No. 25-1021

In the United States Court of Appeals
for the Fourth Circuit

TELIA KIVETT, et al.

Plaintiffs-Appellees,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.

Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of North Carolina

DEFENDANTS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

I certify, pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, that no appellee is in any part a publicly held corporation, a publicly held entity, or a trade association, and that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

Dated: February 18, 2025

/s/ Terence Steed
Terence Steed
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JURISDICTIONAL STATEMENT

Plaintiffs Telia Kivett, Karyn Mulligan, the Wake County Republican Party, the Republican National Committee, and the North Carolina Republican Party sued defendants the North Carolina State Board of Elections and the Board's Chair, Secretary, Executive Director, and Members, in their official capacities, in Wake County Superior Court. JA 12. Plaintiffs sought an order prohibiting the Board from counting certain ballots cast in the November 2024 general election. JA 33-34. The Board removed to federal district court under 28 U.S.C. §§ 1441(a) and 1443(2). JA 7-10.

The district court remanded this case to Wake County Superior Court for the same reasons that it remanded in *Griffin v. North Carolina State Board of Elections*, No. 5:24-cv-724, DE 50. JA 37. There, the district court held that it had jurisdiction under 28 U.S.C. § 1443(2) but abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

The Board timely filed a notice of appeal. JA 39-40. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1447(d). *Quackenbush v.*

Allstate Ins. Co., 517 U.S. 706, 715 (1996); *BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. 230, 237, 239, 246 (2021).

ISSUES PRESENTED

1. Whether this Court's decision in *Griffin v. North Carolina State Board of Elections*, No. 25-1018(L) (4th Cir. Feb. 4, 2025) (per curiam), controls the disposition of this appeal.

2. If *Griffin* does not control here, whether the district court correctly held that the Board properly removed this case to federal court.

3. If *Griffin* does not control here, whether the district court erred in abstaining from deciding this case under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

INTRODUCTION

In this lawsuit, Plaintiffs—two voters and the Republican Party—challenge ballots cast by roughly 60,000 North Carolinians in the November 2024 general election because those individuals submitted allegedly incomplete forms when they registered to vote. The North Carolina State Board of Elections has certified all contests in the 2024 general election, save one: the election for Seat 6 as Associate Justice on the North Carolina Supreme Court.

The two candidates in that election—Judge Jefferson Griffin and Justice Allison Riggs—are actively litigating this same issue about this same set of voters and what effect, if any, their allegedly incomplete registration forms should have on the state supreme court race. In light of the overwhelming similarities between the two cases, the district court below concluded that "the factual and legal subject matter of this action is substantially identical to that in" *Griffin v. North Carolina State Board of Elections*, No. 5:24-cv-724. JA 37. And because the district court remanded *Griffin* back to state court, the district court here remanded this action back to state court for the same reasons. JA 37.

The Board appealed the district court's remand orders. Two weeks ago, this Court issued an opinion and judgment in *Griffin* that affirmed in part, modified in part, and remanded to the district court with instructions 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." *Griffin v. N.C. State Bd. of Elections*, No. 25-1018(L), Dkt. 132 at 11 (4th Cir. Feb. 4, 2025) (per curiam); Dkt. 133. This Court's mandate issued last Friday. No. 25-1018(L), Dkt. 139.

In an effort to preserve this Court's resources, the Board moved the district court under Civil Rule 62.1 for an indicative ruling on how the district court would rule on a motion under Civil Rule 60(b) to modify its remand order in this case to align with this Court's instructions in *Griffin*. *See* DE 24. Were the district court to indicate that it would grant the motion, the Board intended to move this Court for a remand for that purpose. *See* Fed. R. App. P. 12.1(b). The Board conferred with Plaintiffs on this request, but they were opposed. The Board's motion for an indicative ruling remains before the district court. Plaintiffs have not yet filed a response.

Because the district court correctly held that this case is materially identical to *Griffin*, this Court should, as it did in *Griffin*, remand to the district court with instructions that the district court modify its remand order to retain jurisdiction over the federal issues here under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). If the Court concludes that *Griffin* does not control the disposition of this appeal, the Board otherwise incorporates and reasserts the arguments that it made in *Griffin* in support of exercising federal jurisdiction here.

STATEMENT OF CASE

Eight weeks after the November 2024 general election, Plaintiffs sued the Board in Wake County Superior Court. JA 12-36. Plaintiffs challenged ballots cast in that election by individuals who allegedly failed to provide a driver's license or social security number when they registered to vote. JA 25-32.

Plaintiffs sought an order requiring the Board to "remove" these votes from the final election counts. JA 28, 33. Plaintiffs "alternatively" sought an order requiring the Board to segregate the ballots cast by all such voters, notify these voters that their votes were

being challenged, establish a process that would allow voters to cure their allegedly incomplete registration forms, and cancel the votes of any affected individuals who failed to comply. JA 28, 33-34.

