No. 25-181 DISTRICT 10

NORTH CAROLINA COURT OF APPEALS
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JEFFERSON GRIFFIN,

Petitioner-Appellant,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Respondent-Appellee,

and

ALLISON RIGGS,

Intervenor-Respondent-Appellee.

From Wake County

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BRIEF OF PETITIONER-APPELLANT

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The State Board is an administrative agency that has broken the law for decades, while refusing to correct its errors. 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 this Court 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. This appeal seeks review of three categories of protests filed by Judge Griffin and dismissed by the State Board.

First, the Board has accepted absentee ballots cast by thousands of overseas voters who never provided their photo identification. But state law requires all voters to provide photo identification to vote; overseas voters casting absentee ballots do not get special treatment. The Board broke the law by counting these ballots.

Second, the State Board decided to count ballots cast by voters who have, by their own admission, never resided in North Carolina or anywhere else in the United States. Since 1776, our state constitution has limited eligible voters in state races to bona fide North Carolina residents. But ballots were accepted in the Supreme Court race from people who have never lived here. Counting the votes of these "Never Residents" was illegal.

Third, Judge Griffin filed protests 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 allowed thousands to vote in the protested judicial race without providing that statutorily required information. These voters were not allowed to cast a ballot in this race.

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. Our registration statutes have required drivers license or social security numbers since 2004. Our state constitution has imposed a residency requirement since 1776. Photo identification has been required for absentee voting since at least 2018. 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 ignore 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).

ISSUES PRESENTED

Did the superior court err in affirming the State Board?

STATEMENT OF THE CASE

This case began when Judge Griffin filed election protests with all 100 county boards of elections. The State Board of Elections assumed jurisdiction over the three categories of protests at issue in this appeal. (Doc.Ex.I 5366-67.) The Board entered an order on 13 December 2024 dismissing those protests. (Doc.Ex.I 5368-410.)

On 20 December 2024, Judge Griffin filed three notices of appeal and petitions for judicial review in Wake County Superior Court. (R pp 1-51, 157-65, 215-23.) Each action concerned one of those categories of protests rejected by the State Board. On 7 February 2025, the Honorable William R. Pittman held a hearing on the appeal and then entered written orders affirming the State Board. (R pp 152, 210, 269.) On 10 February 2025, Judge Griffin filed notices of appeal from each order. (R pp 154, 212, 271.)

This Court granted a Rule 2 motion to expedite, consolidate, and modify the appellate procedures for this appeal. (R pp 277-78.) Per that order, Judge Griffin filed the record on appeal on 21 February 2025.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appellate jurisdiction exists because Judge Griffin has timely given notice of appeal from the final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1). The superior court entered final judgments in each of these cases on 7 February 2025. (R pp 152, 210, 269.) Judge Griffin timely filed notices of appeal in each case on 10 February 2025. (R pp 154, 212, 271.)

STANDARD OF REVIEW

This Court reviews the orders below de novo, just as the superior court, sitting as an appellate court, reviewed the State Board's order de novo. *See, e.g.*, *Appeal of Ramseur*, 120 N.C. App. 521, 523-24, 463 S.E.2d 254, 256 (1995). In its order, the Board recognized that it was making only legal determinations, not factual ones. (Doc.Ex.I 5407.) The Board considered the protests in a "preliminary consideration" posture, somewhat akin to a summary judgment proceeding. N.C. Gen. Stat. § 163-182.10(a).

Should the Court agree with the merits of any of Judge Griffin's legal theories, but determine that factual determinations are needed, those factual determinations

would be dealt with on remand to the State Board. Remand would also be required to determine how any election protest with legal merit affects the vote total.

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 only 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.

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. 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. (Doc.Ex.I 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. Judge Griffin filed protests that identified approximately 267 people who voted and have never resided in North Carolina. 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

1 Judge Griffin filed protests challenging 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. (Doc.Ex.I 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 voter lists, (Doc.Ex.I 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. (Doc.Ex.I 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. (Doc.Ex.I 3790-4042.)

States." (Doc.Ex.I 296 ¶¶ 12-14.) Counting these ballots is unlawful. An example of this type of protest can be found in the Administrative Record. (Doc.Ex.I 288-303.)

It is unknown how this category of election protests will affect the outcome of the election. As it stands now, Judge Griffin's protests identify fewer than 300 Never Residents who voted, 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.

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2 Judge Griffin asked the Board for data on Never Resident voting before he filed his election protests, and he also requested information from the counties themselves. At the time he filed his protests, Judge Griffin had only received data from the State Board for a limited number of counties. The protests he filed identified 267 Never Residents who voted in the election.

After filing the original protests, 35 counties responded to Judge Griffin's requests. Judge Griffin then supplemented 25 protests with this new data, which showed 138 additional Never Residents who voted in the election. Therefore, at least 405 Never Residents voted in the election.

However, it's unknown exactly how many more Never Residents voted in the election. Since the Board rejected this protest, another five counties have produced records indicating an additional 111 Never Residents 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 election's outcome, but because so many counties have yet to respond to public records requests, it is not certain. The final tally is an issue for the State Board to determine on remand, if this Court agrees with Judge Griffin on the legal merits of the protest.

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 information from new registrants. In the race for Seat 6 of the Supreme Court, the State Board's registration list shows over 60,000 people cast ballots without providing the statutorily required information to become lawful voter registrants. Under state law, unless someone is lawfully registered to vote, he cannot vote. *E.g.*, N.C. Const. art. VI, § 3(1).

A sample protest for incomplete voter registrations can be found in the Administrative Record. (Doc.Ex.I 304-48.) Judge Griffin anticipates that, if these unlawful ballots are excluded, then he will have won the election.

B. Other 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. (Doc.Ex.I 5366.)

The parties filed briefs, then the State Board heard arguments on the protests on 11 December 2024. On 13 December 2024, the Board sent the parties a copy of its final decision that dismissed these consolidated categories of protests. (Doc.Ex.I 5368-410). The protests dismissed by the State Board's order are included in the Administrative Record. (Doc.Ex.I 1-3562.)

On 18 December 2024, Judge Griffin petitioned the North Carolina Supreme Court for a writ of prohibition, and moved 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 superior court regarding the three categories of election protests. That same day, the Board also removed these proceedings to federal court.

In federal district court, Chief Judge Richard Myers remanded all the cases back to state court on the evening of 6 January 2025, including the three petitions for judicial review. (Doc.Ex.II 129-55.)

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 the petitions for judicial review could follow the normal course through the court

system. The Supreme Court ordered such proceedings "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 until "any appeals from [the superior court's] rulings have been exhausted." *Id.*

On 7 February 2025, the Superior Court heard arguments. The trial judge took the matter under advisement for a few hours and then issued orders affirming the judgment of the State Board. (R pp 152, 210, 269.)

Judge Griffin appealed.

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 election's outcome. The Supreme Court ordered the illegal votes to be discounted.

Next, the merits of each of the protests are addressed, as well as the errors committed by the State Board.

This brief then turns to several procedural issues. Appellees contend that this Court lacks jurisdiction over various federal issues, due to their removal of this case to federal court. Appellees are wrong. This Court has jurisdiction to decide all issues in this case and should do so.

Appellees have also pressed various alternative grounds for affirmance of the State Board's decision. But a basic administrative law doctrine, the *Godfrey* doctrine, prohibits courts from affirming agency decisions on alternative grounds. One of those alternative grounds, the *Purcell* principle, has become Appellees' lead argument. Reliance on *Purcell* is foreclosed by the *Godfrey* doctrine. The *Purcell* argument is also wrong on the merits.

The brief then addresses the State Board's attempt to dismiss the protests for procedural defaults. But the Board had no justification for trying to disqualify Judge Griffin from challenging the election results.

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.

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. Those decisions were 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 with the protest appeals. *Id.* The court rejected all three 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 violated the state constitution by allowing 11,310 ballots to be cast out of precinct. *Id.* at 263 n.2, 266, 607 S.E.2d at 640 n.2, 642.

