UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:25-cv-00003-M

TELIA KIVETT, et al.,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO MODIFY FINAL ORDER AND REQUEST RULING FOR INDICATIVE RULING OF THAT SAME MOTION

Plaintiffs Telia Kivett, Karyn Mulligan, the Wake County Republican Party, the North Carolina Republican Party, and the Republican National Committee (collectively, "Plaintiffs"), submit this response in opposition to Defendants' Motion to Modify Final Order and Request for Indicative Ruling of that Same Motion ("Motion") [D.E. 24]. Because Defendants fail to establish the prerequisites warranting the relief sought, Plaintiffs respectfully request that the Motion be denied in full. Alternatively, Plaintiffs ask that the Motion be deferred until the Fourth Circuit considers and rules upon the underlying appeal. In support, Plaintiffs show the following:

INTRODUCTION

At its core, Defendants' Motion asks this Court to effectively predetermine the outcome of a pending appeal on a decision it lacks jurisdiction to alter. At the same time, the parties are actively briefing the same question on appeal before the Fourth Circuit, Defendants belatedly ask this Court to forecast how a different ruling in a wholly distinct set of cases – *Griffin v. N.C. State Bd. Of Elections*, Nos. 25-1018(L), 25-1019, 25-1020, 25-1024 (4th Cir. 2025) (hereinafter, "*Griffin*") – may have impacted its remand order here, had *Griffin* been decided before the present matter arose. But the outcome to the parties' appeal is not preordained, nor is it in any way reliant on that of

Griffin. Defendants' requests ignore the procedural posture of this dispute and instead points to perceived factual similarities between the matters, all while ignoring their significant distinctions. The central questions presented by this Motion are properly before the Fourth Circuit, where they should proceed unencumbered and uninterrupted. Defendants cannot sufficiently establish any of the necessary circumstances for their requested relief. Accordingly, the Motion should be denied.

ARGUMENT

Defendants' Motion fails to satisfy the decidedly narrow and strict conditions necessary to justify relief under either Rule 60(b)(5) or (6) of the Federal Rules of Civil Procedure. For these reasons alone, the Motion should be denied outright. *See* Fed. R. Civ. P. 62.1(a)(2). Alternatively, due to the substantial likelihood that the Fourth Circuit's ruling upon the pending appeal will moot the Motion's requested relief—namely by resolving the exact question presented here as to whether or not *Griffin* controls—Plaintiffs ask that a ruling on this Motion be deferred until the Fourth Circuit issues its opinion. *See id.* at (1).

I. Standard

"Under Rule 60(b), a moving party must first demonstrate that (1) its motion is timely, (2) it has a meritorious claim or defense, (3) the nonmoving party will not suffer unfair prejudice from setting aside the judgment, and (4) exceptional circumstances justify relief." *Fortitude Fin. Investments, Inc. v. LStar Mgmt., LLC*, No. 5:19-MC-28-D, 2023 WL 6035715, at *2 (E.D.N.C. May 16, 2023) (collecting cases). "If the moving party meets it initial burden, then the moving party also must "satisfy one of the six enumerated grounds for relief under Rule 60(b)." *Id.* (citations omitted). As this Court stated in *Erway v. United States Transp. Sec. Admin.*,

> Fundamentally, an issue once determined by a competent court is conclusive. Thus, new decisions are given retroactive effect in all cases still open on direct review, but they do not apply to cases already closed. District courts may reopen a judgment under Rule 60(b) in only a limited set of circumstances, as the rule is meant to make

> an exception to finality. To ensure the exception is not abused, the district court must engage in a "very strict interpretation" of Rule 60(b).

No. 5:21-CV-00338-M, 2024 WL 1252331, at *1 (E.D.N.C. Mar. 22, 2024) (cleaned up) (internal citations and quotations omitted). This fundamental principle is grounded in the notion of finality, especially because "[w]here a Rule 60(b) motion simply asks the district court to change its mind, the motion is 'not authorized by Rule 60(b).'" *Fortitude Fin. Investments, Inc.*, 2023 WL 6035715, at *5 (citing *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982)).