Although Plaintiffs purported to seek relief for all state races in the 2024 general election, JA 33, every election contest in North Carolina—save one—is final, with the certificate of election having issued and the prevailing candidate having taken office. Any relief that Plaintiffs could seek for races that have been certified is thus indisputably moot. *In re Protest of Whittacre*, 743 S.E.2d 68, 69 (N.C. Ct. App. 2013) (issuance of an election certificate moots an action contesting the results of an election).

Plaintiffs' claims remain live only with respect to one outstanding state contest: the race for Associate Justice of the North Carolina Supreme Court. Judge Jefferson Griffin and Associate Justice Allison Riggs were candidates for that office. Final canvassed results of the election show that Justice Riggs prevailed by 734 votes.[1] Like Plaintiffs here, Judge Griffin also challenged the same ballots cast in this past

[1] *NC SBE Election Contest Details*, N.C. State Bd. of Elections, bit.ly/3PA7R6P (last visited Feb. 18, 2025).

election by the same individuals on the same ground that they allegedly failed to provide a driver's license or social security number when they registered to vote.

The Board removed this case to federal court under 28 U.S.C. §§ 1441(a) and 1443(2). JA 7-10. The Board also removed the cases brought by Judge Griffin under the same statutes and on the same grounds. *Griffin v. N.C. State Bd. of Elections*, No. 5:24-cv-724; *Griffin v. N.C. State Bd. of Elections*, No. 5:24-cv-731.

On January 6, 2025, the district court remanded all three cases back to state court. In the two *Griffin* cases, the district court held that it had jurisdiction under 28 U.S.C. § 1443(2) but abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). No. 5:24-cv-724, DE 50; No. 5:24-cv-731, DE 24. In this case, the district court concluded that "the factual and legal subject matter of this action is substantially identical to that in" *Griffin*. JA 37. The district court found its analysis in *Griffin* to "operate[] with equal force" here. JA 37. Thus, the district court remanded this action back to state court for the same reasons it remanded in *Griffin*. JA 37.

The Board appealed the district court's remand order. JA 39-40. While this appeal was pending, this Court resolved the Board's appeals in the *Griffin* litigation. This Court affirmed in part, modified in part, and remanded the district court's orders. *Griffin v. N.C. State Bd. of Elections*, No. 25-1018(L), Dkt. 132 (4th Cir. Feb. 4, 2025) (per curiam). This Court first held that the Board properly removed the case to federal court. *Id.* at 9. This Court also held that the district court had correctly decided to initially abstain from hearing the case. *Id.*

This Court modified the district court's remand order in an important way, however. The district court had remanded this case back to state court under *Burford*—a theory that requires courts to dismiss cases without retaining jurisdiction. This Court held that the "more appropriate theory for abstaining from federal jurisdiction" here arises under *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941). *Id.* at 10. A federal court abstains under *Pullman* "when there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive." *Id.* (citation and internal quotation marks

omitted). Unlike under *Burford*, when a federal court abstains under *Pullman*, it retains jurisdiction over the case to decide any federal issues that may remain after a state court disposes of the state-law issues. *Id.* Accordingly, this Court directed the district court "to modify its order to expressly retain jurisdiction of the federal issues identified in the State Board's notice of removal should those issues remain after the resolution of the state court proceedings, including any appeals." *Id.* at 11.

To preserve this Court's resources, the Board then moved the district court for an indicative ruling under Civil Rule 62.1 on whether the district court would modify its remand order in this case based on this Court's decision in *Griffin*. DE 24. Rule 62.1 allows a district court to indicate how it would rule on a motion while an appeal is pending. Fed. R. Civ. P. 62.1(a). If the district court indicates that it would grant the requested relief, a party may move the appellate court to remand to the district court so that it may do so. Fed. R. App. P. 12.1(b). Plaintiffs opposed this effort. The Board's motion for an indicative ruling remains pending in the district court. Plaintiffs have not yet filed a response.

Since the district court's remand order, proceedings in this case have continued to take place in state court, but the state courts have not issued any substantive rulings. The Wake County Superior Court denied Plaintiffs' request for a temporary restraining order and preliminary injunction. *See* Pet. App. at 145, No. P25-30 (N.C. Ct. App. Jan. 14, 2025), bit.ly/3C6O8IL. Plaintiffs then sought emergency relief in the North Carolina Court of Appeals. *Id.* at 146-47. The Court of Appeals entered an order staying all proceedings before that Court. Order, No. P25-30 (N.C. Ct. App. Jan. 17, 2025), bit.ly/3X1YNvm. Plaintiffs are now seeking emergency relief in the North Carolina Supreme Court. *See* Pet., No. 51P25 (N.C. Feb. 5, 2025), bit.ly/4b3yXNs. Today, the Board is asking the state supreme court to retain the Court of Appeals' stay of those proceedings in this case, in light of the ongoing *Griffin* litigation.

SUMMARY OF ARGUMENT

The district court correctly held that the facts and legal arguments in this case are materially identical to those in the *Griffin* litigation. This Court's decision in *Griffin* should therefore control the outcome of this appeal.

In the alternative, the Board reasserts the arguments that it made in support of federal jurisdiction in *Griffin*. Specifically, the district court correctly held that the Board properly removed this case to federal court. The court erred, however, in abstaining from deciding the federal issues here.