In response to these challenges, the State Board argued that the Republican candidates "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." Br. for Defs.-Appellees at 46, *James*, 359 N.C. 260 (No. 602PA04-2), *available at* https://www.ncappellatecourts.org/show-file.php?document_id=93938. The Board also insisted that the candidates' "failure to press their claims in a timely manner forecloses the relief plaintiffs seek" because it would "alter the rules of and amend the official returns of the election." *Id.*[3]

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3 The Board pointed out that the 2004 general election was not the first time that it had counted out-of-precinct votes. The Board 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 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 statutory deadline.

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. *Id.* at 42. Last, the Board argued that, before the election, it had issued an administrative rule that allowed out-of-precinct voting, and, as a result, no one could now challenge the Board's counting of these ballots after the election. *Id.* at 45.

The Supreme Court rejected all these arguments. 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.

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. Judge Griffin is following the statutory procedure to have his election protests resolved in the way that the General Assembly requires. The State Board is making the same objections rejected by *James*. Because the Board's legal violations have likely changed the election's outcome, the remedy is to "order the discounting of ballots." *Id.*

II. Overseas Voters Who Did Not Provide Photo Identification Cannot Cast a Ballot in State Elections.

The first category of protests at issue involves ballots cast by overseas voters. State law requires overseas voters to submit photo identification along with their

absentee ballots, just like domestic voters. But the State Board accepted overseas absentee ballots without accompanying identification, in violation of state law.

A. Article 21A, which governs overseas absentee voters, incorporates Article 20's requirements for absentee voters.

Subchapter VII of Chapter 163 of the General Statutes contains the requirements for all types of absentee-ballot voting in North Carolina. Article 20 of that subchapter sets out the general rules for absentee voting. *See* N.C. Gen. Stat. §§ 163-226 to -239. Article 21A, which is called the Uniform Military and Overseas Voters Act or UMOVA, layers on additional rules for absentee voting by military and overseas voters. *See id.* §§ 163-258.1 to -258.31.

The general absentee voting provisions of Article 20 apply to overseas absentee voting under Article 21A, and not vice versa. Section 163-239 states, "Except as otherwise provided therein, Article 21A of this Chapter [for overseas absentee voting] shall not apply to or modify the provisions of this Article [20]." In other words, unless Article 21A says it is exempting overseas voters from a requirement set forth in Article 20, Article 21A leaves such requirements in Article 20 untouched and equally applicable to overseas voters. Therefore, Article 21A would exempt overseas voters from the photo-identification requirement of Article 20 only if Article 21A clearly said so. And it doesn't.

Looking at Article 20, one key provision is the requirement of photo identification for absentee voting. N.C. Gen. Stat. § 163-230.1(a)(4), (b)(4), (e)(3), (f1). These provisions equalize the burden of voting: both in-person voters and absentee voters must show photo identification to cast a ballot. *See id.* § 163-166.16(a) (requiring photo identification for in-person voting); N.C. Const. art. VI, §§ 2(4), 3(2) (same). The General Assembly enacted UMOVA in 2011 to regulate absentee ballots cast by overseas voters. *See* N.C. Sess. Law 2011-182. The General Assembly then added legislation to require photo identification for absentee ballots. *See, e.g.*, N.C. Sess. Law 2019-239, § 1.2(b). When the legislature did so, it did not exempt overseas voters. If our legislature intended to exempt overseas absentee voters from the photo identification requirement, it would have said so explicitly. The absence of a clear exemption for overseas voters is determinative.

But even looking at the interplay between Article 20 and Article 21A, it is clear overseas voters must provide photo identification to vote. All absentee ballots—cast under either Article 20 or Article 21A—must be transmitted to the relevant county board of elections by placing it in a "sealed container-return envelope." N.C. Gen. Stat. § 163-231(b)(1). This reference to a sealed container-return envelope applies expressly to absentee ballots cast under both Articles 20 and 21A. *Id.* § 163-231(b). To understand what an overseas voter must put in the "sealed container-return

envelope," the voter must look at the requirements under Article 20, since Article 21A does not answer the question. *See id.* §§ 163-258.1 to -258.31.

Article 20 is clear that the "sealed container-return envelope" exists, in part, to hold the photo identification of *all* absentee ballots. The container-return envelope must contain a valid photo identification: "Each container-return envelope returned to the county board with application and voted ballots under this section shall be accompanied by a photocopy of identification . . . ." *Id.* § 163-230.1(f1). The failure to include a photo identification in the container-return envelope is a curable deficiency, but only if the proper identification is received the day before the county canvass. *Id.* § 163-230.1(e). None of the challenged ballots were cured.

Even at a more general level, absentee ballots cast both within and without the United States (Article 20 and Article 21A absentee ballots) are generally treated alike and are all considered absentee ballots:

- "The county board shall report ballots cast during early voting under Part 5 of Article 14A of this Chapter separately from mail-in absentee ballots cast under Article 20 or 21A of this Chapter." *Id.* § 163-132.5G(a1)(4).
- "The sealed container-return envelope in which executed absentee ballots have been placed shall be transmitted to the county board of

elections who issued those ballots as follows . . . All ballots issued under the provisions of this Article and Article 21A of this Chapter shall be transmitted by one of the following means . . . .” *Id.* § 163-231(b).

- The lawful procedure for counting absentee ballots cast under both Article 20 and Article 21A are set out in Article 20. *Id.* § 163-234.

Moreover, Article 21A recognizes that overseas voters will need to provide photo identification. For instance, an overseas voter may apply for an absentee ballot by using “the regular application provided by Article 20.” *Id.* § 163-258.7(a). And when overseas voters so apply, they are to be informed of the photo-identification requirement, *id.* § 163-230.1(a)(4), and are to return their ballots with photo identification, *id.* § 163-230.1(f1).

Article 20 also has many general provisions about absentee voting that must apply to overseas voters, even though Article 20 does not say so expressly. For instance, Article 20 explains who may vote in partisan primaries, *id.* § 163-226.1, but Article 21A is silent on the issue. Article 20 imposes felony criminal liability for various misdeeds (like ballot harvesting), *id.* §§ 163-226.3, -237, but Article 21A is silent. The same is true for public-record requirements, *id.* § 163-228, duties to report legal violations to district attorneys, *id.* § 163-238, and duties to retain applications for absentee ballots, *id.* § 163-233.

As is apparent from the structure of these articles, Article 20 generally applies to all absentee voting, except where Article 21A provides a different rule. *See id.* § 163-239. Article 20 imposes a photo-identification requirement for absentee voters, and Article 21A does not provide a different rule. Thus, absentee ballots under Article 21A must be accompanied with photo identification.

B. Nothing in Article 21A excuses overseas voters from providing photo identification.

The State Board reasoned that Article 21A excused overseas voters from providing photo identification because section 163-258.17(b) established the exclusive means to authenticate the identity of the voter. (Doc.Ex.I 5399-406.) But subsection (b) says no such thing.

That subsection states that the lone "authentication" required "for *execution of a document*" for overseas voters are the declarations permitted for overseas voters. N.C. Gen. Stat. § 163-258.17(b) (emphasis added); *see id.* § 163-258.4 (describing declaration that acknowledges misstatements are grounds for perjury). Subsection (b) cannot exempt an overseas voter from the photo-identification requirement because photo identification is not the "authentication" of a document—it's the authentication of the voter's identity. This conclusion is easily confirmed by looking at Article 20. Similar to section 163-258.17(b)'s authentication requirement, Article 20 also requires absentee ballots to be authenticated by notarization or a witness. *See id.*

§ 163-231. Notably, the photo identification requirement is an entirely separate requirement found in another statute within Article 20. *Id.* § 163-230.1. Why? Because photo identification is not an "authentication" of a document.

