since dismissed that case. As a basis for seeking supersedeas relief, Petitioners also seek certiorari review of the Court of Appeals' stay

¹³ Order Denying PJRs, *Griffin II*, Nos. 24CVO40619-910, 040620-910, 040622-910 (N.C. Super. Ct., Wake Co., Feb. 7, 2025).

¹⁴ Order and Expedited Briefing Schedule, *Griffin II*, No. P25-104 (N.C. Ct. App. Feb. 13, 2025).

¹⁵ Bypass PDR, *Griffin II*, No. 320P24-2 (N.C., filed Feb. 17, 2025).

order and, alternatively, the trial court's order denying their request for a TRO and PI.

Petitioners are not entitled to supersedeas relief. Under Appellate Rule 23, a writ of supersedeas may issue "to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal." N.C. R. App. P. 23(a)(1). The writ's purpose "is to preserve the *status quo* pending the exercise of appellate jurisdiction." *Craver v. Craver*, 298 N.C. 231, 238, 258 S.E.2d 357, 362 (1979).

On this score, the supersedeas petition is procedurally improper. The petition seeks to *disrupt* the status quo, which is the final certification of every contest in the 2024 elections and the assumption of office by those certified winners, except for the one contest where parallel litigation remains pending. What is more, the stay order Petitioners seek to dissolve is itself maintaining the status quo, pausing proceedings in the Court of Appeals until the issues Petitioners raised there can be finally resolved in a more appropriate proceeding, the *Griffin* case.

Despite what Petitioners argue, the dismissals in *Griffin I* by this Court and the Fourth Circuit hardly obviate the need for a stay of proceedings in

the Court of Appeals. As discussed, litigation in *Griffin II* remains ongoing. The good cause underlying the Court of Appeals' stay therefore still exists, with the *Griffin* case now being even closer to a final resolution than it was when the Court of Appeals originally issued its stay.

Moreover, taking Petitioners' petition for a writ of supersedeas at face value, this Court should presumably apply the ordinary standard for requests that seek to preserve the status quo. That standard requires the appellant to show (1) a likelihood of success on the merits of its appeal and (2) that irreparable harm will occur absent a stay pending appeal. See Elizabeth B. Scherer & Matthew N. Leerberg, *North Carolina Appellate Practice and Procedure* § 23.04; see also *N. Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 78-79, 674 S.E.2d 436, 443 (2009) (listing similar criteria for direct appeals from denials of motions to stay pending appeal). The writ "is only granted in case of necessity." *McArthur v. Land & Timber Co.*, 164 N.C. 383, 384, 80 S.E. 403, 403 (1913) (per curiam).

Petitioners cannot show a likelihood of success. Nor can they show irreparable harm. A writ of supersedeas is not only improper, but also unnecessary, and the petition should be denied.

I. THE BASIS FOR THE COURT OF APPEALS' STAY ORDER WAS NOT MOOTED BY THE DISMISSALS IN *GRIFFIN I*.

This Court should not dissolve the Court of Appeals' stay even if it concluded the supersedeas petition is procedurally proper. The dismissals in *Griffin I* did not obviate the need for a stay of proceedings in the Court of Appeals.

Below, State Board Respondents noted that although Petitioners purport to challenge votes cast in all state races in the 2024 general election, the only part of Petitioners' action that is not moot is their challenge to votes cast in the Associate Justice race, and those claims are entirely duplicative of claims already proceeding in the *Griffin* litigation. *See* Part II.A. *infra*. Below, State Board Respondents also acknowledged that the *Griffin* litigation will likely resolve the issues underlying Petitioners' filings in the Court of Appeals. State Board Respondents further conceded that the parties in *Griffin*, specifically the candidates, had a greater interest in the outcome than the Petitioners here. For that reason, good cause existed to stay the proceedings in the Court of Appeals.

That good cause still exists. The *Griffin* case is ongoing, with the appeal of the trial court's denial of the PJRs proceeding on an expedited basis, and

with a bypass petition for discretionary review pending in this Court. The only issues remaining here will be resolved in *Griffin II*, a case where the parties undoubtedly have a higher stake in those issues.

Because good cause still exists to support the Court of Appeals' stay, it should not be dissolved, and the supersedeas petition should therefore be denied. Alternatively, State Board Respondents request that the Court stay proceedings in this Court in the present case and defer ruling on Petitioners' petitions until a final resolution is reached in *Griffin II*.

II. PETITIONERS CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS.

Petitioners want the Court of Appeals' stay dissolved so that court can grant their pending requests for relief. Specifically, Petitioners have asked the court to reverse the trial court on the merits and impose an injunction to invalidate ballots cast by thousands of voters in the November 2024 general election. As an alternative, Petitioners ask this Court to itself review and reverse the trial court's order and invalidate those ballots.