To start, the district court was correct that the case was properly removed under section 1443(2), which allows a state government defendant to remove any civil action brought in state court "for refusing to do any act on the ground that it would be inconsistent with" "any law providing for equal rights." 28 U.S.C. § 1443(2). The federal civil-rights laws under which the Board has removed—the NVRA, the VRA, and the Equal Protection Clause—are all laws providing for equal rights that prohibit the Board from canceling the roughly 60,000 challenged votes as Plaintiffs have demanded.

Removal was also proper under section 1441. The primary state statute at issue directly implements a federal statute, HAVA, as part of North Carolina's unified registration system for federal and state elections. The North Carolina statute derives its meaning entirely from

HAVA. This case thus necessarily raises issues of federal law and was properly removed under section 1441.

Despite holding that the case was properly removed, the district court decided to abstain under *Burford*. This was error. Federal courts may not abstain from hearing cases properly removed under section 1443. When Congress enacted section 1443, it meant to guarantee a federal forum to state officials who refuse to violate federal civil-rights laws. In this context, it is categorically inappropriate for federal courts to abstain under *Burford*.

Even if *Burford* could apply, the district court erred in abstaining on these facts. *Burford* is a narrow exception to the ordinary rule that federal courts must exercise the jurisdiction that Congress confers on them. It applies only when cases raise certain difficult state-law questions or federal-court review would threaten uniform state treatment of an important local policy. *Quackenbush*, 517 U.S. at 725-26.

The facts of this case do not call for *Burford* abstention. Unsettled state-law questions do not dominate the complaint. Plaintiffs' claims of allegedly improper voter registrations are based on a federal statute,

HAVA. And the relief that Plaintiffs seek is barred by multiple federal civil-rights laws. Nor would federal-court review disrupt state efforts to establish uniform election policy. Plaintiffs are voters and a political party who failed to follow the state administrative process set out to resolve election protests in an orderly fashion. *See* N.C. Gen. Stat. §§ 163-182.9-.12. Instead, they leapfrogged the state administrative process and filed a lawsuit directly in state trial court. Indeed, Plaintiffs waited until *eight weeks* after the election to bring this lawsuit challenging roughly 60,000 votes. Plaintiffs themselves have therefore created substantial disuniformity in the State's election system.

This Court should remand with instructions for the district court to modify its remand order consistent with *Griffin*. Alternatively, this Court should reverse.

ARGUMENT

Standard of Review

This Court reviews issues of subject-matter jurisdiction, including removal, de novo. *Old Dominion Elec. Coop. v. PJM Interconnection,*

LLC, 24 F.4th 271, 279 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 87 (2022).

This Court reviews "a district court's decision to abstain under *Burford* for abuse of discretion." *Martin v. Stewart*, 499 F.3d 360, 363 (4th Cir. 2007). "A district court abuses its discretion whenever its decision is guided by erroneous legal principles," and "there is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Id.* (quotation marks and citations omitted).

Discussion

I. This Court's Decision in *Griffin* Controls Here.

The allegations raised by Plaintiffs in this lawsuit are identical in every material respect to those in the *Griffin* litigation. This Court should therefore resolve this case in the same manner as it resolved *Griffin*.

The relevant facts and legal issues in this case and in *Griffin* are effectively the same. Plaintiffs in both cases are challenging votes cast in the November 2024 general election for Seat 6 on the North Carolina Supreme Court. Plaintiffs in both cases are challenging the same set of roughly 60,000 voters who allegedly registered without providing a

driver's license or social security number. Plaintiffs in both cases are challenging that same set of voters on the same legal theory: that voters who lack a driver's license or social security number in the Board's database should not have been allowed to cast a ballot in the election. In fact, in their opposition to the Board's stay motion in this Court, Plaintiffs here even conceded that the two cases raise "similar theories." Dkt. 23 at 9 n.3. Plaintiffs in both cases, moreover, purport to challenge the same December 13 Board order rejecting those theories. JA 25.

The similarities do not end there. Plaintiffs in both cases sued the Board in state court. The Board removed the cases on the same grounds under the same removal statutes, 28 U.S.C. §§ 1441 and 1443(2). JA 7-10. Here and in *Griffin*, the district court remanded these cases back to state court for the same reasons as a result. JA 37. In their opposition to the Board's stay motion in this Court, Plaintiffs agreed that the district court properly abstained from hearing this case under *Burford*, citing with approval to the district court's reasoning in the *Griffin* litigation. Dkt. 23 at 13-14.

The district court was thus right to conclude that "the factual and legal subject matter of this action is substantially identical to that in"

Griffin. JA 37. In their opposition to the Board's stay motion, Plaintiffs merely stated that "the allegations and claims for relief presented by this case versus *Griffin* are sufficiently factually distinct as to render them separate matters." Dkt. 23 at 6 n.1. But no one disputes that these are separate cases. Although this case may be a separate action, it does not change the fact that both this case and *Griffin* arise out of the same election, challenge the same sets of voters, proceed on the same underlying legal theory, and contest the same Board decision. For these reasons, this Court's decision in *Griffin* is squarely on point here. As in *Griffin*, this Court should remand to the district court with instructions 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." No. 25-1018(L), Dkt. 132 at 11; Dkt. 133.