In the prohibition proceedings at the Supreme Court, Justice Dietz, agreed with Judge Griffin on the merits of this election protest. Am. Order at 2-3, *Griffin* (No. 320P24), *available at* https://appellate.nccourts.org/orders.php?t=P&court=1&id=444978&pdf=1&a=0&docket=1&dev=1. Describing the Board's reasoning as "strained," he explained that the Board's argument "rel[ies] on the bizarre view that voter ID is a means of 'authenticating' a ballot, not identifying the human being who is voting." *Id.* at 3. This argument, he concluded, "does not appear consistent with the text of the applicable state laws. *See* N.C.G.S. § 163-166.16 & -230.1(f1); N.C.G.S. § 163-239." *Id.* Going further, he explained that the Board's argument "is obviously inconsistent with the law's intent":

> One does not need a law degree to understand that people claiming to be registered North Carolina voters while mailing in absentee ballots from a foreign country are among the key groups of people that the General Assembly (and we the people in our state constitution) intended to be subject to our voter ID law. That law is designed to protect the integrity of our elections. It is certainly easier for foreign actors to meddle in an election from overseas. Exempting voters in foreign countries from voter ID requirements that apply to everyone else simply cannot be squared with the text of the law or the obvious legislative intent.

Id. As Justice Dietz knows, "in construing statutes, the courts should always give effect to the legislative intent. In ascertaining such intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *State v. Tew*, 326 N.C. 732, 738-39, 392 S.E.2d 603, 607 (1990) (citation omitted).

The Board's reasoning is concerning for another reason as well. Under the Board's reading of Article 21A, the Board does not confirm the identity of overseas voters. The Board simply accepts a person's own say-so in a declaration. N.C. Gen. Stat. §§ 163-258.13, -258.17(b). Unlike Article 20 ballots, Article 21A does not require witnesses or notarization. And unlike domestic voters, county election boards don't attempt to match an overseas voter's personal information to reliable databases to confirm their identity. *Id.* § 163-166.12(f)(3). It's astounding to think that the General Assembly intended to make it that easy to commit voter fraud through overseas voting, when the legislature has been consistently rooting out voter fraud through statutory amendments for over a decade.

C. The fact that the Board issued a rule excusing overseas voters from providing photo identification does not immunize the Board's decision from judicial review.

The State Board also defended its decision to excuse overseas voters from the photo-identification requirement on the grounds that the Board had already issued a rule saying so. (Doc.Ex.I 5403-06 (citing 8 N.C. Admin. Code § 17.0109(d)).) But the General Assembly never delegated to the State Board the power to make the major policy decision of whether to require photo identification from a class of voters. Photo identification was a decision made by the legislature.

First, the Board cannot issue a valid rule that conflicts with state statutes. If there is a conflict, the statute prevails. And, as just shown, the statutes require photo identification for all absentee voters, including overseas voters.

Second, the General Assembly did not and could not delegate to the State Board the policy decision regarding photo identification for overseas voters. State agencies have only the power actually delegated to them by the General Assembly. *Stam v. State*, 302 N.C. 357, 359-60, 275 S.E.2d 439, 441 (1981). And an administrative agency cannot be "asked to make important policy choices which might just as easily be made by the elected representatives in the legislature." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697-98, 249 S.E.2d 402, 411 (1978). If such legislative power could be delegated, it would be "delegation running riot." *A.L.A.*

Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (administrative delegation held unconstitutional under non-delegation doctrine); *see also State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 860 (1940) (same).

When it comes to questions of "widespread emotional and intellectual debate," courts will not assume that the legislature delegated to agencies the discretion to resolve such a "volatile subject." *Stam*, 302 N.C. at 363, 275 S.E.2d at 443. Rather, courts presume that the legislature would have delegated such important issues only "by express authorization." *Id.* As the Supreme Court of the United States has observed, when an administrative agency makes an extraordinary claim of authority with "political significance," that gives courts a "reason to hesitate" before concluding that the legislature meant to confer the claimed authority. *West Virginia v. EPA*, 597 U.S. 697, 721 (2022). Under the major questions doctrine, courts recognize that the legislature does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Scalia, J.). "[S]eparation of powers principles" caution against such unrestrained readings of administrative authority. *West Virginia*, 597 U.S. at 723.

There is no textual indication that the General Assembly ever intended for the State Board to decide whether to require photo identification for any kind of voter, much less overseas voters. And even if there were some "colorable textual basis,"

id., the major questions doctrine would caution the Court to interpret the statutes against a delegation.

The rule would also collapse under the state constitution. If voters are to be treated differently, there must be a rational basis for differential treatment. *See* N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws . . . ."); *Lloyd v. Babb*, 296 N.C. 416, 439, 251 S.E.2d 843, 858 (1979) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *N.C. Bar & Tavern Ass'n v. Cooper*, 901 S.E.2d 355, 373 (N.C. Ct. App.), *review allowed*, 901 S.E.2d 232 (N.C. 2024); *Askew v. City of Kinston*, 906 S.E.2d 500, 507 (N.C. Ct. App. 2024). But there is no legitimate reason to impose a greater burden—photo identification—on those living in North Carolina than is imposed on those living abroad. There is no reason to think that the General Assembly intended that bizarre, differential treatment, which could violate the promise of equal protection. *James*, 359 N.C. at 266, 607 S.E.2d at 642 (avoiding constitutional question about out-of-precinct voting by interpreting state statutes not to permit it).

D. Federal law has no bearing on the photo-identification requirement.

Because state law offered by the State Board provides no refuge, the Board also sought to intertwine its reasoning with federal law, citing 52 U.S.C. § 20302.

(Doc.Ex.I 5404-05.) But federal law has no application here. The statute on which the Board relies, by its own terms, only applies to "elections for Federal office." *E.g.*, 52 U.S.C. § 20302(a)(1)-(3), (6)-(8), (b)(1), (c).

III. The Boards of Election Cannot Count the Votes of People Who Have Never Lived Here.

The right to vote in North Carolina elections for state offices is granted only to those who reside in North Carolina. The residency requirement "preserve[s] the basic conception of a political community." *Lloyd*, 296 N.C. at 449, 251 S.E.2d at 864. Just last year the Supreme Court confirmed that "nonresidents" are "categorically ineligible to vote." *Bouvier*, 386 N.C. at 4 n.2, 900 S.E.2d at 843 n.2.

Yet people voted in the 2024 general election who, by their own admission, were born overseas and have never resided in North Carolina or anywhere else in the United States. While these overseas voters are United States citizens, they have never been residents of North Carolina who can vote for state contests. It's unlawful to count the votes of these Never Residents.

A. The state constitution forbids counting the votes of Never Residents.

The North Carolina Constitution defines the political community for purposes of voting in our elections. No one can vote in a state election unless they meet the "qualifications" in article VI of the constitution. N.C. Const. art. VI, § 1. The

constitution then sets out the first of the qualifications in the voter residency clause. Under that clause, to vote in an election for a state office, a person must have "resided in the State of North Carolina for one year . . . next preceding an election." *Id.* § 2(1). This requirement is nothing new. In our original constitution, a person could vote for a legislator only in the county in which he "reside[d]." *See* N.C. Const. of 1776, art. VIII.

Despite the constitution's plain language, the State Board permitted people to vote in the general election who have never resided in North Carolina. The Board provided a list of overseas voters who voted in the 2024 general election but who self-identified as having never lived in the United States. (Doc.Ex.I 295-96 ¶¶ 10-13.) These voters checked a box on a federal post card application that stated, "I am a U.S. citizen living outside the country, and I have never lived in the United States." (Doc.Ex.I 295-96, 300 (sample FPCA).)

B. The residency clause is not preempted by the federal constitution.

Before the superior court, the State Board also made a broadside attack on the state constitution itself, claiming that federal law preempts the state constitution. (Doc.Ex.II 11.) That is not correct.

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the U.S. Supreme Court considered whether a one-year durational residency requirement, as a prerequisite to

registering to vote, violated the equal protection clause of the Fourteenth Amendment. *Dunn v. Blumstein*, 405 U.S. 330, 334 (1972). The Court held that a one-year residency requirement was too long to comply with equal protection. *Id.* at 334. Importantly, however, the Court explained what was *not* at issue. The Court emphasized that it was not ruling on whether Tennessee could "restrict the vote to bona fide Tennessee residents," recognizing that a "bona fide residence may be necessary to preserve the basic conception of a political community." *Id.* at 334, 343-44. The Court emphasized that it had consistently approved bona fide residency requirements, which are analyzed differently than durational residency requirements. *Id.* at 343-44.