"Although the language of Rule 60 (b)(5) and (b)(6) is broad, both provisions have been construed narrowly." *United States v. Carr*, No. 5:12-HC-2121-FL, 2017 WL 2787706, at *2 (E.D.N.C. June 27, 2017), *aff'd*, 778 Fed. Appx. 265 (4th Cir. 2019) (citation omitted).

a. Federal Rule of Civil Procedure 60(b)(5)

Rule 60(b)(5) "usually applies to modifications of injunctions or consent decrees and may be granted if the party seeking relief can show a significant change either in factual conditions or in the law." *Dale v. Butler*, No. 7:20-CV-184-BR, 2021 WL 4354610, at *11 (E.D.N.C. Sept. 14, 2021), *aff'd*, No. 21-2037, 2022 WL 595144 (4th Cir. Feb. 28, 2022) (cleaned up) (citation omitted). Under Rule 60(b)(5), "a district court may modify a judgment if 'it is no longer equitable that the judgment should have prospective application.'" *Plyler v. Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991) (citation omitted). Although the Rule also provides for relief when the judgment is "based on an earlier judgment that has been reversed or vacated," *see* Fed. R. Civ. P. 60(b)(5), this portion of the Rule "applies when "a present judgment is based on the prior judgment in the sense of claim or issue preclusion." *Gilbert v. Deutsche Bank Tr. Co. Americas*, No. 4:09-CV-181-D, 2011 WL 10636412, at *3 (E.D.N.C. June 15, 2011). "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests." *Horne v. Flores*, 557 U.S. 433, 447 (2009).

b. Federal Rule of Civil Procedure 60(b)(6)

It is well-established that relief under Rule 60(b)(6) is only appropriate under "exceptional circumstances." *Aikens v. Ingram*, 652 F.3d 496, 511 (4th Cir. 2011) (en banc); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 120 (4th Cir. 2000); *Queern v. United States*, No. 5:20-CV-00363-M, 2021 WL 3574884, at *3 (E.D.N.C. Aug. 12, 2021). Typically, relief under Rule 60(b)(6) is reserved for instances including a risk of inconsistent judgments involving the same parties, or some injustice existing at the time the challenged order issued. *See Cincinnati Ins. Co. v. Hunt*, No. 7:22-CV-00189-M, 2024 WL 4828095 (E.D.N.C. Feb. 23, 2024); *see also Erway*, 2024 WL 1252331, at *3. Notably, both this Court and the Fourth Circuit have held that "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." *Id.* (collecting cases). Indeed, even "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). This holds true even when a seemingly contrary appellate precedent issues prior to the Rule 60(b)(6) motion. *See, e.g., Erway*, 2024 WL 1252331, at *3 (surveying cases where contrary appellate decisions in related cases did not constitute "extraordinary circumstances.").

c. Federal Rule of Civil Procedure 62.1

Rule 62.1 of the Federal Rules of Civil Procedure provides that where a district court lacks jurisdiction to grant a motion for relief due to a pending appeal, the district court may: "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a)(1)-(3). The decision to act under Rule 62.1 is soundly within the trial court's discretion. *See, e.g., Williams v. Smith*, No. 22-CV-6482 (CS), 2025 WL 507752, at *1-2 (S.D.N.Y.

Feb. 14, 2025) (exercising discretion under Rule 62.1(2) to deny a motion made pursuant to Rule 60(b)(6) while an appeal was pending); *see also Slaten v. Christian Dior Perfumes, LLC.*, No. 23-CV-00409-JSC, 2024 WL 4642873 (N.D. Cal. Oct. 30, 2024) (finding that exercising the court's powers under Rule 62.1 could avoid wasting judicial resources, when the overarching appeal was several months away from being heard yet the underlying motion before the district court was fully briefed, argued, and ripe for a decision).