In the alternative, if this Court holds that *Griffin* does not control here, it should reverse the district court's remand order because, although the district court was correct that federal courts have removal jurisdiction, the district court erred in abstaining under *Burford*.

Below, the Board incorporates and reasserts the arguments that it made in *Griffin* in support of exercising federal jurisdiction here.

II. The Federal Courts Have Removal Jurisdiction.

A. Removal was proper under the civil-rights removal statute.

The district court was correct to hold that removal was proper under 28 U.S.C. § 1443(2). That statute permits a state government defendant to remove any civil action brought in state court "for refusing to do any act on the ground that it would be inconsistent with" "any law providing for equal rights." 28 U.S.C. § 1443(2). Here, the Board refused to cancel the votes of roughly 60,000 North Carolinians in part because doing so would violate the National Voter Registration Act, the Voting Rights Act, and the Equal Protection Clause. Removal is therefore proper.

The civil-rights removal statute squarely applies to this civil action. As this Court recently held, the NVRA is a "law providing for equal rights" and thus "provides a proper basis for removal under Section 1443(2)." *Republican Nat'l Comm. v. N. Carolina State Bd. of Elections* (*RNC*), 120 F.4th 390, 408 (4th Cir. 2024). This Court likewise observed in *RNC* that courts have routinely held that section

1443 removal under the VRA is proper. *Id.* at 406 n.5. The Equal Protection Clause is also a "law providing for equal rights," and thus provides a proper basis for removal under section 1443(2) as well. *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (the "central purpose" of the Equal Protection Clause is "to prevent the States from purposefully discriminating between individuals on the basis of race").

Here, moreover, the Board is refusing to take the requested action because doing so would clash with those three civil-rights laws. Plaintiffs' lawsuit is premised on the Board's refusal to "discard the votes of tens of thousands of voters." *See Griffin*, No. 5:24-cv-724, DE 50 at 18. "Had the State Board adopted [Plaintiffs'] arguments and removed the in-question votes from the current tally, i.e., had the State Board taken affirmative action," Plaintiffs would not have sued in state court. *See id.*

The Board explicitly refused to accede to any request to cancel votes because doing so would violate the NVRA twice over. *Griffin*, No. 5:24-cv-724, DE 1-5 at 66-67 (State Board's December 13 order). First, the Board explained that the NVRA prohibits the Board from removing voters from the rolls outside of narrow, enumerated circumstances that

are not present here. *Id.* (citing 52 U.S.C. §§ 20507(a)(3), (a)(4), (c)(1)). Second, it explained that the NVRA also prohibits the Board from removing voters en masse from the rolls within 90 days of an election. *Id.* (citing 52 U.S.C. § 20507(c)(2)). Thus, as the district court held in *Griffin*, "considering North Carolina's unified system of registration and election administration," the NVRA provides a proper basis for removal. No. 5:24-cv-724, DE 50 at 20.

In addition, although the district court did not reach the VRA or Equal Protection Clause, those laws also provide a proper basis for removal under section 1443(2).

The VRA prohibits officials from "willfully fail[ing] or refus[ing] to tabulate, count, and report" the votes of individuals who were "qualified to vote" in the election. 52 U.S.C. § 10307(a). In North Carolina, to qualify to vote, a person must (1) be at least 18 years old; (2) be a U.S. citizen; (3) have resided in the State and precinct for 30 days preceding the election; (4) not have been adjudged guilty of a felony without having citizenship rights restored; and (5), for in-person voters, present photo ID or meet a qualifying exception. N.C. Const. art. VI, § 2; N.C. Gen. Stat. § 163-55. Plaintiffs do not argue that any voter whose vote

they are seeking to cancel fails to meet these qualifications. As a result, under the VRA, the Board may not cancel those votes.

The equal Protection Clause also does not allow the Board to cancel these votes. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam). But that is precisely what Plaintiffs are asking the Board to do here. Plaintiffs seek to invalidate votes that were cast by voters whose registration records are missing driver's license or social security numbers and voted *before* election day only (either absentee or early in-person). Plaintiffs have not challenged voters who voted *on* election day but who also lacked a driver's license or social security number in their records. *See, e.g.*, JA 13, 23 (alleging that 225,000 registered voters were missing data in their records). By seeking to cancel only pre-election day votes, Plaintiffs ask the Board to "valu[e] one person's vote over that of another." *Bush*, 531 U.S. at 104-05. The Equal Protection Clause forbids the Board from taking this action.

In sum, Plaintiffs challenge the Board's refusal to cancel roughly 60,000 votes. The reason the Board refuses to do so is because it would violate the NVRA, VRA, and Equal Protection Clause. Removal is therefore proper under section 1443(2).

B. Removal was also proper under section 1441.

The civil-rights removal statute is sufficient basis for exercising federal jurisdiction here. However, removal was also proper under 28 U.S.C. § 1441. Section 1441(a) allows a defendant to remove any claim over which a federal district court would have had original jurisdiction under section 1331. *Id.* "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005)). Applying that test here, this action plainly arises under federal law. The district court erred in concluding otherwise.