Our Supreme Court then considered the impact of *Dunn* on the residency requirement of our own state constitution and determined that the bona fide residency requirement continues to apply. Our Supreme Court explained that *Dunn* drew a "careful distinction . . . between durational residence requirements and bona fide residence requirements." *Lloyd*, 296 N.C. at 439, 251 S.E.2d at 858. Thus, "[a]ppropriately defined and [u]niformly applied bona fide residence requirements are permissible" under the federal constitution. *Id.* at 440, 251 S.E.2d at 859. And although those "who reside in a community and are subject to its laws must be permitted to vote there," the corollary is that those who do *not* reside in a community are not

permitted to vote. *Id.* Citing *Dunn*, the Court held that "[t]he power of the state to require that voters be bona fide residents is unquestioned." *Id.*; *see also Bouvier*, 386 N.C. at 4 n.2, 900 S.E.2d at 843 n.2 (holding "nonresidents" are "categorically ineligible to vote" under the state constitution).

C. If UMOVA permits these votes to be counted, it is unconstitutional as applied to these circumstances.

In its decision, the State Board turned to a state statute, UMOVA, to let it count unconstitutional ballots of Never Residents. Of course, if the statute permits voting by those ineligible to vote under the constitution, it violates the constitution. UMOVA, therefore, should not be read to conflict with the state constitution.

In 2011, the General Assembly enacted UMOVA. N.C. Sess. Law 2011-182 (enacting N.C. Gen. Stat. §§ 163-258.1 to -258.20). The bill was originally drafted by the Uniform Law Commission, which recommended its adoption among the states.

UMOVA lets a "covered voter" register to vote in various ways for elections to federal and state offices. *See* N.C. Gen. Stat. § 163-258.3 (defining elections covered by UMOVA); *id.* § 163-258.6 (setting out methods of registration). At issue here is who counts as a "covered voter." The relevant part of the definition is provided here in full:

> (1) "Covered voter" means any of the following:

> e. An overseas voter who was born outside the United States, is not described in sub-subdivision c. or d. of this subdivision, and, except for a State residency requirement, otherwise satisfies this State's voter eligibility requirements, if:
>
> 1. The last place where a parent or legal guardian of the voter was, or under this Article would have been, eligible to vote before leaving the United States is within this State; and
>
> 2. The voter has not previously registered to vote in any other state.

Id. § 163-258.2(1).

UMOVA doesn't define the phrase "State residency requirement" as used in subsection (1)(e). The term is not defined anywhere in the Act. As it stands, the phrase is ambiguous as to whether it means a durational residency requirement or a bona fide residency requirement. If the ambiguous phrase were interpreted to mean just a durational residency requirement, it's possible that UMOVA would, at least in some circumstances, be constitutional under the residency clause, as that clause is limited by *Dunn*. But if, on the other hand, the ambiguous clause were interpreted to let someone vote who has *never* been a resident, it would be unenforceable under the bona fide residency requirement of the state constitution.

As in *James*, the canon of constitutional avoidance requires the Court to interpret N.C. Gen. Stat. § 163-258.2(1)(e) as exempting overseas voters only from a durational residency requirement, and not a bona fide residency requirement. *See*

James, 359 N.C. at 266-69, 607 S.E.2d at 642-44. Only such an interpretation could save the statute from being invalidated: "[W]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *N.C. State Bd. of Educ. v. State*, 371 N.C. 149, 160, 814 S.E.2d 54, 62 (2018).

Below, Judge Griffin asked the Board to apply the canon of constitutional avoidance to this subsection of UMOVA. But the State Board just misconstrued that as a request to find the provision unconstitutional. (Doc.Ex.I 5396.) The State Board held that it was incompetent to hold a state statute unconstitutional. (Doc.Ex.I 5398-99.) The Board then decided to opine on the constitutional question anyway, stating in one sentence that, if this subsection of UMOVA violated the state constitution, then the federal constitution's doctrine of substantive due process would reinstate the state law. (Doc.Ex.I 5399.) The theory appears to be that applying our state constitution to this election would be applying a "newly announced rule of law." (Doc.Ex.I 5392.) The Board, however, has confused the chronology. The residency requirement in the state constitution has existed and persisted since the Revolutionary War. UMOVA was enacted 235 years later. Not exactly a new rule.

Alternatively, if the Court does not believe section 163-258.2(1)(e) is reasonably susceptible to Judge Griffin's proposed interpretation, then the Court should

refuse to enforce the statute as it applies to Never Residents. When "there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *In re Chastain*, 909 S.E.2d 475, 482 (N.C. 2024) (Riggs, J.). And the constitution is clear: only bona fide residents can vote for state offices.

D. This argument has no impact on votes cast for federal elections, military voters, or North Carolina residents living overseas.

To be clear, this protest does not challenge the votes of military voters nor votes cast for federal contests.

Judge Griffin was not a candidate for federal office. And federal statutory law, which imposes duties on states for uniformed services voters and other overseas voters, applies only to "elections for Federal office." *See* 52 U.S.C. § 20302(a). Besides, it's highly unlikely the Never Residents includes servicemembers because Never Residents were born abroad and have never lived anywhere in the United States.[4]

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4 Because this case does not involve an election for a federal office, other provisions of the state constitution are not implicated. Article VI of the North Carolina Constitution lets the General Assembly reduce the residency requirement, but such short-term residents can only vote for president and vice president. N.C. Const. art. VI, § 2(2).

UMOVA also distinguishes between, on one hand, uniformed-service voters and overseas voters who have resided in this state, N.C. Gen. Stat. § 163-258.2(1)(a)-(d), and, on the other hand, overseas voters who were born abroad and have never resided in this state, *id.* § 163-258.2(1)(e). Judge Griffin has challenged the votes of this latter group ***only***.

Anyway, a servicemember who previously resided in North Carolina but is deployed overseas does not lose his North Carolina residency. Unless a servicemember leaves the state and never intends to return, he remains a resident of the state. *See Lloyd*, 296 N.C. at 444, 251 S.E.2d at 861 (student who leaves for college becomes resident at the place of his college unless he intends to return to his former home after graduation). The servicemember remains a resident here for voting purposes so long as he hasn't "abandoned" his home in North Carolina. *Id.* at 449, 251 S.E.2d at 864. By contrast, the Never Residents never had a home in North Carolina that they could abandon.

E. Residency isn't inheritable under the state constitution's voter qualifications.

Justice Riggs argued that Never Residents inherit the residencies of their parents. (Doc.Ex.II 58-59.) She analogizes to the law of domiciliary for infants. Yet the analogy crumbles upon inspection because infants can't vote. N.C. Const. art. VI, § 1 (voting rights limited to those at least "18 years of age"). Unlike an infant, an 18-

year-old *chooses* where he resides. If he wishes to become a member of North Carolina's political community, he must decide, as an adult, to move here. Otherwise, he is not a member of our political community entitled to vote in state elections. There is no such thing as "birthright residency" for purposes of voting in our state.

Inherited voting rights also make no sense when applied to the circumstances of the Never Residents. Under Appellees' theory, a child's residence or domicile is the same as his parents'. But recall that the Never Residents were born abroad and have never lived in the United States. That means that the parents of the Never Residents have been abroad for all eighteen years of the Never Resident's childhood. But a person can only establish residency in a place in which they have actually lived. When the Never Resident turned 18, his residence was where his parents had set up their international abode. Wherever that was, it wasn't North Carolina.

By its own terms, UMOVA doesn't care whether the Never Residents' parents set up a fixed habitation somewhere abroad. Instead, it ascribes to the parent a fictional North Carolina residency, even when the parent settled down in a foreign country 18 years ago. *See* N.C. Gen. Stat. § 163-258.2(1)(e). Justice Riggs argues that this is fine because the legislature can ascribe a fictional residency "by operation of law." (Doc.Ex.II 60.) That is true when the residency matters for other statutory or common law purposes. But the legislature is powerless to rewrite the meaning of

"residency" as it's set out in the North Carolina Constitution. Our Supreme Court has already rejected this very argument, holding that the legislature cannot define the meaning of "residency" as used in this part of the constitution. *Owens v. Chaplin*, 228 N.C. 705, 710, 47 S.E.2d 12, 16 (1948).