But Petitioners' claims are largely moot. And the issues that are not moot will be resolved in a more appropriate proceeding, the *Griffin* case.

A. Petitioners' Claims are Largely Moot, and Those That Are Not Will Soon Be Resolved in *Griffin II*.

Petitioners claim to seek relief regarding votes cast in all state and local office elections on the November 2024 general election ballot. But, with the exception of the contest for Associate Justice Seat Six, all other state and local office elections have been certified and those prevailing candidates have taken office. See N.C. State Bd. of Elections, Meeting Minutes for 26 Nov. 2024 Canvass of the 2024 General Election, and 11 Dec. 2024 Suppl. Canvass of 2024 General Election.¹⁶ Once a certification of election issues, neither the State Board nor courts have the authority to revoke that certification, reopen canvass, or order a new election. *Britt v. Bd. of Canvassers of Buncombe Cty.*, 172 N.C. 797, 90 S.E. 1005, 1008 (1916); *In re Election Protest of Fletcher*, 175 N.C. App. 755, 759, 625 S.E.2d 564, 567 (2006); *In re Protest of Whittacre*, 228 N.C. App. 58, 59, 743 S.E.2d 68, 69 (2013) (issuance of an election certificate moots an action contesting the

¹⁶ Available on the State Boards' website, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2025-01-22/Draft%20Meeting%20Minutes/Draft%20SBE%20Open%20Session%20Minutes%2011.26.24.pdf, and https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2025-01-22/Draft%20Meeting%20Minutes/Draft%20SBE%20Minutes%2012.11.24.pdf, respectively (last visited Feb. 18, 2025).

results of an election). Because there exists no relief in this case that can be obtained with respect to those other races, Petitioners' claims to the extent they seek to involve those contests are moot.

The only claim that is not moot involves the Associate Justice election, and that claim is entirely duplicative of the claims that our state courts will soon resolve in the *Griffin* litigation. See Part I. *supra*.

Petitioners attempt to avoid this obvious obstacle to relief here by arguing that the absence of a preliminary injunction now could lead to ad hoc *quo warranto* litigation to challenge office holders where the certificate has already issued. Pet. pp 4, 25-26. But *quo warranto* suits are specialized actions, brought by the Attorney General or with his consent, on behalf of the State. N.C. Gen. Stat. §§ 1-515, -516. Any suggestion that such suits would be pursued is highly speculative and not a reason to grant the extraordinary relief requested here, without any specific evidence that any state officeholder would be subject to such an action. *Id.* § 1-515(1). Moreover, the fact that there is an existing legal remedy to unseat an unlawful officeholder shows that there is no need for this Court should issue extraordinary injunctive relief now. See *id.*

B. Petitioners' Claims Fail Because Petitioners Failed to Exhaust Administrative Remedies, Depriving the Court of Jurisdiction.

“In the administrative realm, jurisdiction over agency disputes turns on whether a party channeled their claim through prescribed administrative avenues. If the legislature has ‘explicitly provided’ a vehicle to ‘seek effective judicial review of [a] particular administrative action,’ that ‘relief must be exhausted before recourse may be had to the courts[.]’” *Askew v. City of Kinston*, 386 N.C. 286, 297, 902 S.E.2d 722, 731 (2024) (first alteration in original) (citations omitted). As such, “parties challenging administrative matters must adhere to statutory criteria as a condition precedent to obtaining a review by the courts.” *Id.* at 298, 902 S.E.2d at 731 (cleaned up).

Article 15A of Chapter 163 provides the statutory criteria for any registered voter eligible to vote in the contest to bring an election protest about an alleged violation of election law in the conduct of the election. N.C. Gen. Stat. § 163-182.9(a).

Petitioners are seeking to dispute the recent election based on the same proposed interpretation of election laws at issue in the State Board’s 13 December 2024 decision denying Judge Griffin’s election protests. Resp.

App. pp 135-78. But Petitioners did not invoke the election-protest statutes in Article 15A to advance their theory as to why there was a violation of election law or irregularity in the conduct of the election. Instead, they filed this lawsuit.

It does not matter that certain of these Petitioners are organizational parties, as any of their members or candidates would be eligible to bring such election protests. See N.C. Gen. Stat. § 163-182.9(a) (providing that protests may be filed by “any registered voter who was eligible to vote in the election or by any person who was a candidate for nomination or election in the election”).