1. The complaint necessarily raises federal issues.

Substantial questions of federal law pervade the complaint. Plaintiffs demand that the Board cancel the votes of eligible and qualified voters who they claim improperly registered by failing to provide their driver's license or social security number on their registration forms. JA 33-34. Deciding whether these voters were improperly registered for this reason necessarily requires this Court to construe HAVA.

The state statute that Plaintiffs allege was violated is N.C. Gen. Stat. § 163-82.4(a). JA 26. That statute merely implements HAVA. In fact, the provision at issue—which requires that registration forms request a driver's license or social security number—was enacted through a session law whose express purpose was to "ensure that the State of North Carolina has a system for North Carolina elections that complies with the requirements for federal elections set forth in the federal Help America Vote Act of 2002." Act of June 19, 2003, S.L. No. 2003-226, § 1. The identification requirement did not exist in the North Carolina statutes until Congress enacted HAVA, and the state statute merely implements HAVA's directive to the States. As a result, it is

impossible to determine whether the state statute was violated without interpreting HAVA.

On that question, this Court has already determined that a "federal question[] [is] essential to resolving" whether "North Carolina's previous voter registration form violate[d] HAVA." *RNC*, 120 F.4th at 400. Because the issue raised by Plaintiffs "contains no articulation of a state [law] violation separate and apart from an alleged HAVA violation," Plaintiffs' claims are "state cause[s] of action in name only." *Id.* at 401.

The district court reached a contrary conclusion because "this matter involves a state election." *Griffin*, No. 5:24-cv-724, DE 50 at 13. In the court's view, HAVA applies only to federal elections and, as a result, "[n]othing prevents [Plaintiffs] from prevailing on [their] state [law arguments] on exclusively state grounds." *See id.* (quoting *Vlaming v. West Point Sch. Bd.*, 10 F.4th 300, 308 (4th Cir. 2021)).

That is wrong. The state statute at issue is not merely "coextensive" with "analogous federal . . . provisions." *Id.* (quoting *Vlaming*, 10 F.4th at 307). Instead, the state statute *directly* implements HAVA's requirement—based on Congress's explicit

directive to the States, in the context of federal elections—for state elections as well.

This is why, contrary to the district court's analysis, this case is different from *Vlaming v. West Point School Board* and *American Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539 (5th Cir. 2012). *Id.* at 13-15. In *Vlaming*, the state-law provisions were merely "coextensive" with provisions of federal law. 10 F.4th at 305. The same is true of *American Airlines*. 694 F.3d at 542 (state statute was construed "in harmony with . . . comparable federal antitrust statutes") (citation omitted). Here, by contrast, the state statute is not merely interpreted in a similar fashion as federal law—it implements federal law directly. Section 163-82.4 operates in just the same way as the related provision requiring voter-list maintenance to "meet the requirements of . . . HAVA" that was at issue in *RNC*. 120 F.4th at 401 (citing N.C. Gen. Stat. § 163-82.11(c)) (cleaned up).

Were it otherwise—and a court could look only to the four corners of the state statute for guidance on voter registration for statewide offices—that interpretation would run headlong into other provisions of state law. According to the district court, state law could require

different registration requirements for state and federal contests, resulting in two separate voter databases. *See Griffin*, No. 5:24-cv-724, DE 50 at 14. But the North Carolina General Assembly specifically directed the Board to create a single statewide voter database, with the same voter registration requirements, for both state and federal elections. N.C. Gen. Stat. § 163-82.11(a) ("The State Board of Elections shall develop and implement a *statewide*" registration system that "shall serve as the official voter registration list" for "*all elections* in the State") (emphasis added)); *id.* § 163-82.11(c) ("The State Board of Elections shall update the statewide computerized voter registration list and database to meet the requirements of section 303(a) of the Help America Vote Act of 2002[.]"). That is why this Court held that "North Carolina has a unified registration system for both state and federal elections, and thus is bound by the provisions" of federal registration law—including HAVA—for both state and federal elections. *RNC*, 120 F.4th at 401-02.

Plaintiffs seek to cancel the votes of 60,000 North Carolinians by claiming that they were not properly registered. A court cannot address this issue without construing HAVA.

2. The federal issues raised are actually disputed.

The federal questions raised in the complaint are also "actually disputed." *Gunn*, 568 U.S. at 258. Plaintiffs seek to cancel roughly 60,000 votes in a way that the Board contends would require it to violate federal civil-rights laws. The Board further does not believe that HAVA requires it to cancel the challenged votes. On the merits, the applicability of HAVA and the civil-rights provisions are "the central point of dispute." *Gunn*, 568 U.S. at 259.

3. The federal issues are substantial.

A federal question is substantial when the issue is "importan[t] . . . to the federal system as a whole." *RNC*, 120 F.4th at 403-04 (citing *Gunn*, 568 U.S. at 260).