IV. 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, for decades, registering people who never provided this statutorily required information. The ballots cast by these improper registrants lack statutory authorization because no one can vote if he is unlawfully registered.

A. To be eligible to vote, you must be lawfully registered.

If you are not lawfully registered to vote, then you are not eligible to vote. 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). Two statutes reiterate this requirement: "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."). Simply put, if you are not lawfully registered, you are not allowed to vote—our constitution and statutes make no exceptions.

B. To be lawfully registered to vote, an applicant must provide a drivers license or social security number.

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

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). Specifically, the State Board of Elections is required to create an application form for voter registration. *Id.* § 163-82.3(a). And 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). 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. § 163-82.12(6), (8), (9).

The statute makes clear that you must provide a drivers license or social security number if you have one. In fact, if an applicant "fails to complete any required item on the voter registration form," then the statute is very clear on what should happen. First, the county board should notify the applicant that he omitted the information from his application. *Id.* § 163-82.4(f). Next, the applicant has until 5:00 P.M. on the day before canvass to provide the omitted information. *Id.* Finally, if the applicant "corrects that omission within that time," then "the board shall permit the voter to vote." *Id.* Thus, if an applicant fails to provide the omitted information by the deadline, then he is not properly registered—and not allowed to vote.

Mandating such information from voter registrants is not unique to North Carolina. For elections to federal offices, Congress, through the Help American Vote Act (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 doesn't apply to elections for state offices, this federal requirement for federal elections corroborates the importance of collecting such information from would-be voters. Collecting this information is a decades-old requirement that protects the integrity of our elections.

The lone group of people who need not provide a drivers license or social security number are those who have never been issued such numbers. A board can accept an application without a drivers license or social security number ***only if*** the applicant "has *not been issued* either a current and valid drivers license or a social security number." N.C. Gen. Stat. § 163-82.4(b) (emphasis added). This limited statutory exception—for those who do not have a drivers license or social security number—proves the rule that such information is otherwise mandatory. There would be no need for an explicit, narrow exception if the information was unnecessary to register.

C. The State Board 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.

In 2023, the Board admitted that it allowed voters to register in violation of the law when it entered an order on an administrative complaint that raised this issue. In that order, the Board concluded that it would violate HAVA's similar provisions "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) (emphasis added) (Doc.Ex.II 123-27.)

To correct the violation, the Board ordered its staff to revise the form going forward.[5] *Id.* But the Board refused to remedy its past violations. Now, however, the failure to do so has changed the outcome of an election.

D. The unlawful registrations haven't been cured by providing alternative identification.

In its dismissal of Judge Griffin's petition, the Board reasoned that an applicant's failure to provide a drivers license or social security number was harmless because the applicant cured the omission by providing "an alternative form of identification" before voting. (Doc.Ex.I 5385-86.) To be more precise, the Board believes that applicants don't need to provide such numbers because section 163-166.12 allows applicants to, in lieu of providing the numbers, present alternative identification when they vote.[6] The Board's logic is rejected by section 163-166.12's plain language.

Section 163-166.12 imposes special requirements on voters who have registered by mail: such voters must provide additional identification before they can vote. *See* N.C. Gen. Stat. § 163-166.12(a), (b). Indeed, the statute's very title

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5 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). (Doc.Ex.I 311.)

6 Strangely, the State Board's decision cited a provision of HAVA—which govern federal elections, *e.g.*, 52 U.S.C. § 21081(a)—rather than the relevant North Carolina statute—which governs this state election. (Doc.Ex.I 5385.)

announces that it applies only to those voters who have registered by mail: "Requirements for certain voters *who register by mail*." *Id.* § 163-166.12. Looking at the statute's text, it plainly explains that a person "who *has registered to vote by mail*" must provide additional identification before voting. *Id.* § 163-166.12(a), (b) (emphasis added).

The Board's misreading of the statute runs headlong into how the Eleventh Circuit Court of Appeals has construed similar parts of HAVA, holding that such provisions "impos[e] *additional restrictions* on those individuals *who registered by mail* before they can vote either a regular or a provisional ballot." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1169 (11th Cir. 2008) (emphasis added). A statute that places an additional restriction on a voter who (properly) registered by mail is not a "cure" for somebody who never register properly in the first place.

Moreover, providing the additional identification as required by section 163-166.12 is simply 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 applicant by matching the applicant's drivers license or social security number to other government databases. *See* N.C. Gen. Stat. § 163-82.12(6), (8), (9). In contrast, section 163-166.12 lets a registered voter provide documents such as a current utility bill, a bank statement, or a paycheck. *Id.* § 163-166.12(a)-(b). The mere

presentation of such documents is not the equivalent of an identity match with government databases. They are apples and oranges.

The General Assembly has never given the State Board the authority to accept "an alternative form of identification" in the place of a drivers license or social security number. Individuals who were registered without providing such numbers were illegally registered and, under our constitution and laws, ineligible to vote.

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

As an alternative ground for the Board's dismissal of these protests, the Board attempted to inject federal law—HAVA and the National Voter Registration Act (NVRA)—into a state-law election issue. (Doc.Ex.I 5384-87.) HAVA and the NVRA have nothing to do with this case.

1. HAVA has no bearing on state elections.

The State Board 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 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).

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. (Doc.Ex.I 5392-94.)

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 constitution: The NVRA cannot apply when the issue is about an election to a state office. *See, e.g.*, *Young v. Fordice*, 520 U.S. 273, 275 (1997); *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).[7]

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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." (Doc.Ex.I 5392 (quoting 52 U.S.C. § 20507(a)(3)).) The State Board omitted that these

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 the 2024 election, much less cause that voter to be removed from the voter rolls for future elections.

V. This Court Has Jurisdiction to Decide the Federal Issues.

This Court can and should reject each defense Appellees have raised in the proceedings before the State Board or the superior court, including all federal issues. The federal proceedings are no barrier to this Court deciding all issues before it. When the federal district court remanded this case to state court, it did so in full, leaving no part of the dispute in federal court. Appellees point to a so-called "*England* reservation" and the Fourth Circuit's recent ruling, but neither of those developments changes this Court's duty to decide the issues.

The *England* reservation is related to the removal to federal court. After the Board removed the petitions for judicial review from superior court, the federal

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restrictions apply "to voter registration for elections **for Federal office**." 52 U.S.C. § 20507(a) (emphasis added).

district court invoked *Burford* abstention,[8] declined to exercise jurisdiction, and remanded the cases back to superior court in their entirety. (Doc.Ex.II 129-35); Order, *Griffin v. N.C. State Bd. of Elections*, No. 5:24-cv-731 (Jan. 2, 2025), https://storage.courtlistener.com/recap/gov.uscourts.nced.214953/gov.uscourts.nced.214953.24.0_1.pdf. The Board sought a stay of the remand order pending appeal, but the Fourth Circuit did not grant a stay. After an expedited appeal, the Fourth Circuit entered a per curiam opinion on 4 February 2025. (R pp 135-45.)

The per curiam opinion modified and affirmed the district court's order. The court agreed that federal court abstention was right but found that abstention was "more appropriate" under another doctrine, *Pullman* abstention. (R p 144.) *Pullman* abstention applies when an action is filed in federal court with constitutional claims, but clarification of unsettled state-law issues could moot the need for resolution of federal constitutional claims. 17A Charles A. Wright et al., *Federal Practice and Procedure* § 4242 (3d ed. Westlaw 2024 update). The Fourth Circuit remanded "with instructions directing the district court to modify its order to expressly retain

8 *Burford* abstention "is ordered in order to avoid needless conflict with the administration by a state of its own affairs." 17A Charles A. Wright et al., *Federal Practice and Procedure* § 4244 (3d ed. Westlaw update 2024). It applies when "the state has specially concentrated all judicial review of administrative orders of the sort involved in a single state court." *Id.*

jurisdiction of the federal issues identified in the Board's notice of removal should those issues remain after the resolution of the state court proceedings, including any appeals." (R p 145.) The court issued its mandate ten days later, on 14 February 2025. Mandate, *Griffin v. N.C. State Bd. of Elections*, No. 25-1018 (L) (Feb. 14, 2025), https://storage.courtlistener.com/recap/gov.uscourts.ca4.177422/gov.uscourts.ca4.177422.139.0.pdf.