II. Defendants Fail to Establish that Relief Under Either Fed. R. Civ. P. 60(b)(5) or (6) is Supported on the Facts Presented

Defendants' Motion is premised upon the notion that because this matter and *Griffin* share some factual similarities, then the resolution of the latter must dictate the former. This assumption is patently flawed for several reasons, not the least of which is the distinct allegations, claims for relief, and scope of Plaintiffs' Complaint versus that of *Griffin*. Yet even if factual similarities were enough to justify this Court revisiting its judgment in light of the Fourth Circuit's order in *Griffin*, Defendants' Motion "fails to demonstrate how [their] situation is different from any other situation in which a post-judgment change in the law favors a [party]." *Erway*, 2024 WL 1252331, at *3 (citing *Wadley v. Equifax Info. Servs., LLC*, 296 F. App'x 366, 369 (4th Cir. 2008)). At this juncture, this Court has remanded the matter to state court and divested itself of jurisdiction.[1] Thus, Defendants ask this Court to do exactly what *Erway* warns against—using a broad interpretation of Rule 60(b) to circumvent the ordinary rules of finality. *Id.*, at *1. Because Defendants cannot satisfy any of the elements required for a Rule 60(b) motion to be appropriate, the Motion must fail. *See, e.g, Fortitude Fin. Investments, Inc.*, 2023 WL 6035715, at *2.

[1] *Kivett*, 5:25-cv-00003, at D.E. 19. Due to its issuance of the letter or remand to Wake County Superior Court, this Court lacks jurisdiction to take any actions affecting its underlying order. *See City of Martinsville, Virginia v. Express Scripts, Inc.*, 128 F.4th 265, 267-68 (4th Cir. 2025).

a. Considering the circumstances, Defendants' Motion is untimely.

Unlike for Rules (1) through (3), Rule 60(b) does not define what makes a motion "timely" under Rule 60(b)(5) or (6). *C.f.* Fed. R. Civ. P. 60(c)(1). Here, given the procedural posture of this dispute, the Motion is untimely and highly prejudicial to Plaintiffs. To be sure, the parties are currently in the latter stages of merits briefing before the Fourth Circuit. Defendants submitted their opening brief on February 18, 2025,[2] five days after filing this Motion.[3] Per the Fourth Circuit's scheduling order,[4] Plaintiffs' response brief will be filed by March 20, 2025, followed by Defendants' reply brief on or before April 10, 2025. Should Defendants elect to file a reply brief regarding the present Motion, then said brief would be due by March 20, 2025 as well.[5] Thus, this Motion would only be fully briefed two weeks prior to the overarching appeal becoming ripe. Such a short window between the Motion and the appeal's respective completions renders the appeal the proper vehicle for litigating these issues.

Similarly, Defendants cannot explain their delay in bringing the Motion. The *Griffin* opinion which Defendants rely upon issued on February 4, 2025.[6] Defendants were fully capable of filing this Motion immediately upon *Griffin*'s issuance or soon thereafter, yet they chose not to. Instead, Defendants waited over a week before filing their Motion, followed by filing their opening appellate brief in the Fourth Circuit. Based on the timing of this Motion's filing and the Fourth Circuit's scheduling order, this delay forces Plaintiffs expend additional resources to brief effectively the same issues twice over. Although such a turnaround between an opinion's issuance

[2] *Kivett, et al. v. N.C. State Bd. Of Elections, et al.*, 25-1021 at D.E. 29 (4th Cir. Feb. 18, 2025).
[3] Defendants' opening appellate brief then cites to this Motion in furtherance of their merits argument asking the Fourth Circuit to treat this dispute in the same manner as *Griffin*. *See id.*, at p. 11.
[4] *Id.* at D.E. 3.
[5] *See* Local Rule 7.1(g)(1).
[6] *See Griffin* at D.E. 132.

and a Rule 60(b) motion may not typically be considered an unreasonable delay in the ordinary course, given the unique circumstances and posture, including the pending appellate deadlines, Plaintiffs maintain that this Motion is both untimely and improper. Coupled with the prejudicial effect of the relief sought, Defendants' Motion fails to satisfy the first requirement of Rule 60(b).

b. Defendants' arguments regarding *Griffin* are unpersuasive.