The federal issues raised in the complaint are, without doubt, substantial. Plaintiffs seek to cancel the votes of roughly 60,000 North Carolinians *after* all the votes have been cast and counted. JA 33-34. A decision based on federal law that could have such wide-ranging consequences to the fundamental rights of voters is "substantial" by any measure. Indeed, this Court recently "ha[d] no hesitation concluding that" whether a "voter through no apparent fault of their own was

initially registered to vote in a manner inconsistent with [HAVA]" is "of substantial importance." *RNC*, 120 F.4th at 404 (cleaned up).

4. Exercising jurisdiction would not disrupt the federal-state balance.

As the district court in *RNC* observed, to decide whether exercising jurisdiction would disrupt the federal-state balance, courts engage in a "practical, common-sense inquiry." No. 5:24-cv-547, 2024 WL 4523912, at *16 (E.D.N.C. Oct. 17, 2024). Courts project whether accepting jurisdiction will "attract a horde of original filings and removal cases raising other state claims" and ask whether exercising jurisdiction would "disrupt the federal-state balance approved by Congress." *RNC*, 120 F.4th at 404 (citing *Gunn*, 569 U.S. at 258) (cleaned up)). Neither consideration militates against jurisdiction here.

First, as this Court held in *RNC*, "it will be the rare state equal protection case that turns on a violation of HAVA or the NVRA." *Id.* at 404-05. The same is true here: It will be the rare case that would seek to cancel tens of thousands of votes after an election has taken place, based on state law that implements federal law, and that would potentially violate multiple separate federal statutes and the Fourteenth Amendment.

Moreover, the complaint, though "com[ing] cloaked in state [law] garb," raises only federal questions. *Id.* at 405; *see supra* Part II.B.1. The alleged state-law violation necessarily turns on the contested interpretation of federal laws. As this Court observed in *RNC*, it is unlikely that Congress intended to prevent federal courts from deciding cases that turn on federal statutes relating to voting rights. *See RNC*, 120 F.4th at 405. The "mere invocation" of state law should not frustrate this congressional understanding. *Id.*

III. The District Court Erred In Abstaining.

The court below held that, even though it had jurisdiction to hear this case, it should abstain from exercising that jurisdiction. JA 37. Abstention, however, is categorically inapplicable in cases under section 1443(2)'s refusal clause. And even if that were not the case, the district court would have erred in deciding to abstain here.

A. *Burford* abstention is a narrow exception to a federal court's obligation to exercise its jurisdiction.

Federal courts "have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush*, 517 U.S. at 716. After all, "Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New*

Orleans Pub. Serv., Inc. v. Council of New Orleans (*NOPSI*), 491 U.S. 350, 359 (1989). That is why abstention "remains 'the exception, not the rule,'" *NOPSI*, 491 U.S. at 359 (citation omitted). The federal courts' obligation to hear cases within their jurisdiction is thus "virtually unflagging." *Colorado River*, 424 U.S. at 817.

In keeping with these principles, the Supreme Court has "carefully defined . . . the areas in which such 'abstention' is permissible." *NOPSI*, 491 U.S. at 359 (citation omitted). The relevant abstention doctrine here arises under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).[2] In *Burford*, companies challenged in federal district court a state agency's order granting a permit to drill oil wells. *Id.* at 316-17. The order was "part of the general regulatory system devised for the conservation of oil and gas in Texas," and Texas had established the

[2] Below, the district court partly grounded its decision to abstain in the Supreme Court's decision in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). J.A. 321-326. *Thibodaux* abstention, however, is only warranted "in diversity cases." *See Nature Conservancy v. Machipongo Club, Inc.*, 579 F.2d 873, 875 (4th Cir. 1978); *see also* Erwin Chemerinsky, *Federal Jurisdiction* 846 (7th ed. 2016) (explaining that *Thibodaux* "establish[es] that federal courts should abstain in *diversity* cases" in certain situations (emphasis added)). Here, of course, the district court's jurisdiction is not premised on diversity.

agency to regulate it. *Id.* at 318, 324-26. The regulatory scheme allowed the parties to seek judicial review of the agency's orders in a single state trial court "[t]o prevent the confusion of multiple review of the same general issues." *Id.* at 326.

The Court held that federal courts should abstain from exercising jurisdiction in these unique circumstances. "As a practical matter," the Court explained, "the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide." *Id.* at 327. The regulation of oil and gas presented "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." *Id.* at 318 (citation omitted). And the parties had sought federal-court review on "obviously difficult problems of state law"—from the res judicata effect of a previous state-court judgment to whether another pending state-court case had deprived the state agency of jurisdiction to act. *Id.* at 331 & n.28. The Court observed that misinterpreting Texas state law on these questions could "provoke[ ] a needless conflict with the Texas courts." *Id.*; *see id.* at 334.

The Court also stressed Texas's need for uniform regulation. Because "each oil and gas field must be regulated as a unit for

conservation purposes," the State had "to control the flow of oil and at the same time protect the interest of the many operators [who] have from time to time been entangled in geological-legal problems of novel nature." *Id.* at 319-20.