As of the date of the filing of this brief, the district court has still not modified its order to retain jurisdiction over any issues. The district court has not acted since its original order was entered remanding the cases back to superior court.

In the superior court actions, Appellees actively litigated the federal issues in the case, asking the superior court to rule on the federal issues and to do so in their favor. (Doc.Ex.II 50, 67-69, 159, 197-207, 304-17, 336-48.) On 6 February 2025, Appellees changed their strategy. In each superior court action, Appellees filed a purported notice of an "*England* reservation." (R pp 128-51, 196-209, 255-68.) An *England* reservation is a way for litigants who must pursue state-law claims in state courts, because a federal court has abstained from those state-law issues, to reserve their federal claims for a future decision in federal court. *See generally England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964).

The day after Appellees filed their reservations, the superior court held its hearing. Judge Griffin's counsel raised the ineffectiveness of the *England* reservation at the outset of the hearing. (T pp 4-6.) Judge Griffin asked the superior court to disregard the improper reservations and to rule on the federal issues. (T pp 4-6.) Appellees disagreed, arguing that the superior court should not exercise jurisdiction over the federal issues. (T pp 6-7.) The superior court then appeared to agree that it would rule on the federal issues: "I agree with you -- with both of you that that doesn't preclude this court from considering those issues in its ruling if it decides it's relevant." (T p 7.) Later that day, the trial court entered orders affirming the State Board's decision in its entirety.

On appeal, Appellees have indicated that they will ask this Court to respect their *England* reservation, since they asked for the issue to be listed as a proposed issue on appeal in the record. (R p 283.) Their argument should be rejected for several, independent reasons.

First, Appellees could not make an *England* reservation in this case because "[t]he *England* procedure strictly speaking is applicable only if a case was begun in federal court . . . ." 17A Charles A. Wright et al., *Federal Practice and Procedure* § 4243 (3d ed. Westlaw update 2024); *see also Atwater v. Chester*, 730 F.3d 58, 64 (1st Cir. 2013) ("Under our caselaw, litigants must *first* file suit in federal court to secure

an *England* reservation."); *Allen v. McCurry*, 449 U.S. 90 (1980). This case began in state court, not federal court.

Second, Appellees waived any *England* rights many times over. *See England*, 375 U.S. at 419 (a litigant waives his right to return to federal court when he "submits his federal claims for decision by the state courts, litigates them there, and has them decided there").

Appellees submitted the federal issues for decision by the State Board originally, without making a reservation. They then submitted the issues to the superior court for resolution, again without reservation. When the district court abstained on 6 January 2025, Appellees could have attempted an *England* reservation in superior court.[9] Instead of making a reservation, Appellees filed six briefs in superior court, which asked the superior court to adjudicate all the issues in this case, including the federal issues. If Appellees ever had a right to make an *England* reservation, they waived it by making the arguments in those briefs. And it is certainly too late to make an *England* reservation at this stage of the litigation. *Godoy v. Gullotta*, 406 F. Supp. 692, 694 (S.D.N.Y. 1975) (reservation must be made "at the beginning of state court

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9 That the district court originally abstained under *Burford* rather than *Pullman* does not matter because an *England* reservation can be made in either case. *See, e.g.*, *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

proceedings rather than for the first time on appeal"); *Mission Oaks Mobile Home Park v. City of Hollister*, 788 F. Supp. 1117, 1123 (N.D. Cal. 1992), *aff'd*, 989 F.2d 359 (9th Cir. 1993) (reservation too late when made after filing of summary judgment motion).

Third, Appellees have argued that the Fourth Circuit's opinion somehow prevents this Court from rejecting the federal defenses that Appellees have already raised. That is not so. To be sure, the Fourth Circuit remanded "with instructions directing the district court to modify its order to expressly retain jurisdiction of the federal issues identified in the Board's notice of removal should those issues remain after the resolution of the state court proceedings, including any appeals." (R p 145.) But the district court did not modify its opinion before the superior court decided this case. To be clear, the Fourth Circuit did not, in itself, modify the district court's remand order; instead, it ordered the district court to do that. (R p 145.) The district court has not yet done so.

Fourth, if or when the district court does modify its order, the modification will not strip the state courts of jurisdiction over any issue. The modification will not transfer the case, or any portion of the case, from the state court system to the federal court system. The district court already remanded the case: "When a district court remands a case to a state court, the district court disassociates itself from the case

entirely, retaining nothing of the matter on the federal court's docket." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). Even if a district court's remand order is reversed on appeal, the reversal does not automatically return the case to federal court. Rather, the federal district court must first ask the state court to return jurisdiction to the federal court. *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 80 (1st Cir. 2021) (indicating that federal courts lack "any formal procedural mechanism for the retrieval of a removed case erroneously returned to a state court"). The district court cannot simply resume jurisdiction on its own. *Jackson v. Sloan*, 800 F.3d 260, 261 (6th Cir. 2015) ("'Jurisdiction follows the file,' we have said, meaning that the one court loses jurisdiction and the other court gains it when a case file physically moves between courts.").

Neither Appellees nor the district court have requested "the state court's cooperation" to "restore the action to [the federal court's] docket." *Cadence Educ.*, 15 F.4th at 81. In light of the order from our Supreme Court mandating the expeditious resolution of all issues in this case, Appellees must ask the Supreme Court to return jurisdiction of any federal issues to federal court.

Fifth, in any event, this Court need not confront those issues because the Fourth Circuit's opinion does not purport to require this Court to refrain from deciding any defenses to Judge Griffin's state-law claims. As the Fourth Circuit

acknowledged, its order for the district court to retain jurisdiction applies to "claims," not defenses. The Fourth Circuit explained the doctrine: "[U]nder *Pullman* abstention, the federal court retains jurisdiction of the federal constitutional *claims* while the state court issues are addressed in state court." (R p 147 (emphasis added); *see also* R p 145 ("[I]f the Board prevails in Wake County on the state law issues, the resolution of the federal *claims* may not be necessary." (emphasis added))). Thus, the Fourth Circuit—seemingly accepting the Board's argument that Judge Griffin affirmatively seeks declaratory relief under federal law—apparently anticipates a return to federal court to decide any federal constitutional claims that remain after the state courts decide Judge Griffin's state-law claim and any relevant defenses.

Thus, it is not surprising that the superior court appeared to reject the Appellees' *England*-reservation argument: "I agree with you—with both of you that that doesn't preclude this court from considering those issues in its ruling if it decides it's relevant." (T p 7.) Later that day, the trial court entered orders affirming the State Board's decision in its entirety, which necessarily included the federal issues adjudicated by the Board. The superior court stated that it "carefully considered . . . the written and oral arguments of counsel" and concluded "that the Board's decision was not in violation of constitutional provisions." (R pp 152, 210, 269.) There

is no indication in the record that the superior court ever acquiesced in the Appellees' efforts to reserve their federal issues for adjudication in federal court.

For these reasons, the superior court had jurisdiction over all issues when it ruled on them, and this Court does as well. Indeed, Appellees' have stipulated to the superior court's subject-matter jurisdiction. (R p vi.) Judge Griffin, therefore, asks this Court to take the following steps: (1) determine that this Court has jurisdiction to decide the federal issues, either because the *England* reservations were ineffective or for any of the reasons stated, then (2) decide the federal issues as requested in this brief.

VI. Under the *Godfrey* Doctrine, Appellees Cannot Seek Affirmance on Alternative Grounds.

Before the superior court, the Appellees' lead argument was *Purcell*. But Appellees cannot rely on that or the various other alternative grounds for affirmance that they argued on appeal in the superior court. Not only were these arguments not raised before the State Board, but they also violate the *Godfrey* doctrine, a fundamental administrative law doctrine that limits the scope of judicial review of agency action.