It also does not matter that Petitioners are bringing constitutional claims. Those too can be asserted in an appeal to superior court from a decision by the State Board in an election protest proceeding. State Board decisions are subject to the judicial review provisions of the Administrative Procedures Act found in Article 4 of Chapter 150B. See *McFadyen v. New Hanover Cty.*, 273 N.C. App. 124, 131, 848 S.E.2d 217, 222 (2020) (providing that challenges to State Board decisions require “an administrative proceeding under the NCAPA”); see *Anderson v. N.C. State Bd. of Elections*,

248 N.C. App. 1, 3-4, 788 S.E.2d 179, 182-83 (2016); *Appeal of Harper*, 118 N.C. App. 698, 700, 456 S.E.2d 878, 879 (1995); *Newsome v. N.C. State Bd. of Elections*, 105 N.C. App. 499, 507, 415 S.E.2d 201, 205 (1992). Provisions of the APA thus apply to election protest proceedings where aspects of those proceedings are not specifically provided for in Article 15A of Chapter 163. The APA clearly permits the superior court to determine whether an agency's decision violates the North Carolina Constitution. See N.C. Gen. Stat. § 150B-51(b)(1) (permitting the superior court to "reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because" the decision is "[i]n violation of constitutional provisions").

Similarly, because this adequate alternative remedy exists, Petitioners' constitutional claims are also inherently flawed. *Patterson v. City of Gastonia*, 220 N.C. App. 233, 242, 725 S.E.2d 82, 90 (2012) (Petitioner "must establish that they lacked an adequate alternative state remedy."). If the court finds that an adequate state remedy exists, the court need not address whether Petitioners can establish their constitutional claims. *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 429 (2010). Because

Petitioners failed to exhaust administrative remedies, their claims necessarily fail. The petitions should be denied on this basis alone.¹⁷

III. THE EQUITIES DO NOT FAVOR GRANTING PETITIONERS' REQUESTED RELIEF.

The balance of equities also weighs against granting the petitions.

Petitioners seek to disrupt the status quo, while at the same time fail to demonstrate that they will suffer any harm without that relief, particularly as compared to the significant harm that such relief would visit on voters.

At this stage, the Court must “engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant[s] if injunctive relief is granted.” *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Petitioners invoke irreparable harm in support of their petition, but their theories of harm are generalized and conclusory at best. In actuality,

¹⁷ The State Board also correctly interpreted and followed the law. Respondents rely upon and hereby incorporate by reference relevant arguments contained within the filings and other documents attached in the Appendix to this Response from RNC, see Resp. App. pp 29-33, 37-47, 60-64, 76-83, and *Griffin II*, see *id.* at 200-06, 210-21, and all reasoning raised in the State Board’s 13 December 2024 decision denying the Griffin’s election protests on these same issues, see *id.* at 148-63.

Petitioners will suffer no harm if this motion is denied. This Court temporarily stayed the issuance of the certificate of election for the North Carolina Supreme Court Associate Justice race, then extended the stay until the appeals are exhausted in the case protesting that race. Moreover, this Court ordered the Superior Court in *Griffin II* to proceed expeditiously, which it did, issuing a final ruling on 7 February 2025. What is more, notice of appeal was promptly given in *Griffin II*, the Court of Appeals has expedited that appeal, and the State Board moved for review by this Court bypassing the Court of Appeals. Petitioners therefore ceased to suffer any possible irreparable harm when this Court stayed the certificate of the only election to which their claims can apply and ordered that case to proceed expeditiously, which all parties and subordinate courts are doing. That case also involves the two candidates in the Associate Justice race, who undoubtedly have the greatest interests in the outcome of the resolution of this election. The *Griffin* case, not this one, should resolve the issues underlying Petitioners' filings.

Petitioners purport to seek alternative relief in the form of an order requiring the State Board to notify the challenged voters and give them an

opportunity to cure their voter registrations. The *Griffin* protest, which is being actively litigated on appeal, seeks *the same thing*. See *Griffin II*, No. 24CV040620-910, Petitioner's Brief, Index # 11, pp. 12-13, 40 (seeking an "order the State Board to retabulate the vote with the unlawful ballots excluded.").

Accordingly, the facts, claims, legal theories, and relief here are identical to those in *Griffin* and there is no need for this Court to entertain this duplicative lawsuit.

The balancing of the equities in this case therefore strongly favors denying the petition for a writ of supersedeas.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

For all the same reasons discussed above, this Court should also deny Petitioners' petition for writ of certiorari asking the Court to review the Court of Appeals' stay order or, alternatively, to itself review and reverse the trial court's order denying a TRO and PI. Petitioners are unlikely to succeed on their claims because they have failed to exhaust administrative remedies. And the substantive claims raised by Petitioners can and should be adjudicated and resolved by the *Griffin* case, not this one.

CONCLUSION

State Board Respondents respectfully request that this Court deny Petitioners' petition for a writ of supersedeas and certiorari.

Electronically submitted this the 18th day of February, 2025.

Electronically Submitted

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