The second necessary prong which must be established under Rule 60(b) is that the movant must have "meritorious claims or defenses." *See Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993). Although not fully clear, Defendants' arguments in this regard appear akin to that of a *res judicata* or an estoppel defense. *See Gilbert* 2011 WL 10636412, at *3. In support, Defendants argue that this Court's remand order in the present dispute, which adopted the rationale in *Griffin v. N.C. State Bd. Of Elections*, No. 5:24-cv-724, at D.E. 50 (E.D.N.C. Jan. 06, 2025), means that the two must rise and fall together. Not only does this position ignore the significant distinctions between the two matters, but it is far short of reaching any form of preclusion. *See, e.g.*, *Fate v. Dixon*, 649 F. Supp. 551, 555 (E.D.N.C. 1986) (citing *Nash County Board of Education v. The Biltmore Company*, 640 F.2d 484, at 486 (4th Cir.1981)) (stating that the essential elements for claim preclusion are "(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits."); *see also Saimplice v. Ocwen Loan Servicing Inc.*, 368 F. Supp. 3d 858, 865-66 (E.D.N.C. 2019) (collecting cases explaining that the elements necessary to find issue preclusion under North Carolina law are: "(1) the issues are the same as those involved in the prior action, (2) the issues were raised and actually litigated in the prior action, (3) the issues were material and relevant to the disposition of the prior action, and (4) the determination of those issues was necessary and essential to the judgment in the prior action."); *B & B Hardware, Inc. v.*

Hargis Indus., Inc., 575 U.S. 138, 148 (2015) (identifying substantially the same elements regarding federal law).

This dispute does not involve the same parties as in *Griffin*. The claims for relief and allegations, including those concerning Defendants' failure to follow the registration cure process of N.C. Gen. Stat. § 163-82.4(f) and the harms and remedies which follow, are unique such that the issues presented were not actually raised, litigated, or "necessarily decided" by the Fourth Circuit's resolution of *Griffin*.

Separately, Defendants assert that the Fourth Circuit's order modifying the specific remand order at issue in *Griffin* was "tantamount" to a reversal. *See* [D.E. 25, at 8]. Defendants cite no authority supporting the extraordinary notion that an affirmance and modification of a trial court's order by an appellate court is somehow akin to a reversal. Instead, Defendants highlight the Fourth Circuit's modification of the *Griffin* remand order itself. But the Fourth Circuit's order in *Griffin* was sparse in its reasoning and tied to the facts and postures of the various matters consolidated into *Griffin*.[7] It is hardly the conclusive opinion Defendants wish it to be.

Defendants' attempts to paint *Griffin* as outcome determinative fail several times over. First, *Griffin* was an unpublished, *per curiam* opinion and, as the Fourth Circuit has repeatedly explained, "ordinarily, unpublished opinions are not accorded precedential value but ... 'are entitled only to the weight they generate by the persuasiveness of their reasoning.'" *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 417 (4th Cir. 2014) (citations omitted). Second, and perhaps most importantly, Defendants' arguments ignore the clear distinctions between the present dispute and *Griffin*. More specifically, Plaintiffs seek relief pertaining to all statewide election contests in the form of, among other things, a mandated judicial process ordering the State Board to take certain

[7] *See Griffin*, at D.E. 132, pp. 8-11.

actions in accordance with N.C. Gen. Stat. § 163-82.4(f). *See* D.E. 1-4, at ¶¶ 75, 103(c). Ultimately, these distinctions, along with the additional unique claims for relief presented, overshadows any underlying factual similarities[8] between the events giving rise to the complaints.

Relatedly, Plaintiffs are preparing their arguments to the Fourth Circuit that these very distinctions provide independent grounds why this Court's chosen method of abstention was uniquely appropriate here. Thus, the issues presented by Defendants' Motion strike at the very core of what the Fourth Circuit will soon consider. Defendants' attempt to artificially tip the scales of that appeal is an inappropriate use of Rule 60(b).

c. Plaintiffs would be prejudiced by the requested relief.

Defendants' arguments that Plaintiffs would not be prejudiced by the requested relief because they would still be able to pursue their claims in state court first, misses the mark. No party seriously disputes that, at this current juncture, the matter can fully proceed in state court. By remanding and divesting itself of jurisdiction, this Court recognized that fact. However, Defendants' arguments ignore that the relief the Motion seeks—i.e., asking this Court to preemptively inject its own opinion as to the applicability of *Griffin* on the facts presented—would prejudice Plaintiffs' rights on appeal. Put differently, Defendants ask this Court to assist in furthering their appellate arguments that *Griffin* controls the proper form of abstention here.[9] Considering the aforementioned briefing timelines, this Motion would not be fully briefed until

[8] Even assuming *arguendo* that Defendants' statements concerning the feasibility of the relief sought on contests other than that at issue in *Griffin*, *see Kivett*, 5:25-cv-00003, at D.E. 25, p. 10, this position still ignores the fact that the form of the relief sought—i.e., a judicially mandated cure process for statutorily deficient registration forms—is absent from *Griffin*. Indeed, given the scope of the relief sought by Plaintiffs, it naturally follows that the contest in *Griffin*, which is itself a contest for state office, would fall within the present complaint's reach. That separate parties are complaining of Defendants' potentially unlawful administration of these contests in the November 5, 2024 election is equally unsurprising. But this does not rise to any form of preclusion.

[9] *See Kivett*, 25-1021 at D.E. 29 (4th Cir. Feb. 18, 2025).

after Plaintiffs have already filed their response brief in the Fourth Circuit. Should this Court then grant Defendants' requested relief and forecast its opinion on *Griffin*'s applicability, Plaintiffs would be unable to address either that ruling or its rationale in their appellate papers.

d. <u>Defendants have not established that exceptional or extraordinary circumstances" exist</u>.

Defendants' Motion is, in essence, a request that this Court redo its remand order in light of an appellate court's post-judgment decision because that decision, in Defendants' mind, favors them. But this Court, the Fourth Circuit, and even the U.S. Supreme Court have uniformly held that such a posture does not establish "extraordinary circumstances" sufficient to establish relief under Rule 60(b). *See, e.g.*, *Erway*, 2024 WL 1252331, at *3 (citing *Hall v. Warden, Md. Penitentiary*, 364 F.2d 495, 496 (4th Cir. 1966) and *Agostini v. Felton*, 521 U.S. 203, 239 (1997)). Defendants do not identify any grounds independent from the intervening decision in *Griffin*—which Plaintiffs maintain is of limited applicability, if any—to support a finding of extraordinary circumstances. In fact, Defendants' Motion is wholly reliant on this Court agreeing with Defendants' assertion that *Griffin* somehow controls. Clear circuit precedent forecloses this argument from the outset. *See id.* Because of this, Defendants fail to satisfy the fourth element of Rule 60(b)'s inquiry.

III. An Indicative Ruling in Inappropriate

As established, Defendants' Motion cannot satisfy any of the conditions precedent to relief under Rule 60(b). Thus, this Court is empowered to deny the Motion outright. *See* Fed. R. Civ. P. 62.1(a)(2). However, given that the conclusion of merits briefing in the Fourth Circuit is imminent, Plaintiffs respectfully request that, in the alternative, this Court defer ruling on the Motion until the Fourth Circuit's order issues, at which point both the Court and all parties may act in accordance therewith. Defendants do not identify any justifiable reason supporting their request to

utilize Rule 60(b) in the manner sought. As such, Plaintiffs request that, should this Court decline to deny the Motion, then any ruling on the Motion be deferred so the parties' appeal may proceed without delay. *See* Fed. R. Civ. P. 62.1(a)(1).

CONCLUSION

For the foregoing reasons, Plaintiffs maintain that Defendants have not carried their burden to sufficiently establish that relief pursuant to Rule 60(b)(5) or (6) is necessary and proper. Coupled with the risk of prejudice to Plaintiffs and the pending appeal, Defendants' Motion fails. Accordingly, Plaintiffs respectfully request that the Motion be denied in its entirety. Alternatively, Plaintiffs respectfully ask that any ruling on the Motion be deferred until the Fourth Circuit issues its order and mandate at the forthcoming conclusion of the appeal.

Respectfully submitted this, the 6th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with Local Rule 7.2(f) as it does not exceed 30 pages in length or 8400 words, as indicated by the word processing services used to create the document.

This, the 6th day of March, 2025.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Phillip J. Strach
Phillip J. Strach

CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such to all counsel of record in the above-captioned matter.

This, the 6th day of March, 2025.

By: /s/ Phillip J. Strach
Phillip J. Strach