Under the *Godfrey* doctrine, a reviewing court cannot affirm an agency decision for reasons different from those given by the agency. In *Godfrey v. Zoning Board of Adjustment of Union County*, our Supreme Court held that a reviewing court must

judge an agency's decision "solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." 317 N.C. 51, 63-64, 344 S.E.2d 272, 279-80 (1986) (cleaned up). This Court has applied *Godfrey* many times. *See, e.g.*, *Frazier v. Town of Blowing Rock*, 286 N.C. App. 570, 576-77, 882 S.E.2d 91, 96-97 (2022) ("Appellate review of the [agency's] decision is strictly limited to the grounds invoked by the [agency]."); *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 191-92, 689 S.E.2d 576, 587 (2010).

In response to the Appellees' arguments before the superior court, Judge Griffin urged the court to follow *Godfrey*. (T pp 23-25.) It's unknown whether the trial court followed the law, since no questions were asked and the order of affirmance contains no reasoning. Regardless, Appellees' arguments within *Godfrey*'s ambit must be rejected in this Court, as noted below.

VII. The *Purcell* Principle Does Not Apply.

In the superior court, the Appellees' lead argument was the *Purcell* principle. The *Purcell* principle establishes "(i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when . . . as here, lower federal courts

contravene that principle." *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*)).

This argument is wrong. It's foreclosed by *Godfrey*. It's also a category error because *Purcell* never applies after an election or to an election-protest remedy created by statute.

A. The *Purcell* argument has been forfeited.

The State Board did not rest its decision on *Purcell* or any other issue with timeliness. That's no surprise because no one argued *Purcell* in the agency proceedings. The first time *Purcell* was ever mentioned with this case was in Justice Dietz's separate opinion from 7 January 2025 in the amended order granting a temporary stay, in the writ of prohibition proceeding at the Supreme Court. The first time that either Appellee mentioned *Purcell* in connection with this dispute was in their subsequent briefs in that proceeding, filed on 21 January 2025, long after the State Board's decision was issued.

Thus, the *Purcell* argument is squarely foreclosed by *Godfrey*. This case is a prime example of how agencies try to make litigants and courts chase moving targets and escape judicial review. *Godfrey* forbids it.

B. *Purcell* cannot apply after an election.

Next, even by *Purcell*'s logic, the principle cannot apply to post-election lawsuits. Appellees have never provided a single case applying *Purcell* after an election.

Purcell is designed to protect the mechanics of state elections from being changed shortly ***before*** an election. Indeed, *Purcell* applies only to determine whether to stay an injunction before an election. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (*Purcell* is a "refinement of ordinary stay principles for the election context"). *Purcell* exists because "late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 31 (2020). Sudden changes *before* an election can "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5.

But none of these harms are threatened by post-election challenges. *Purcell* does not apply if "[v]oter behavior cannot be impacted by [a court's] decision one way or another." *Wise v. Circosta*, 978 F.3d 93, 99 (4th Cir. 2020). The harms against which *Purcell* protects are not at issue after an election "has already occurred," as many courts have explained. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244-45 (6th Cir. 2011) ("Because this election has already occurred, we need not worry that conflicting court orders will generate 'voter confusion and consequent

incentive[s] to remain away from the polls.'" (quoting *Purcell*, 549 U.S. at 4-5)); *La Union del Pueblo Entero v. Abbott*, 705 F. Supp. 3d 725, 767 (W.D. Tex. 2023) (similar); *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *15 (Pa. Commw. Ct. June 2, 2022) [Add. 14-15] (rejecting argument that *Purcell* prohibits "an after-the-fact state court challenge to the actual implementation of those state laws").

Applying *Purcell* after an election would be an unfortunate category error, taking *Purcell* in a direction that *no jurisdiction* has ever gone. Although our Supreme Court has never cited *Purcell* in a majority opinion, the several dissenting opinions that would have applied *Purcell* all recognized that *Purcell* would operate to halt changes to the administration of an election shortly *before* an election. *Kennedy v. N.C. State Bd. of Elections*, 386 N.C. 620, 629, 905 S.E.2d 55, 61 (2024) (Earls, J., dissenting, joined by Riggs, J.); *id.* at 644, 905 S.E.2d at 71 (Dietz, J., dissenting, joined by Earls, J.); *Holmes v. Moore*, 382 N.C. 690, 691, 876 S.E.2d 903, 904 (2022) (Newby, C.J., dissenting, joined by Berger and Barringer, JJ.); *Harper v. Hall*, 382 N.C. 314, 319, 874 S.E.2d 902, 906 (2022) (Barringer, J., dissenting, joined by Newby, C.J., and Berger, J.).

Purcell doesn't apply after an election.

C. *Purcell* cannot apply to a statutory election-protest remedy.

Third, *Purcell* cannot apply to an election protest filed under the state's election protest statutes. Appellees have never provided a single case applying *Purcell* to a statutory election-protest remedy.

To apply *Purcell* to an election-protest remedy, filed after an election, would invalidate the election-protest statutes. By statute, the deadlines for filing an election protest are *post*-election, based on the date of county canvassing. N.C. Gen. Stat. § 163-182.9(b)(4)(a)-(c). There are no *pre*-election deadlines for filing an election protest. In fact, an election protest that's filed before election day is automatically stayed and ordinarily cannot be heard at all by an election board "until after election day." *Id.* § 163-182.9(b)(4)(d).

To apply *Purcell* to an election protest would undo the legislature's creation of a post-election remedy for election-law violations: post-election protests would be prohibited, despite their statutory creation. Such a holding would be judicial usurpation of the legislature's prerogative to create this remedy. *See OPAWL - Bldg. AAPI Feminist Leadership v. Yost*, 118 F.4th 770, 775 n.1 (6th Cir. 2024) ("To reason that *Purcell* somehow constrains a state legislature's power to set rules would turn *Purcell* on its head." (cleaned up)).

Applying *Purcell* would also require the overturning of precedent. After the 2004 general election, election protests were filed in two state electoral contests. *James*, 359 N.C. at 264, 607 S.E.2d at 640. The issue was whether poll workers violated state law by counting out-of-precinct ballots, and, if so, what was to be done about it. *Id.* at 263, 607 S.E.2d at 640. The Supreme Court held that the law was violated, so the out-of-precinct ballots had to be excluded. *Id.* at 270, 607 S.E.2d at 644 ("we cannot allow our reluctance to order the discounting of ballots to cause us to shirk our responsibility to 'say what the law is'"). The Supreme Court reversed and remanded for further proceedings.

That's the same thing Judge Griffin seeks. But if the Supreme Court had applied *Purcell* or its reasoning to the election protests, the case would have come out the other way.

Judge Griffin complied with the time constraints in the election protest statute. It makes no sense for Appellees to say that an election protest should have been filed before the election, since, by statute, the protests are to be filed after the election.

D. Laches is not a defense either.

Because there are no cases applying *Purcell* after an election, Appellees began arguing in the superior court—for the first time—that *Purcell* is a lot like laches, so laches is an alternative ground to affirm the State Board's order.

Of course, that runs into *Godfrey*: agencies can't be affirmed on alternative grounds. Even if *Purcell* is re-christened as laches, it's still a forfeited argument that can't be raised on judicial review.

Laches even suffers a second preservation defect. Laches is an affirmative defense, *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976), and affirmative defenses cannot be raised for the first time on appeal, either by a litigant or sua sponte by an appellate court. *Robinson v. Powell*, 348 N.C. 562, 566-67, 500 S.E.2d 714, 717 (1998).

Besides being doubly forfeited, laches fails on the merits.

First, laches cannot apply to a statutory election protest remedy filed within the time period permitted by statute. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677-80 (2014) (laches does not apply to statutory remedy that has its own limitations period). Where the legislature has set its own limitations period, courts will not use laches to shorten the period further. *Creech v. Creech*, 222 N.C. 656, 663, 24 S.E.2d 642, 647 (1943). If a court were to replace a statutory limitations period with

its own limitations period through the doctrine of laches, it would usurp the role of the legislature to enact its own policies governing election protests. That would be a violation of the separation of powers. *See* N.C. Const. art. I, § 6 (separating the legislative and judicial powers); *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) ("Separation of powers principles thus preclude us from applying the judicially created doctrine of laches to bar a federal statutory claim that has been timely filed under an express statute of limitations.").