Given these unique circumstances, the Supreme Court has since made clear that *Burford* applies only in two narrow contexts. First, "when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'" *NOPSI*, 491 U.S. at 361 (quoting *Colorado River*, 424 U.S. at 814). Second, "where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Id.* (quoting *Colorado River*, 424 U.S. at 814). This case does not implicate either of these "extraordinary" contexts. *Quackenbush*, 517 U.S. at 726.

B. Federal courts may not abstain from hearing cases properly removed under section 1443.

As a threshold matter, the district court's decision to abstain should be reversed because federal courts may not abstain under *Burford* from hearing cases removed under section 1443.

When a case is properly removed under the civil-rights removal statute, the federal interest in resolving a case necessarily outweighs any competing interests that might justify abstention under *Burford*. That is so because "[a]bstention doctrines are not intended . . . to alter policy choices that Congress itself considered and addressed." *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 497 (7th Cir. 2011); *see also Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 31 (1st Cir. 2011) (holding that abstention only allows courts to decline jurisdiction based on considerations "that were not . . . foreseen by Congress at the time that it granted jurisdiction").

Here, when Congress enacted section 1443, Congress sought to ensure that state officials protecting federal civil rights would be able to litigate the claims against them in a federal forum. Nearly sixty years ago, the Supreme Court held that section 1443 "*entitles* . . . defendants to remove [cases] to . . . federal court" when its statutory criteria for removal are satisfied. *Georgia v. Rachel*, 384 U.S. 780, 788 (1966) (emphasis added). The Court recently reaffirmed this holding, again explaining that section 1443 "*guarantees* a federal forum for certain federal civil rights claims." *BP*, 593 U.S. at 235 (emphasis added).

In keeping with this understanding of the statute, the Second Circuit has held that federal courts may not abstain from exercising jurisdiction when a case is properly removed under section 1443. In *Greenberg v. Veteran*, it reversed a district court's decision to abstain under *Burford* in a case where, as here, the refusal clause had been invoked. *Greenberg*, 889 F.2d 418 (2d Cir. 1989). The Second Circuit held that abstention under *Burford* "would be inconsistent with the purpose" of section 1443. *Id.* at 422. Congress, as the district court explained, had made an "explicit determination that state officials facing the type of federal-state conflict" addressed by the statute "should be afforded the option of a Federal forum." *Greenberg v. Veteran*, 710 F. Supp. 962, 970 n.7 (S.D.N.Y. 1989).

This Court has reached the same conclusion with respect to a similar removal statute. Section 1442 allows federal officers to remove cases in certain situations "to protect federal officers in the performance of their federal duties," *Kolibash v. Comm. on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 573 (4th Cir. 1989)—just as section 1443 allows state officers to remove "to protect [themselves] from being penalized for failing to enforce discriminatory state laws or policies." *Detroit Police*

Lieutenants & Sergeants Ass'n v. City of Detroit, 597 F.2d 566, 568 (6th Cir. 1979).

This Court has held that because section 1442 "*guarantee[s]* a federal officer the right to remove an action," district courts have "no authority to abstain" where jurisdiction has been properly invoked under section 1442. *Jamison v. Wiley*, 14 F.3d 222, 238-39 (4th Cir. 1994) (emphasis added); *see also Kolibash*, 872 F.2d at 575 (because "the federal interest in protecting federal officials . . . is paramount," "discretionary abstention" is "not available").

Here, too, because the Supreme Court has interpreted section 1443 as "guarantee[ing] a federal forum" for state officials, federal courts lack authority to abstain when a case has been properly removed under section 1443. *BP*, 593 U.S. at 253.

C. The district court erred in applying *Burford* here.

Even if a court could invoke *Burford* in a case removed under section 1443(2), the district court erred in holding that *Burford* abstention was warranted on these facts.

1. Difficult state-law questions do not dominate the complaint.

Plaintiffs' central claim is that roughly 60,000 North Carolina voters were improperly registered because they lack a driver's license or social security number in the Board's voter registration database. JA 25-32. That is a challenge to whether voters were registered in violation of a federal statute—HAVA—that state law implements. *See supra* Part II.B. Plaintiffs also request that the Board decline to count these votes. JA 33-34. That remedy is barred by multiple federal laws. *See supra* Part II. Resolving this case thus does not require a federal court to answer unsettled state-law questions.

North Carolina's "unified registration system for both state and federal elections" only underscores the pervasive federal-law issues here. *RNC*, 120 F.4th at 401 (citing N.C. Gen. Stat. § 163-82.11). This unified system means that North Carolina "is bound by the provisions" of federal registration law in state and federal elections. *Id.* at 401-02; *see also supra* Part II.B. As a result, a ruling on whether these voters were properly registered, and whether their votes may be counted, "could very much change how federal law is enforced" in future federal elections, even though Plaintiffs here challenge a state contest. *RNC*,

120 F.4th at 404. This case thus does not present the risk of "contradictory adjudications by the state and federal courts" on matters of pure state policy that *Burford* was designed to prevent. *Quackenbush*, 517 U.S. at 725.

Moreover, this Court has held that federal-court review can be particularly important in cases raising potential conflicts between state and federal law. *Neufeld v. City of Baltimore*, 964 F.2d 347, 350 (4th Cir. 1992) ("[A] federal court should not abstain under *Burford* just because resolution of a federal question may result in overturning state policy."). That is the case here. To the extent that this case raises any state-law questions, they are in the context of federal law prohibiting that which Plaintiffs claim state law requires. If, for example, state law really did require canceling the ballots cast by certain voters under these circumstances, that state law would violate the federal civil-rights laws and the U.S. Constitution. *See supra* Part II.A.

Likewise, "the presence of federal-law issues must always be a major consideration weighing against surrender" of federal-court jurisdiction. *Quackenbush*, 517 U.S. at 729 (citation omitted). Here, the significant federal issues in this case weigh strongly against

abstention. *Burford* abstention in voting-rights cases is often "particularly inappropriate" for just this reason. *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) (en banc) (per curiam); *Edwards v. Sammons*, 437 F.2d 1240, 1244 (5th Cir. 1971) (reversing lower court's decision to abstain because "abstention is not to be countenanced in cases involving such a strong national interest as the right to vote").

Indeed, "the federal interests in this case are pronounced." *Quackenbush*, 517 U.S. at 728. This is not a situation where, for example, a party claims "that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors"—the type of difficult state-law questions the Court abstained from deciding in *Burford*. *NOPSI*, 491 U.S. at 362.

The district court's contrary conclusion lacks merit. The district court, while conceding that federal law is "practically relevant" given North Carolina's unified registration system, reasoned that this challenge to North Carolina's voter-registration and list-maintenance system would not "legally implicate federal elections." *Griffin*, No. 5:24-cv-724, DE 50 at 25. But as discussed above, state law fully implements federal law in this context by applying that federal law to state

elections. *See supra* Part II.B; *accord RNC*, 120 F.4th at 401-02. The district court's effort to distinguish between the practical and legal effects of federal law in this area therefore misses the mark.

The district court also stressed that state courts are "competent to enforce federal constitutional rights." *Griffin*, No. 5:24-cv-724, DE 50 at 25. That is undoubtedly true. But if accepted, that argument would justify abstention in *any* case involving federal constitutional law. The mere availability of a state forum in which to litigate a federal constitutional question cannot determine whether a federal court should abstain. Rather, the question is whether there are significant federal issues that predominate. *NOPSI*, 491 U.S. at 363; *see Martin*, 499 F.3d at 370 (holding abstention was inappropriate because "issues of federal law—the constitutionality of [state] statutes under the Fourteenth Amendment—dominate this action"). They do so here.

2. Federal review would not disrupt state efforts to establish uniform election policy.

Nor would federal review disrupt state efforts to establish uniform election policy. To the contrary, accepting *Plaintiffs'* arguments would disrupt the uniformity of North Carolina's election system.

To begin, the State's routine procedural pathway for resolving election protests in no way approximates the complex regulatory framework at issue in *Burford*. In that case, the Supreme Court emphasized that "nonlegal complexities" required Texas courts to be "working partners" with the agency "in the business of creating a regulatory system for the oil industry." *Burford*, 319 U.S. at 323, 326. Given that context, the Supreme Court held that federal-court review of these orders interfered with the State's strong interest in uniform and streamlined adjudication. *Id.* at 326-27. Here, it is true that, like in *Burford*, the North Carolina legislature has passed a statute directing challenges to the Board's decisions to be filed initially in a single court. N.C. Gen. Stat. § 163-182.14(b). But that routine and commonplace decision to channel cases to a particular venue, without more, cannot possibly justify abstention under *Burford*.

Moreover, even if the North Carolina statutory scheme were analogous to the complex regulatory framework in *Burford*, Plaintiffs have not followed it here. State law sets out an administrative process for resolving election protests, first before the county boards, then in an appeal before the State Board, followed finally by the opportunity for

judicial review. N.C. Gen. Stat. §§ 163-182.9-.11, -182.14. Plaintiffs did not follow that administrative process here. Instead, they waited eight weeks until after the election to bring this lawsuit directly in state trial court. Any interest in uniform state adjudication under *Burford* is thus not present here.

In addition, the relief that Plaintiffs seek will create disuniformity. Contrary to the design of North Carolina's uniform registration system, Plaintiffs seek to apply different rules to federal and state elections. *But see id.* § 163-82.11. And contrary to federal law, Plaintiffs seek to retroactively change election rules for only a subset of voters. *See supra* Part II.A. Plaintiffs' requested relief thus threatens to create the very type of conflicting standards that *Burford* abstention seeks to avoid.

CONCLUSION

The Board respectfully requests that this Court remand with instructions for the district court to modify its remand order consistent with *Griffin*. Alternatively, this Court should reverse the district court and remand with instructions that the district court retrieve the case from state court and exercise federal jurisdiction over the merits of this

dispute. *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th 70, 79, 81 (1st Cir. 2021).

Respectfully submitted, this the 18th of February, 2025.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 7,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface: 14-point Century Schoolbook font.

This the 18th day of February, 2025.

/s/ Terence Steed
Terence Steed
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CERTIFICATE OF SERVICE

I certify that I have this day filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

This the 18th of February, 2025.

/s/ Terence Steed
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