Nor can laches apply in a case like this one, where the remedy sought by Judge Griffin is administrative and legal, rather than equitable. Laches *only* applies to equitable claims. *Petrella*, 572 U.S. at 678 ("Last, but hardly least, laches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation."); *Cater v. Barker*, 172 N.C. App. 441, 448, 617 S.E.2d 113, 118 (2005), *aff'd,* 360 N.C. 357, 625 S.E.2d 778 (2006) ("[L]aches is an equitable defense and is not available in an action at law.").

For any of these reasons, laches can't apply.

VIII. 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.[10] The State Board, as an alternative ground, 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 must "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

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10 In its final decision, the Board reasoned that it should dismiss the protests because they were untimely voter challenges. (Doc.Ex.I 5394-96.) The Board also mentioned, in passing, that some of Judge Griffin's protests might have been untimely filed and, therefore, could be subject to dismissal. (Doc.Ex.I 5373 n.4.) Because the Board failed to raise these arguments before the superior court, they are waived. *E.g.*, *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal.").

protests." (Doc.Ex.I 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).

(Doc.Ex.I 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. (Doc.Ex.I 5375-81.) The Board concluded that such postcards did not properly inform voters of the protests and provide them an opportunity to object. (Doc.Ex.I 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." (Doc.Ex.I 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)").[11]

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 replicates the State Board's own methods of notifying voters, the Board had no grounds to claim his method of service was deficient.

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11 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.

IX. No Other Federal Statute Bars the Protests.

Before the Board, 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 [under HAVA], 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.

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 "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 VRA is irrelevant.

X. All Protests Filed by Judge Griffin Comport with Substantive Due Process.

In its decision, the State Board reasoned it could not provide Judge Griffin any relief because the substantive due process guarantees of the U.S. Constitution shielded illegal votes from being challenged after an election had concluded. (Doc.Ex.I 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 Board 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 these qualifications apply to anybody who wants to vote in North Carolina—no exceptions are allowed. Judge Griffin's request that the State Board enforce this *even-handed* 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.

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 "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, 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)).

D. The Board's state cases are irrelevant here.

The State Board never mentions the *Anderson-Burdick* test anywhere in its decision. Rather, the Board defends its dismissal of those protests on the grounds that the individuals "did everything they were told to do to register." (Doc.Ex.I 5378.)

The Board relies on our 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." (Doc.Ex.I 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 to register.

Here, in contrast, we are not dealing with an official's failure to administer an oath. North Carolina statutes impose a duty on all absentee voters to provide photo identification, and on all applicants to provide a drivers license or social security number that validates the applicants' identities. 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, the decisions in *Woodall* and *Overton* happened before the General Assembly had created the election-protest regime. In 2001, the legislature enacted

the election-protest statutes, which allowed voters and candidates to challenge an election's result if "a violation of [an] election law" "might have affected the outcome of the election." N.C. Gen. Stat. § 163-189.10(d)(2)(d), (d)(2)(e); *see* N.C. Sess. Law 2001-398, § 3. And the statutes made clear that such a challenge could be raised ***after*** the election. N.C. Gen. Stat. § 163-189.9(b)(4)(c). To the extent the Supreme Court previously held that voters' unlawful registrations could not result in their votes being discounted, the General Assembly changed the law by enacting a post-election process that expressly allows for challenging illegal votes.

In short, *Woodall* and *Overton* are obsolete precedents. Indeed, four years after the creation of the election-protest scheme, the Supreme Court in *James* disqualified thousands of voters who unlawfully voted out of precinct at the instruction of poll workers. 359 N.C. at 270, 607 S.E.2d at 644. Notably, in *James*, the Supreme Court cited to *Burdick* to justify its result, seeing no conflict with this remedy and the *Anderson-Burdick* framework. *Id.*

XI. The Protests Do Not Seek Remedies That Violate the Equal Protection Clause.

Although the Board did not raise any equal protection concerns in its final decision, Appellees nevertheless raised such objections before the superior court. Because the State Board did not rely on equal protection to justify its dismissal of Judge Griffin's protests, the Board cannot introduce this justification while its decision is

under judicial review. *Godfrey*, 317 N.C. at 63-64, 344 S.E.2d at 279-80 (1986). Nevertheless, the Court should rule that this justification is meritless.

"To establish an equal protection violation, [a party] must identify a class of similarly situated persons who are treated dissimilarly." *Yan-Min Wang v. UNC-CH Sch. of Med.*, 216 N.C. App. 185, 204, 716 S.E.2d 646, 658 (2011). Notably, only a state's classification of persons can violate their equal protection rights—a classification drawn by a private actor, such as Judge Griffin, cannot. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (federal constitution restrains state action); *Bailey v. Flue Cured Tobacco Co-op. Stabilization Corp.*, 158 N.C. App. 449, 456, 581 S.E.2d 811, 816 (2003) (state constitution restrains state action).

Moreover, the mere fact that the protests challenged some, but not all, unlawful voters does not create an equal protection violation. "One who violates a law, valid upon its face, does not bring himself within the protection of the [the equal protection clause] merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefor." *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 661, 178 S.E.2d 382, 386 (1971). Rather, to prove an equal protection violation, one must show "the state *intended* to discriminate" in enforcing the laws. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810, 819 (4th Cir. 1995) (emphasis in original); *see S.S. Kresge Co.*, 277 N.C. at 662, 178 S.E.2d at 386.

Here, Appellees first object that Judge Griffin's incomplete-registration protests violates equal protection because those protests only challenge voters who voted by early voting or absentee ballot—the protests do not challenge voters who voted on Election Day. (Doc.Ex.II 171-72, 200-01.) But Judge Griffin cannot violate anyone's equal protection rights, only the state can. *See, e.g.*, *Tarkanian*, 488 U.S. at 191. Plus, the mere fact that the protests identify some unlawful voters, but not all, does not constitute an equal protection violation. *See S.S. Kresge Co.*, 277 N.C. at 661-62, 178 S.E.2d at 386. And Appellees do not—and cannot—allege that the state intentionally discriminated.

Appellees also cannot establish that Election Day voters are similarly situated to early voters and absentee voters. They're not the same. To start, the State Board does not identify Election Day voters until after the deadline for filing an election protest. As a result, it is impossible to file a timely protest challenging the lawfulness of Election Day voters. In addition, while election boards can retrieve ballots by early and absentee voters—and thereby adjust the vote count by excluding the votes on such ballots—election boards are unable to retrieve the ballots of Election Day voters. *See* N.C. State Bd. of Elections, *Fact: In NC, if an Election Worker Writes on Your Ballot, It Does Not Invalidate It* (Aug. 2, 2024), *available at* https://www.ncsbe.gov/news/press-releases/2024/08/02/fact-nc-if-election-

worker-writes-your-ballot-it-does-not-invalidate-it. In sum, if a voter chooses to vote on Election Day, she is essentially immune from having her vote discounted by an election protest—but the same is not true if she chooses to vote early or by absentee ballot. The chosen method of voting places a voter in very different situations.

Appellees next object that the protests that identified overseas voters in only four counties are an equal protection violation because overseas voters in other counties remain unchallenged. (Doc.Ex.II 329-31, 337, 348.) The fact that Judge Griffin, working under the protest-scheme deadlines, was able to identify overseas voters in only four counties, *see infra* n.1, does not violate anyone's equal protection rights. The state's adjudication of the as-filed protests does not violate equal protection simply because those protests did not identify all overseas voters who did not provide photo identification. *See S.S. Kresge Co.*, 277 N.C. at 661-62, 178 S.E.2d at 386.

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 24th day of February, 2025.

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

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CERTIFICATE OF COMPLIANCE

Pursuant this Court's Rule 2 order, counsel certifies that this brief contains no more than 17,500 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

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I hereby certify that a copy of the foregoing document was electronically filed and served this day by email as follows:

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This the 24th day of February, 2025.

/s/ Craig D. Schauer
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No. 25-181 DISTRICT 10

NORTH CAROLINA COURT OF APPEALS
****

JEFFERSON GRIFFIN,

Petitioner-Appellant,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Respondent-Appellee,

and

ALLISON RIGGS,

Intervenor-Respondent-Appellee.

From Wake County

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ADDENDUM

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Addendum Pages: