No. COA25-181 TENTH JUDICIAL DISTRICT

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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RESPONSE BRIEF OF RESPONDENT-APPELLEE

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RESPONSE BRIEF OF RESPONDENT-APPELLEE

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ISSUES PRESENTED

1. Did the Board correctly dismiss Petitioner's protests because they seek to change established election rules in close proximity to an election?

2. Did the Board correctly dismiss Petitioner's protests because retroactively invalidating votes that were cast consistent with the laws and regulations that existed during the voting process would be fundamentally unfair under state law?

3. Did the Board correctly dismiss Petitioner's protests for providing inadequate notice under state law to challenged voters?

4. Did the Board correctly dismiss under state law Petitioner's protest that is based on allegedly incomplete voter registrations?

5. Was the Board correct to conclude that state law allows military and overseas voters to submit ballots without including a copy of their photo ID?

6. Was the Board correct to comply with a state statute allowing certain military and overseas voters to vote in state elections?

7. Even if Petitioner's protests had merit, is Petitioner's proposed remedy appropriate under state law?

STATEMENT OF THE CASE

On December 13, 2024, Respondent the North Carolina State Board of Elections dismissed three categories of election protests filed by Petitioner Judge Jefferson Griffin related to the November 2024 general election for Associate Justice of the North Carolina Supreme Court. (R pp 9-51)

Petitioner filed petitions for judicial review in Wake County Superior Court. (R pp 1, 157, 215) The Board removed the petitions to the U.S. District Court for the Eastern District of North Carolina. (R pp 55, 169, 227) The U.S. Court of Appeals for the Fourth Circuit held that the Board properly removed to federal court, that the state courts should decide the state-law issues involved in this dispute, and that the federal courts should retain jurisdiction over any federal-law issues that remain after the conclusion of state-court proceedings, including any appeals. *Griffin v. N.C. State Bd. of Elections*, No. 25-1018(L), slip op. at 9-11 (4th Cir. Feb. 4, 2025) (per curiam).

The Superior Court denied the petitions for judicial review. (R pp 152, 210, 269) Petitioner then appealed to this Court. (R pp 154, 212, 271)

STATEMENT OF THE FACTS

A. Petitioner files hundreds of election protests.

Petitioner Judge Jefferson Griffin and Intervenor Associate Justice Allison Riggs were candidates in the 2024 general election for Associate Justice on the North Carolina Supreme Court. Final canvassed results show that Justice Riggs prevailed by 734 votes.[1]

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[1] *NCSBE Election Contest Details*, N.C. State Bd. of Elections, bit.ly/3PA7R6P (last visited Feb. 27, 2025).

On November 19, 2024, Petitioner filed hundreds of election protests throughout the State challenging the election results, alleging that certain votes were invalid. (R p 10) Petitioner's protests included challenges to the following three categories of voters:

- 60,273 ballots cast by registered voters with allegedly incomplete voter registrations. These challenged ballots include only those cast by individuals who voted early or voted absentee. They do not include tens of thousands of identically situated ballots cast in-person on election day.[2]

- 1,409 ballots cast by military and overseas voters registered in Guilford County who did not include a copy of a photo identification or an exception form with their ballots. Petitioner also purported to challenge similar votes in three additional counties (Buncombe, Durham, and Forsyth), but did not identify specific voters.[3]

- 266 ballots cast by overseas citizens who voted absentee and who have never resided in the United States.[4]

B. The Board takes jurisdiction over three categories of protests.

When an election protest is filed with a county board, the State Board may take jurisdiction over the protest and resolve it in the first instance.

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[2] (*See, e.g.*, Doc. Ex. I 21-64); (R p 11)

[3] (*See* Doc. Ex. I 349-58, 1102-11, 1238-47, 1504-51); (R p 11) Petitioner initially challenged voters in Cumberland and New Hanover counties as well but declined to pursue those challenges. (*See* Doc. Ex. I 831-40, 2401-10)

[4] (*See, e.g.*, Doc. Ex. I 5-20,); (R p 11)

N.C. Gen. Stat. § 163-182.12. On November 20, the Board voted unanimously to take jurisdiction over the three categories of protests listed above, "which presented legal questions of statewide significance."[5] (R p 12)

Because the Board took jurisdiction over protests initially filed with the county boards, the Board followed the same procedures for resolving the protests that the county boards would have. *See* N.C. Gen. Stat. §§ 163-182.10, -182.11(b), -182.12. Those procedures first require the Board to give the protest "[p]reliminary [c]onsideration." *Id.* § 163-182.10(a). At this initial stage, the Board must answer two questions. First, did the protest comply with the protest-filing requirements in section 163-182.9? *Id.* Second, did the protest "establish[] probable cause to believe that a violation of election law

[5] In filings submitted after the deadline to file an election protest, *see* N.C. Gen. Stat. § 163-182.9(b)(4), Petitioner sought to add voters to the second and third protest categories listed above. On the second category, Petitioner tried to challenge the votes of 4,100 more military and overseas voters in Buncombe, Durham, and Forsyth counties. (Doc. Ex. I 3790-926, 4006-42) Petitioner did not, however, challenge the more than 25,000 identically situated voters across the State. On the third category, Petitioner tried to update his protests to challenge votes from seven additional counties. He did not include these in the appendix to his petition for judicial review. The Board recognized that the additional protests that Petitioner filed after the deadline "may not have been timely filed under [section] 163-182.9(b)(4)," but did not decide whether these protests were timely given that it "dismiss[ed] these protests for other reasons." (R p 14 n.4)

or irregularity or misconduct has occurred"? *Id.* For a protest to proceed beyond the preliminary consideration stage, the Board must answer "yes" to both questions. *Id.*

Protests that meet these preliminary requirements then proceed to an evidentiary hearing. *Id.* §§ 163-182.10(a), (c)-(d). Following this hearing, the Board must issue a "written decision" with findings of fact and conclusions of law. *Id.* § 163-182.10(d). The findings must be "based exclusively on the evidence" presented at the hearing "and on matters officially noticed." *Id.* § 163-182.10(d)(1). The conclusions must be based on whether there is "substantial evidence of any violation, irregularity, or misconduct sufficient to cast doubt on the results of the election." *See id.* §§ 163-182.10(d)(2)(a)-(e).

If the Board finds substantial evidence of a violation, the Board may correct vote totals, order a recount, or take "[a]ny other action within [its] authority." *See id.* § 163-182.10(d)(2)(e); *see also id.* § 163-182.12. Under certain circumstances, the Board may order a new election. *Id.* § 163-182.13. The Board's decisions may be appealed to Wake County Superior Court. *Id.* § 163-182.14.

C. The Board dismisses the protests.

In line with these procedures, after a public hearing, the Board dismissed the protests at the "preliminary consideration" stage. (R pp 9-51) The Board concluded that Petitioner had failed to comply with the protest-filing requirements in section 163-182.9. (R pp 14-22) The Board also concluded that Petitioner had failed to establish "probable cause" of an election-law violation. (R pp 22-47)

As a threshold matter, the Board held that Petitioner "failed to serve" voters affected by his protests, in violation of the North Carolina Administrative Code and "the requirements of constitutional due process." (R p 14) The Board reasoned that Petitioner's chosen method of service—a postcard with a QR code—did not provide affected voters adequate notice that their votes were being challenged. (R pp 16-22)

The Board then turned to the merits, explaining why each protest was "legally invalid." (R pp 22-47) *First*, on the protests about alleged incomplete voter registrations, the Board held that it would be "an unwarranted inference" to conclude from the absence of a driver's license or social security number in Board's database that the voter failed to provide that information when registering. (R p 25) To take just one example, the Board

noted that voters could have provided an identification number that was not retained in the Board's database because the number did not match with existing government records. (R p 24) Under those circumstances, state law provides alternative ways to confirm the voter's identity, allowing them to vote. (R p 24 (citing N.C. Gen. Stat. § 163-166.12(d))

On the same protest category, the Board held that the federal Help America Vote Act (HAVA) foreclosed Petitioner's requested relief to cancel the votes of affected voters. (R pp 23-28, 35) The Board further held that, "to the extent there is a potential violation of HAVA involved in registration of voters in the past, it was remedied consistent with a separate provision of HAVA." (R p 28) That "separate provision . . . states that a new voter registration applicant must provide an alternative form of identification before or upon voting for the first time, if the state did not have a system complying with the requirement to collect a driver's license number or last four digits of a social security number." (R p 27 (citing 52 U.S.C. § 21083(b)(1)-(3))

The Board also held that votes cannot be invalidated *after* an election when eligible voters complied with all the instructions that they had been given when they registered and voted. (R pp 28-33) Doing so, the Board

held, would be fundamentally unfair and therefore violate the law under longstanding North Carolina Supreme Court precedent. (R pp 30-31 (citing *Woodall v. W. Wake Highway Comm'n.*, 176 N.C. 377, 97 S.E. 226 (1918); *Overton v. Mayor of Hendersonville*, 253 N.C. 306, 116 S.E.2d 808 (1960))) Retroactively canceling votes under these circumstances, the Board further explained, would violate the U.S. Constitution and federal statutes as well. (R pp 31-35)

Second, the Board rejected Petitioner's protests as to the votes of military and overseas voters who did not include a copy of their photo identification or a Photo ID Exception Form with their ballots. (R p 40) One of its administrative rules, the Board explained, expressly provides that these voters were "not required to submit a photocopy of acceptable photo identification" with their absentee ballots. (R pp 44-45 (citing 08 N.C. Admin. Code 17 .0109(d)))

The Board further explained that absentee voting by military and overseas voters is governed by the Uniform Military and Overseas Voters Act (UMOVA), a 2011 law that the General Assembly unanimously passed allowing these voters to register and vote absentee under special procedures. *See* R pp 37, 40-44; N.C. Gen. Stat. §§ 163-258.1 *et seq*. These procedures, the

Board noted, do not require military and overseas voters to include a copy of their photo identification when submitting their absentee ballot. (R pp 40-42) Moreover, these procedures originate under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—a federal law that UMOVA applies to state elections. (R p 45) The Board therefore concluded that imposing an identification requirement on voters covered by UOCAVA that is inconsistent with that federal law would likely violate the Supremacy Clause of the U.S. Constitution. (R pp 45-47)

Third, the Board also rejected Petitioner's protests as to overseas voters who have never resided in the United States but whose parents had been North Carolina residents. (R p 37) In dismissing this category of protests, the Board noted that UMOVA "specifically authorized U.S. citizens who have never lived in the United States to vote in North Carolina elections if they have a familial connection to this state." (R pp 37-38) The Board held that it could not "ignore" this state statute. (R p 37)

D. The superior court denies the petitions for judicial review.

Petitioner filed three petitions for judicial review in Wake County Superior Court for each of the three categories of protests. (R pp 1-51, 157-65, 215-23) The Board removed those petitions to federal court, and the

district court remanded. The Board appealed the district court's remand order to the Fourth Circuit.

While the Board's appeal was pending before the Fourth Circuit, the North Carolina Supreme Court entered two orders arising out of a separate petition for writ of prohibition that Petitioner filed as an original action in that Court. In its first order, the Court entered a temporary stay of the certification of the election. *Griffin v. N.C. Bd. of Elections*, 909 S.E.2d 867, 867-68 (N.C. 2025). In its second order, the Court dismissed Petitioner's petition for a writ of prohibition, maintained its stay on the certification of the election until "any appeals . . . have been exhausted," and ordered the Wake County Superior Court to proceed "expeditiously" on Petitioner's three petitions for judicial review. *Griffin v. N.C. Bd. of Elections*, 910 S.E.2d 348, 349 (N.C. 2025).

The parties then filed briefs on the petitions for judicial review back in superior court. The day after the Board filed its response briefs, the Fourth Circuit issued a decision affirming in part and modifying in part the federal district court's remand order. *Griffin v. N.C. State Bd. of Elections*, No. 25-1018(L) (4th Cir. Feb. 4, 2025) (per curiam). The Fourth Circuit held that the State Board properly removed the case to federal court. *Id.* at 9. The district

court had remanded this case back to state court under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), without retaining jurisdiction. *Griffin*, slip op. at 6, 11. The Fourth Circuit held that the "more appropriate theory for abstaining from federal jurisdiction" arises under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). *Griffin*, slip op. 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 omitted). Unlike under *Burford,* when a federal court abstains under *Pullman*, it retains jurisdiction over the case to decide the federal issues in the case after the state-law issues are decided in state court. *Id.* The Fourth Circuit thus 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 (citation omitted).[6]

[6] The district court subsequently amended its order, consistent with the Fourth Circuit's decision, on February 26, 2025. *Griffin v. N.C. State Bd. of Elections*, No. 24-cv-731, D.E. 35 (E.D.N.C. Feb. 26, 2025).

In light of the Fourth Circuit's decision, the Board filed a reservation of its rights under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), in Wake County Superior Court. (R pp 128-33) When a federal court abstains under *Pullman* and a party returns to state court to litigate state-law issues, the party must still inform the state courts of its federal-law arguments. *Gov't & Civic Emps. Org. Comm., CIO v. Windsor*, 353 U.S. 364, 366 (1957) (per curiam). This requirement allows the state court to construe the state laws at issue in light of federal law. But to preserve the right to a federal forum guaranteed under *Pullman*, a party may also inform the state courts "that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." *England*, 375 U.S. at 421. "When the reservation has been made . . . his right to return [to federal court] will in all events be preserved." *Id.* at 421-22; *see also Promovision Int'l Films, Ltd. v. Trapani*, 744 F.2d 1063, 1065 (4th Cir. 1984).

Thus, the Board's *England* reservation expressly stated that it was informing the superior court of its federal-law arguments only to comply with the U.S. Supreme Court's decision in *Windsor* and that it was otherwise making a "reservation to the disposition of the entire case by the state

courts." (R pp 131, 199, 258 (quoting *England*, 375 U.S. at 421); Doc. Ex. II 66-69, 187-207, 335-38) The Board further stated its intent, "should the state courts hold against [it] on the question of state law, to return to the District Court for disposition of [its] federal contentions." (R pp 131, 199, 258 (alterations in original) (quoting *England*, 375 U.S. at 421)) The Board reiterated this reservation under *England* at the hearing on Petitioner's petitions for judicial review. (T pp 6-7, 77-78)

After a hearing, the superior court denied the petitions. (R pp 152, 210, 269) Petitioner appealed to this Court. (R pp 154-56, 212-14, 271-73)

SUMMARY OF THE ARGUMENT

The superior court was right to dismiss the petitions for three threshold reasons.

First, Petitioner's request that this Court retroactively change election rules to alter the result in his recent election violates North Carolina's version of the *Purcell* principle, articulated first in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007). As Justice Dietz has explained, this principle "recognizes that, as elections draw near, judicial intervention becomes inappropriate because it can damage the integrity of the election process." *Griffin*, 909 S.E.2d at 871 (Dietz, J., dissenting). Strict,

dispassionate adherence to this doctrine "protects the State's interest in running an orderly, efficient election" and preserves the public's "confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

The circumstances of this case call out for application of this principle. Petitioner, like all candidates, has the right to file post-election protests claiming that irregularities occurred during the course of the election. But Petitioner does not claim here that the Board counted votes in violation of the rules in place at the time of the election. He instead seeks to retroactively *change* longstanding election rules by bringing novel legal claims—including claims that would require courts to strike down statutes passed by the General Assembly and rules duly promulgated by the Board and approved by the Rules Review Commission. The result would be to retroactively disenfranchise more than 60,000 voters, many of whom have been voting in North Carolina elections without controversy for decades. Under *Pender County*, these claims should be litigated on a going-forward basis. But it is far too late to alter the rules of an election that has already taken place.

Our Supreme Court's decision in *James v. Bartlett* is not to the contrary. 359 N.C. 260, 607 S.E.2d 638 (2005). In that case, as Justice Dietz has explained, the Board decided to count certain ballots that were "unlawful under the election rules that existed at the time of the election." *Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring). In this case, "by contrast, the State Board of Elections complied with the election rules existing at the time of the election." *Id.*

Second, Petitioner's requested remedy would violate longstanding North Carolina Supreme Court precedent holding that it is fundamentally unfair, and therefore unlawful, to retroactively cancel votes that were cast in compliance with official guidance from election officials. *See, e.g.*, *Woodall v. W. Wake Highway Comm'n*, 176 N.C. 377, 388-89, 97 S.E. 226, 231-32 (1918); *Overton v. Mayor of Hendersonville*, 253 N.C. 306, 315-16, 116 S.E.2d 808, 815 (1960). The Court has specifically held that it is unlawful to discount votes in the circumstances alleged here—where a candidate claims that election officials made errors in registering voters during the registration process. *See id.* These precedents recognize that when a lawful voter casts a ballot after being registered, it would be "hostile to the free exercise of the right of franchise" to cancel their ballot merely because "the voter may not actually

have complied entirely with the requirements of the registration law." *Woodall*, 176 N.C. at 388-89, 97 S.E. at 232.

Third, Petitioner's protests should be denied because he failed to provide voters with adequate notice that he was challenging their votes. Here, challenged voters were mailed a postcard stating that their votes *may* be subject to a protest, along with a QR code that, when scanned with a smartphone, linked to a list of *hundreds* of protests, many of which contained *thousands* of names, out of alphabetical order, on *hundreds* of pages. This form of notice violates state law requiring persons filing protests to serve challenged voters "copies of all filings." 08 N.C. Admin. Code 02 .0111.

For each of these independent reasons, the protests fail at the threshold. But even if this Court were inclined to consider the merits of Petitioner's protests, they would fail on the merits as well.

Petitioner first claims that over 60,000 voters should have their votes disregarded because they allegedly registered to vote improperly. But Petitioner has failed to establish probable cause to believe that any challenged voter *actually* registered to vote and cast ballots in violation of the law. State law explicitly contemplates numerous situations in which

voters may lawfully register and vote, even though their records lack a social security or driver's license number in the Board's database. For example, some challenged voters registered *before* the relevant state law was even enacted, and nothing in the law requires previously registered voters to provide an identification number to *remain* on the rolls. As another example, state registration law recognizes that, due to database-matching errors, many voters who *did*, in fact, provide an identification number at registration may not have that number reflected in the Board's database. The law therefore provides that these voters also may vote if they show a qualifying ID before voting for the first time.

Because Petitioner failed to satisfy his burden to show that any individual voter whose registration records lack an identification number *actually* was ineligible to register and vote, the Board correctly dismissed Petitioner's first protest. Indeed, in response to Petitioner's arguments here and in other post-election litigation, the Board conducted a preliminary data analysis showing that at least half of the voters that Petitioner challenges (and likely many more) actually *did* provide a driver's license or social security number on their voter-registration form or were not required by law to do so. (Doc. Ex. II 226-29 ¶¶ 8-13)

Petitioner next challenges votes cast by military and overseas voters who voted absentee without providing a copy of their photo identification. This protest fails, however, because the Board correctly concluded that these voters cast ballots consistent with North Carolina law. The General Assembly chose to allow military and overseas voters to vote in state elections using the same rules that govern their participation in federal elections, for which these voters do not need to present a photocopy of their photo ID. In keeping with this practice, the Board adopted a rule to this effect before the election, without controversy or opposition, and that rule was unanimously approved by the legislatively appointed Rules Review Commission. Accordingly, none of the challenged military and overseas voters were informed of a requirement to include a copy of a photo ID with their ballot to ensure it counted. Military and overseas voters should not be disenfranchised for following this clear guidance from the executive and legislative branches.

Finally, Petitioner challenges a statute enacted by the General Assembly that allows certain overseas voters to vote in state elections based on their family ties to North Carolina, even though they have never lived here. This protest fails at the outset, because it does not challenge a

sufficient number of votes to alter the result of the election. But even aside from this defect, this is a facial challenge to a state statute that must be decided by a three-judge panel. And even if this Court did have jurisdiction to consider Petitioner's facial challenge, the challenge fails because nothing in the state constitution creates a durational residency requirement to vote.

For these reasons, the superior court was right to conclude that Petitioner's protests fail on the merits. But even if this Court were to conclude that Petitioner's protests state valid claims, Petitioner has asked for the wrong relief. Petitioner asks this Court to skip past factfinding and the Board's remedial process and summarily strike the votes he challenges. But below, the Board dismissed Petitioner's protests at the preliminary stage—akin to a dismissal on the pleadings. Thus, the only remedy available to Petitioner at this stage would be a remand to the Board for further proceedings, including an evidentiary hearing. At that evidentiary hearing, the State Board or county boards could conduct any necessary factfinding on an individualized basis.

In sum, this Court should affirm the dismissal of the petitions as procedurally and constitutionally defective. But even if this Court were to consider Petitioner's arguments, those arguments fail on the merits. And

even if this Court were to consider and agree with the merits of Petitioner's claims, the only proper relief would be a remand to the Board.

ARGUMENT

Standard of Review

Petitioner argues that the Board's decision was based on errors of law. "It is well settled that in cases appealed from administrative tribunals, questions of law receive de novo review." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (quotation marks and alterations omitted).

Discussion of Law

I. The Petitions For Judicial Review Fail For Three Independent, Threshold Reasons Under State Law.

The superior court correctly denied Petitioner's petitions for judicial review for three independent, threshold reasons under state law. First, Petitioner waited too late in the election cycle to challenge longstanding election rules. His claims are thus barred under our Supreme Court's decision in *Pender County*. Second, granting Petitioner's requested relief to retroactively change the rules of the election would be fundamentally unfair, in violation of state-law equitable principles that the North Carolina

Supreme Court has recognized for more than a century. Third, Petitioner did not provide these affected voters with adequate notice that he sought to cancel their votes.

A. Petitioner's requested relief violates *Pender County*.

The rules that Petitioner challenges here were in place long before the November 2024 general election. Under our Supreme Court's decision in *Pender County*, Petitioner needed to bring challenges of this kind well in advance of the election—not after all the ballots were cast.

1. *Pender County* is a neutral rule of judicial restraint that guards against late-breaking challenges to election rules.

The North Carolina Supreme Court's decision in *Pender County* is a state-law analog to the U.S. Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). The *Purcell* principle "reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring). "Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 881.

Given these concerns, *Purcell* serves as an "important principle of judicial restraint." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). Adhering to *Purcell* "protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Id*. It "also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process." *Id.*

The North Carolina Supreme Court "has long acknowledged a state version of *Purcell* (although not always by name)." *Griffin*, 909 S.E.2d at 872 (Dietz, J., dissenting). The Court first recognized the principle just one year after *Purcell* was decided, in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007). In that opinion, the Court held that a state house district drawn to comply with the Voting Rights Act was not actually required by that law and thus had to be redrawn to comply with our state constitution's whole county provision. *Id.* at 510, 649 S.E.2d at 376. The Court also recognized, however, that candidates had already begun preparing for the upcoming 2008 election "in reliance upon the districts as presently drawn." *Id.* The primaries for that election were set to begin roughly nine months

later—in May 2008. *See* N.C. Gen. Stat. § 163-106(c) (2007). As a result, "to minimize disruption to the ongoing election cycle," the Court stayed its order requiring the General Assembly to redraw the district "until after the 2008 election." *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376 In other words, the Court ordered that relief for the election-law violation at issue should run only prospectively for *future* election cycles rather than change the rules for an election cycle that was already underway. *See id.*

Several Justices of the North Carolina Supreme Court have since emphasized the importance of this principle. *E.g.*, *Griffin*, 909 S.E.2d at 872 (Dietz, J., dissenting); *Holmes v. Moore*, 382 N.C. 690, 691, 876 S.E.2d 903, 904 (2022) (Newby, C.J., dissenting); *Harper v. Hall*, 382 N.C. 314, 319, 874 S.E.2d 902, 906 (2022) (Barringer, J., dissenting).

2. *Pender County* applies here.

There can be no doubt that this case involves a challenge to election rules in a period close to the election. The election concluded four months ago, followed by multiple recounts confirming the winner. To change the rules of the election now—months after millions of North Carolinians have already cast their ballots—would "fundamentally alter[] the nature of the election" and "gravely affect the integrity of the election process."

Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. 423, 424-25 (2020) (per curiam).

Moreover, Petitioner unduly delayed in challenging the election rules. Petitioner, like all candidates, has every right to bring post-election protests over alleged irregularities in the election process. But that is not what Petitioner's protests are about. To the contrary, Petitioner's protests challenge longstanding election rules. That kind of post-election challenge violates *Pender County*.

Each of Petitioner's three categories of protests comes far too late. Petitioner first challenges voters who lack a driver's license or social security number in the Board's database. But it is undisputed that the voter-registration form that he contests was in place long before this election.[7] It was not until October 2023 when a voter took issue with the form. (Doc. Ex. I 4825) In December 2023, the Board concluded that "the appropriate remedy is to implement changes recommended by staff to the voter

[7] Petitioner wrongly claims that the Board did not list a driver's license or social-security number as required since 2003 Br. 39. In fact, as public records have long shown, the voter-registration form expressly listed this information as required until 2009 and was only changed to imply that the information was not required in 2013, during the McCrory administration. (*See* Doc. Ex. II 231 ¶ 16; Doc. Ex. II 233-38)

registration application form and any related materials" only on a going-forward basis. (Doc. Ex. I 4828-29) Petitioner thus had almost a year before the election to challenge this decision.

Petitioner next challenges certain votes cast by military and overseas voters who did not include a copy of a photo identification with their ballots. Long before the election, however, the Board promulgated a rule providing that these military and overseas voters were "not required to submit a photocopy of acceptable photo identification" with their absentee ballots. 08 N.C. Admin. Code 17 .0109(d). This rule was first made effective on August 23, 2019. 08 N.C. Admin. Code 17 .0109(d) (2019). During an injunction against the photo ID law, that rule expired. A substantively identical provision was then readopted as a temporary rule when the injunction was lifted and became effective on August 1, 2023, and then was made a permanent rule on April 1, 2024. Doc. Ex. I 5404; *see* 08 N.C. Admin. Code 17 .0109. The Rules Review Commission thus approved this rule provision three separate times, and the rule applied in five different elections before this past November's general election.

Petitioner finally challenges votes cast by overseas citizens who voted absentee and have never resided in the United States. That challenge

questions the constitutionality of a statute passed by the General Assembly in a bipartisan fashion more than 13 years ago.

When, as here, a party challenges longstanding election statutes and Board rules, *Pender County* requires the party to bring those challenges well in advance of the election. The reason is that voters, candidates, and election officials all act "in reliance upon" the rules in place during the voting process. *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376. To retroactively change those rules after the election has concluded would hardly "minimize disruption" to elections, as *Pender County* instructs. *Id.* To the contrary, "[p]ermitting post-election litigation that seeks to rewrite our state's election rules—and, as a result, remove the right to vote in an election from people who already lawfully voted under the existing rules—invites incredible mischief." *Griffin*, 909 S.E.2d at 872 (Dietz, J., dissenting). "It will lead to doubts about the finality of vote counts following an election, encourage novel legal challenges that greatly delay certification of the results, and fuel an already troubling decline in public faith in our elections." *Id*.

Pender County's neutral and evenhanded rule preserves the public's faith in the election process, and ensures against courts excessively

entangling themselves in hotly disputed political contests. The Court should follow that rule here.

3. Petitioner's reliance on *James* is misplaced.

Petitioner ignores *Pender County*, instead analogizing this case to our Supreme Court's decision in *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). But *James*—which predates *Pender County*—is this case's opposite.

In *James*, two candidates challenged whether the Board could lawfully count provisional ballots cast on election day at a precinct other than the voter's assigned precinct. 359 N.C. at 263, 607 S.E.2d at 640. The defendants argued that the challengers had waited too long to contest the Board's counting such out-of-precinct ballots. *Id.* at 265, 607 S.E.2d at 641.

The Court rejected this delay argument, observing that "[t]he facts do not support defendants' allegations." *Id.* The Court explained that the election marked "the first time in North Carolina history that State election officials counted out-of-precinct provisional ballots." *Id.* What is more, when one of the challengers had asked the Board *before* the election whether the Board would count such votes, the Board's General Counsel "failed to indicate that [it] would count out-of-precinct provisional ballots." *Id.* "This response, coupled with the absence of any clear statutory or regulatory

directive that such action would be taken, failed to provide plaintiffs with adequate notice that election officials would count" the ballots. *Id.* The challengers thus did not unreasonably delay in bringing their claims. *Id.*

After concluding that the petitions were timely, the Court held that the Board had improperly counted the challenged ballots. *Id.* at 271, 607 S.E.2d at 645. Relevant statutes and the Board's own regulations said "clearly and unambiguously" that "voters must cast ballots . . . in their precincts of residence." *Id.* at 267-68, 607 S.E.2d at 642-43. Thus, "the [Board] violated the election rules by counting those votes." *Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring).

Given these facts, this case is hardly "the same" as *James*, as Petitioner claims. Br. 16. Unlike the challengers in *James*, Petitioner was on notice long before the election of the rules that he now challenges. *See supra* Part I.A.2. Also unlike in *James*, where the Board deviated from its historical practice, the election here was conducted in accordance with longstanding rules. As Justice Dietz has recognized, in *James*, the ballot counting in question "was unlawful under the election rules that existed at the time of the election." *Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring) (citing *James*, 359 N.C. at 269). In this case, "by contrast, the State Board of Elections

complied with the election rules existing at the time of the election." *Id.* And there is no allegation (as there was in *James*) that Petitioner relied on contrary, pre-election statements from the Board in deciding whether to bring a challenge. *See James*, 359 N.C. at 265, 607 S.E.2d at 641.

Petitioner argues that this case is similar to *James* because the Board in that case *claimed* that out-of-precinct votes had been counted prior to the election, pointing to the primaries leading up to that election. Br. 14-16. But our Supreme Court squarely *rejected* that argument, concluding that this isolated episode did not provide "adequate notice" where the Board had later advised that these votes would *not* be counted in the general election. *James*, 359 N.C. at 265, 607 S.E.2d at 641. More importantly, unlike here, counting the contested ballots was *unlawful* under the rules in place at the time of the election. *Id.* at 267-68, 607 S.E.2d at 642-43.

Moreover, although the Court in *James* made clear that it thought the challenged votes were cast unlawfully, it did not actually order those votes to be discounted. *See id.* at 271, 607 S.E.2d at 645. Instead, it simply "remand[ed]" the "case . . . for further proceedings." *Id.* After the Supreme Court's remand, the General Assembly passed legislation clarifying that "[i]t would be fundamentally unfair to discount" the votes of persons who had

followed official guidance from elections officials in casting their ballots. Act of Mar. 1, 2005, S.L. No. 2005-2, § 1(11), 2005 N.C. Sess. Laws 13, 15. The General Assembly further reaffirmed "that an innocent voter's ballot shall not be disqualified because of errors or omissions by elections officials." *Id.* § 1(12). The legislature's response to *James* is thus powerful evidence that the decision cannot be read to permit the remedy that Petitioner seeks here. *See infra* Part III.

4. Petitioner's other arguments against applying *Pender County* are unpersuasive.

Petitioner makes two additional arguments about why *Pender County* does not apply here. These arguments fail.

First, Petitioner argues that *Pender County* only applies to bar challenges brought shortly *before* an election. Br. 55. Petitioner asserts that applying *Pender County* after an election would be an "unfortunate category error." Br. 56.

Petitioner is making the category error. The question is not, as Petitioner seems to suggest, whether a party brings a lawsuit before or after Election Day. *See* Br. 55. *Pender County* has nothing to say about that choice. Rather, the question is about the nature of the *relief* that the party

seeks. Under *Pender County*, courts may not change the rules for an election that has already begun. 361 N.C. at 510, 649 S.E.2d at 376. The Court stressed, for example, that candidates had begun to act "in reliance upon" the legislative districts that the General Assembly had imposed. *Id.* In other words, even though plaintiffs' challenge to a legislative district was meritorious, the challenge came too late for a backward-looking remedy. The remedy for the violation would instead have to run prospectively, after the 2008 election concluded. *Id.*

The same result follows here. The 2024 general election began (and ended) long ago, so the rules *for that election* cannot now be retroactively changed. If Petitioner were seeking forward-looking relief for future elections, by contrast, there would be no *Pender County* bar. In fact, most of the protests here are the subject of pending lawsuits that seek changes to the State's election rules for future elections. *See Republican Nat'l Comm. v. N.C. State Bd. of Elections*, No. 24-cv-547, D.E. 73 at 4 (E.D.N.C. Nov. 22, 2024); *Kivett v. N.C. State Bd. of Elections*, No. 281P24 (N.C. Nov. 1, 2024). Thus, applying *Pender County* here will not immunize these or other future election challenges from judicial review.

Petitioner makes the sweeping assertion that "no jurisdiction" has ever applied the principles in *Purcell* and *Pender County* to a lawsuit brought after an election. Br. 56. That is simply incorrect. The U.S. Supreme Court has repeatedly invoked the *Purcell* principle during an election cycle—*after* some votes have already been cast. In so doing, the Court has made clear that any votes that were cast that complied with the election rules in place at the time may not be thrown out. *See, e.g.*, *Andino v. Middleton*, 141 S. Ct. 9, 9-10 (2020) (invoking *Purcell* to stay an injunction that had been entered against a state election rule, but expressly ordering that ballots cast before the stay "may not be rejected for failing to comply" with the reinstated election rule); *see also Trump v. Biden*, 951 N.W.2d 568, 577 (Wis. 2020) (rejecting claims brought "after the election to raise selective challenges that could have been raised long before the election").

Second, Petitioner argues that applying *Pender County* would be incompatible with the election-protest statutes, which impose a deadline for filing post-election protests. Br. 57. Petitioner is once again mistaken. Legislatures are "understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). *Purcell* and *Pender County* reflect such principles. *See*

Crookston v. Johnson, 841 F.3d 396, 398 (6th Cir. 2016) (Sutton, J.) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."). For example, the Wisconsin Supreme Court has applied laches to bar post-election challenges to roughly 220,000 votes under Wisconsin's election-protest statute. *Trump*, 951 N.W.2d at 570. The court explained that "the proposition that laches may bar an untimely election challenge . . . appears to be recognized and applied universally." *Id.* at 572-73 & n.7 (collecting numerous cases). Applying this principle, the court found unreasonable delay in bringing election challenges when those challenges similarly concerned events and rules in place long before the start of the election. *Id.* at 575 . "The time to challenge election policies," the court explained, "is not after all ballots have been cast and the votes tallied." *Id.* at 575-76. Rather, "[p]arties bringing election-related claims have a special duty to bring their claims in a timely manner." *Id.* at 577. "Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results." *Id.*

Petitioner is also incorrect that applying *Pender County* would bar all post-election protests. Because *Pender County* seeks to ensure clear and

settled election rules, it does not apply to claims arising from unforeseen election-day errors or improprieties. When a party brings "claims . . . of improper electoral activity"—rather than "issues that arise in the administration of every election"—those claims do not face the *Pender County* bar because the party lacked advance notice of the alleged impropriety. *See id.* (drawing this distinction).

The election-protest statutes support this distinction. They apply to "the conduct of an election"—that is, a party may protest "the manner in which votes were counted and results tabulated" or "some other irregularity." N.C. Gen. Stat. §§ 163-182.9(a), (b)(2). The plain text of these statutes thus undermines Petitioner's claim that they can be used as a vehicle for retroactively challenging longstanding election rules after the election has concluded. The statutes instead focus on allowing voters and candidates to challenge errors or improprieties that arise during the administration of an election—challenges that *Pender County* does not in any way prohibit.

5. This Court can and should rule based on *Pender County*.

Petitioner is wrong that this Court is somehow precluded from considering our Supreme Court's decision in *Pender County*. Br. 52-53.

First, Petitioner is wrong that the Board did not base its decision on the rationale underlying the *Pender County* rule—that courts should refrain from changing election rules close to an election. In fact, the Board reasoned that, even if Petitioner's protests had merit, they should be denied because the Board could not change the rules on voters who "did everything that was asked of them" in the election process. (R p 30) The Board has never wavered from this position. In its first substantive response in state court, to Petitioner's petition for a writ of prohibition, the Board argued that "[t]o change the rules of the election now—months after millions of North Carolinians have already cast their ballots—would fundamentally alter the nature of the election and gravely affect the integrity of the election process." No. 320P24, Respondent's Br. at 33-36.

Second, Petitioner claims that a little-known North Carolina Supreme Court case supposedly establishes the "fundamental" principle that agencies cannot make arguments in court that do not precisely match the grounds for their decision. Br. 52 (citing *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986)). To the Board's knowledge, however, our Supreme Court has *never* cited *Godfrey* for the proposition Petitioner advances. Instead, it has generally cited *Godfrey* for the uncontroversial principle that

"fact finding is not a function of our appellate courts." *See, e.g.*, *State v. Best*, 376 N.C. 340, 341, 852 S.E.2d 191, 194 (2020). That makes sense. *Godfrey* held that a court may not substitute its own analysis of the *factual* record for the agency's. 317 N.C. at 63, 344 S.E.2d at 279 (noting that the question at issue required "resolution of questions of fact"); *see also Frazier v. Town of Blowing Rock*, 286 N.C. App. 570, 576, 882 S.E.2d 91, 96-97 (2022) (same); *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 191-92, 689 S.E.2d 576, 587 (2010) (same). Of course, that concern is not at play here.

Thus, the Supreme Court's analysis in *Godfrey* arose from a particular procedural posture: state courts applying an arbitrary-and-capricious standard of review to a fact-intensive agency decision related to a zoning ordinance. *Godfrey*, 317 N.C. at 63-64, 344 S.E.2d at 279-80. Applying the arbitrary-and-capricious standard, the Supreme Court in *Godfrey* limited its review of the board's decision to whether it was "supported by substantial evidence," not whether the legal theory relied upon by the agency was proper. *Id.* at 60, 344 S.E.2d at 278.

The procedural posture in this case is completely different. State courts are reviewing de novo a decision by the Board that Petitioner's challenge fails as a matter of law. And under de novo review, this Court may

"consider the matter anew and freely substitute its own [legal] judgment for the agency's." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (cleaned up). This de novo review grants this Court the authority to affirm the Board's decision on any independent *legal* basis. *See Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017) (a decision reviewed de novo "should be affirmed on appeal if there is any ground to support the decision"); *cf. Steiner v. Windrow Estates Home Owners Ass'n, Inc.*, 213 N.C. App. 454, 467, 713 S.E.2d 518, 528 (2011) (appellate courts may "affirm the trial court's ruling for any reason presented before it which is supported by the evidence and law").

After all, when resolving election protests, the Board serves as a "quasi-judicial agency." *Ponder v. Joslin*, 262 N.C. 496, 501, 138 S.E.2d 143, 147 (1964). And where an agency performs its quasi-judicial function in rendering a decision, a court, under de novo review, may affirm that agency's decision on any legal ground as well. That is why both this Court, our Supreme Court, and the U.S. Supreme Court routinely decide appeals based on *legal* issues that the agency did not reach or address. *See, e.g.*, *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544 (2008) (holding that the rule that an agency decision cannot be affirmed for "justification in court different from what it provided in its opinion . . . has no application" for issues of law);

Craven Cnty. Bd. of Educ. v. Boyles, 343 N.C. 87, 89, 468 S.E.2d 50, 51 (1996) (deciding a constitutional issue that OAH never considered); *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 225 N.C. App. 120, 134-35, 738 S.E.2d 187, 196-98 (2013) (deciding constitutional issue that the Utilities Commission never addressed).

B. Canceling votes cast in compliance with guidance from election officials would violate longstanding North Carolina Supreme Court precedent.

This Court should affirm the dismissal of Petitioner's petitions for another threshold reason: Our Supreme Court has held for more than a century that votes cast in compliance with guidance from election officials cannot be retroactively canceled. Like the Supreme Court's decision in *Pender County*, these cases further confirm that remedies in the election context must run prospectively, not retrospectively.

Our Supreme Court's precedent in this area traces its roots to the 1868 Constitution. The Constitution at that time imposed a "duty" on the General Assembly to "provide" "for the registration of all electors." N.C. Const. of 1868, art. VI, § 2. The Constitution further stated that "no person shall be allowed to vote without registration, or to register, without first taking an

oath or affirmation" to "support and maintain" the state and federal constitutions. *Id.*

An 1889 law implemented this constitutional provision. It provided that "[n]o registration shall be valid unless it specifies as near as may be the age, occupation, place of birth and place of residence of the elector, as well as the township or county from whence the elector has removed—in the event of a removal—and the full name by which the voter is known." Act of Mar. 9, 1889, ch. 287, § 3, 1889 N.C. Sess. Laws 289, 289.

Shortly after the law was passed, our Supreme Court considered whether ballots cast by voters whose registrations failed to meet the registration law's requirements could be validly counted in an election. In *State ex rel. Harris v. Scarboro*, 110 N.C. 232, 14 S.E. 737 (1892), the Court explained that the 1889 law "in unmistakable and imperative terms, declares that the registration in each particular case shall be invalid and void for failure to comply with the specific requirements." *Id.* at 239, 14 S.E. at 739. Applying that rule, the Court held that voters who listed their place of birth or residence as "North Carolina" in their registration had failed to comply with the law because that answer "was not sufficiently specific." *Id.* at 241, 14

S.E. at 739. Votes cast by those individuals, the Court concluded, were invalid. *See id.* at 241-42, 14 S.E. at 739-40.

Justice Clark dissented in part. He objected to the Court's decision holding that these ballots were "per se" invalid. *Id.* at 243, 14 S.E. at 740 (Clark, J., concurring in part and dissenting in part). If election officials had asked for a response more specific than "North Carolina" when the voters registered, and the voters had failed to provide one, Justice Clark agreed that those individuals could be lawfully denied the right to vote. *Id.* By contrast, if election officials did not ask for more specific information when the voters registered, Justice Clark would have held that the voters were "guilty of no disobedience of law or other act which deprived [them] of [their] right to vote." *Id.* From the voter's perspective, "the acquiescence of the [election] officer" was "a representation that the answer was a full compliance with the requirements of the law." *Id.* at 244, 14 S.E. at 740. "Any other view," Justice Clark argued, "would make the registration of voters not an impartial observance of regulations to protect the electoral franchise, and to prevent frauds upon it, but would furnish opportunities whereby the trusting, the unwary, the unskilled, or the ignorant would be deprived of their constitutional right of exercising the right of voting." *Id.*

Just five years later, our Supreme Court unanimously reversed its decision in *Scarboro* and instead adopted the reasoning of Justice Clark's dissent. In *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 26 S.E. 638 (1897), the Court considered a dispute over the winner of the 1894 election for Clerk of the Cleveland County Superior Court. *Id.* at 427, 26 S.E. at 638. The unsuccessful candidate in that election challenged certain groups of voters, including voters who cast ballots without first swearing an oath under Article VI, section 2 of the 1868 constitution and voters who were registered by individuals other than the duly appointed election registrars. *Id.* at 427-28, 26 S.E. at 638.

The Court rejected the unsuccessful candidate's effort to retroactively cancel these ballots. As for voters who did not take an oath, the Court held that an election official's error in failing to administer the oath could not be held against the voter. *Id.* at 430, 26 S.E. at 639. "[A] qualified elector," the Court explained, "cannot be deprived of his right to vote, and the theory of our government, that the majority shall govern, be destroyed, b[y] either the willful or negligent acts of the registrar, a sworn officer of the law." *Id.* The Court concluded that such a rule "would be self-destruction—governmental suicide." *Id.*

As for voters who were not registered by a duly appointed election registrar, the Court reached a similar conclusion. The Court acknowledged that "[t]hese registrations were irregularly made, and might have been rejected and erased by the registrars" in the first instance. *Id.* But "instead of their doing this, they retained these names on their books, which they and the judges of election used on the day of election, thereby ratifying and approving these registrations." *Id.* And the Court held that "it would now be a fraud on the electors, as well as on the parties for whom they voted, and also upon the state, to reject these votes for this irregularity." *Id.* at 430-31, 26 S.E. at 639. Thus, "[t]hese votes cannot be rejected for this reason." *Id.* at 431, 26 S.E. at 639.

As the Court explained, "[t]he object of the law—a fair and full expression of the will of the qualified voters—must be kept in mind." *Id.* at 432, 26 S.E. at 640. "[M]ere irregularities," the Court held, cannot "defeat this will." *Id.* For "what may be a good reason for not allowing a party to register is not always a good reason for rejecting his vote after it has been cast." *Id.* at 433, 26 S.E. at 640.

The Court stressed that "[i]t is the right of parties to have the fairness of elections inquired into for the protection of honest electors." *Id.* at 434, 26

S.E. at 640. "But such legislation is not to be regarded as hostile to the right of a free exercise of the right of franchise, and should receive such construction by the courts as will be conductive to a full and fair expression of the will of the qualified voters." *Id.* The Court thus expressly "overruled" its decision in *Scarboro* and held that "the more liberal construction placed upon the [registration] statute in the dissenting opinion is approved." *Id.*

A decade later, the Court again confronted whether courts could retroactively cancel ballots cast by voters who did not take an oath at the fault of election officials. *Gibson v. Bd. of Comm'rs*, 163 N.C. 510, 512, 79 S.E. 976, 977 (1913). The Court reaffirmed *Lattimore* "in the interest of a free and full expression of the popular will." *Id.* Citing *Lattimore*, the Court held again that "where a registrar of election registers a person entitled, under the Constitution and laws to vote, but through inadvertence or fraud fails to administer the oath required to be administered, such person shall not be for that reason deprived of his vote." *Id.*

The Court confronted the same fact pattern again in *Woodall v. Western Wake Highway Commission*, 176 N.C. 377, 97 S.E. 226 (1918), and reached the same conclusion. There, registrars again failed to administer the oath to certain voters. *Id.* at 388, 97 S.E. at 231. The Court again rejected the

argument that such voters could have their ballots canceled. Following *Lattimore*, the Court held that "[w]here a voter has registered, but the registration books show that he had not complied with all the minutiae of the registration law, his vote will not be rejected." *Id.* at 389, 97 S.E. at 232.

Our Supreme Court has since repeatedly confirmed the rule that lawfully eligible voters should not have their ballots canceled based on technical errors in the registration process or mechanics of voting, when they acted in reliance on guidance from election officials, even when that guidance is later determined to have been incorrect. *See, e.g.*, *Owens v. Chaplin*, 228 N.C. 705, 711, 47 S.E.2d 12, 17 (1948) ("We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake, or even the willful misconduct, of election officials in performing the duty cast upon them." (quotation marks omitted)); *Overton v. Mayor of Hendersonville*, 253 N.C. 306, 315, 116 S.E.2d 808, 815 (1960) ("[I]n the absence of actual fraud participated in by an election official or officials and the voter, voters are not to be denied the right to vote by reason of ignorance, negligence or misconduct of the election officials.").

These longstanding precedents resolve this case. The rules that Petitioner challenges have long been in place, without issue or protest. As in

numerous past elections, the challenged voters here cast ballots in line with all applicable rules in place at the time of the election. It would therefore be fundamentally unfair to retroactively cancel their ballots and disenfranchise innocent voters.

Petitioner barely acknowledges this line of authority. Br. 72-73. He first contends that the voters in these earlier cases did everything that was asked of them, pointing to the obligation to administer oaths that fell on election officials. Br. 72. But that is not accurate. In *Lattimore*, for example, some voters had failed to properly register. 120 N.C. at 430-32, 26 S.E. at 639-40. Our Supreme Court nonetheless held that their votes could not be retroactively canceled. "[W]hat may be a good reason for not allowing a party to register," the Court explained, "is not always a good reason for rejecting his vote after it has been cast." *Id.* at 433, 26 S.E. at 640.

More broadly, Petitioner's argument is fundamentally inconsistent with his entire theory of the case. From the first page of his brief, Petitioner asserts time and again that the *Board* has "broken the law." Br. 1; *see also* Br. 17, 28, 39. Supreme Court precedent squarely precludes a court from canceling the votes of innocent voters merely because the court concludes, with the benefit of hindsight, that the Board's guidance to voters was

incorrect. When innocent voters follow the advice of election officials, courts cannot later retroactively cancel their votes.

Petitioner also claims that the election-protest statutes render these cases "obsolete," because those statutes now permit a candidate to bring such challenges after an election. Br. 73. But that is the same fact pattern that our Supreme Court has already considered in prior cases—post-election challenges seeking to cancel votes that allegedly failed to comply with voting laws. *E.g.*, *Lattimore*, 120 N.C. at 427, 26 S.E. at 638 (action decided in 1897 about the legality of votes cast in 1894 election). The Court has rejected challenges of that kind when voters acted in compliance with guidance from election officials, as they did here.

C. The petitions fail for improper service.

This Court should affirm the dismissal of Petitioner's petitions for judicial review for a final threshold reason: Petitioner failed to properly serve his protests under state law.

Sections 163-182.9 and 163-182.10 of the General Statutes govern the filing and consideration of election protests. These provisions direct the Board to "prescribe forms for filing protests" and to "promulgate rules providing for adequate notice to parties." N.C. Gen. Stat. §§ 163-182.9(c),

-182.10(e). Implementing this legislative mandate, the Board prescribed forms for the filing of protests. *See* 08 N.C. Admin. Code 02 .0111.

For protests concerning "the eligibility or ineligibility of particular voters," the forms direct persons filing protests to serve voters. *Id.* The forms specifically provide that when voters' eligibility to vote is challenged in a protest, voters must be sent "copies of all filings" by "personal delivery, transmittal through U.S. Mail or commercial carrier service," or "by any other means affirmatively authorized" by voters. *Id.*

Here, Petitioner's protests fail because he did not send copies of his protests to voters' addresses. Instead, Petitioner's political party mailed voters a postcard directed to the voter "or current resident" stating that their "vote *may* be affected by one or more protests filed in relation to the 2024 General Election." (Doc. Ex. I 4889 (emphasis added); T pp 46, 89) The postcard did not inform voters that their vote *was* actually being challenged, or the grounds for that challenge. It also did not inform voters that it was meant to effect formal service of an election protest. Rather, the postcard merely directed voters to "scan this QR code to view the protest filings." (Doc. Ex. I 4889)

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*** NOTICE ***

[[First Name]] [[Middle Name]] [[Last Name]], your vote may be affected by one or more protests filed in relation to the 2024 General Election.

Please scan this QR code to view the protest 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).

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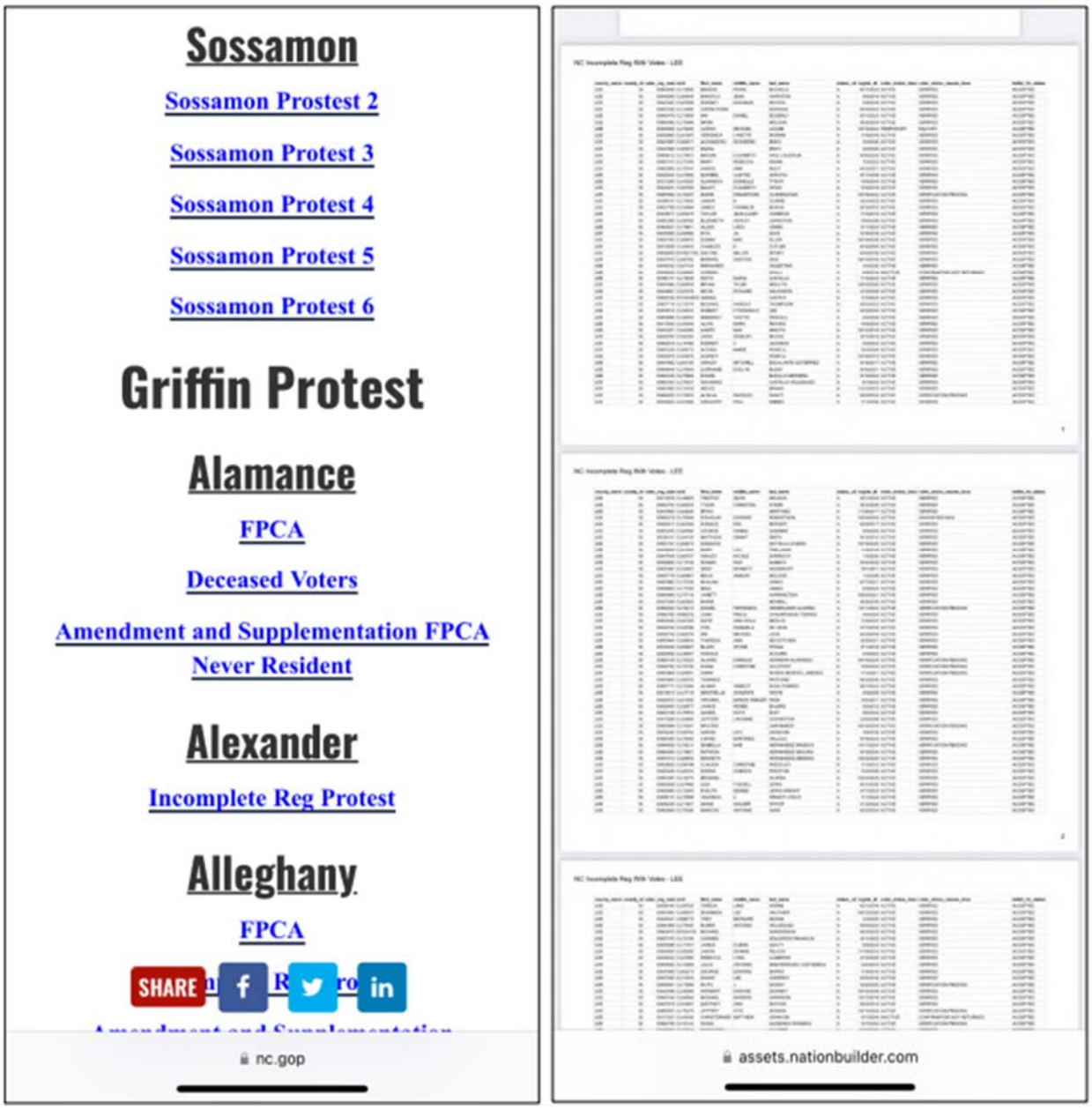
(Doc. Ex. I 4889)

This QR code, when scanned with a smartphone, took users to a website where hundreds of protests were listed, not just from Petitioner, but also from three other campaigns. (Doc. Ex. I 5408-09) Voters then, to find out if any protests concerned them, had to scour hundreds of protests and thousands of names to try to locate their names on attached spreadsheets. (Doc. Ex. I 5409) As shown below, these spreadsheets listed voters' names in small print, out of alphabetical order. (Doc. Ex. I 5409)



(Doc. Ex. I 5409)

Thus, Petitioner failed to serve voters with "copies" of his protests via "personal delivery, transmittal through U.S. Mail or commercial carrier service." 08 N.C. Admin. Code 02 .0111. At best, he served voters with copies via a QR Code, in a confusing manner that failed to directly inform voters

that he was actually challenging their votes. Petitioner's protests were therefore properly rejected for failure to provide proper service.

Petitioner suggests that this failure should be ignored because he had no obligation to serve his protests on voters at all. Br. 61-62. He claims that the county boards have exclusive statutory responsibility for "giv[ing] notice" of "protest hearing[s]." Br. 62; N.C. Gen. Stat. § 163-182.10(b).

But Petitioner overlooks that the General Assembly *also* directed the Board to "promulgate rules providing for adequate notice" of election protests. N.C. Gen. Stat. § 163-182.10(e). The Board's rulemaking authority is thus not limited to prescribing rules for the *county boards* to follow when they provide notice of a *hearing*, as Petitioner argues. Instead, the Board has authority to require that separate notice also be provided when persons *file protests* that initiate legal proceedings, just as civil litigants must do when initiating a case.

The Board's duly promulgated rules, moreover, leave no doubt that Petitioner was required to notify voters in this situation, *see* 08 N.C. Admin. Code 02 .0111—which Petitioner expressly agreed to do. (Doc. Ex. I 8) Given this commitment, Petitioner cannot now claim he had no obligation to notify the voters he seeks to disenfranchise.

Petitioner also argues that his postcard "complied with the Board's service demand." Br. 62. This argument, however, cannot be squared with the text of the Board's service rule. That rule does not require protesters to mail voters postcards stating that their votes *might* be affected. It rather requires service of "copies" of actual "filings" via "U.S. Mail or commercial carrier service," so that voters know that their votes *are* being protested. 08 N.C. Admin. Code 02 .0111. Because Petitioner indisputably did not provide such service, the Board properly dismissed his protests.[8]

II. The Petitions For Judicial Review Fail On The Merits.

If the Court rejects the Board's threshold arguments, it should nonetheless affirm the superior court's order denying the petitions for judicial review because each category of Petitioner's election protests fails on the merits.

A. Petitioner has not shown election-law violations based on alleged incomplete voter registrations.

1. North Carolina law implements a process for voter registration and list maintenance.

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[8] Petitioner notes that the Board sometimes sends cards to voters with QR codes. Br. 63-64. The cards that Petitioner references, however, did not purport to effect formal service of legal filings. Nor was the method of sending these cards prescribed by a clear administrative rule, as here.

In 2003, the General Assembly enacted a statute that applied the requirements of the federal Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002), to state elections. Act of June 19, 2003, S.L. No. 2003-226, 2003 N.C. Sess. Laws 341. The law updated and amended many of the rules governing voter registration and list maintenance in state elections.

Three state registration laws are at issue here. The first is section 163-82.4. That statute requires all voter registration applications to "request" that voters provide their driver's license number or the last four digits of their social security number. N.C. Gen. Stat. § 163-82.4(a)(11). It also allows voters who have not been issued one of those numbers to receive a "unique identifier number" from the Board for registration. *Id.* § 163-82.4(b). If a "voter fails to complete any required item on the voter registration form," the law requires the county boards of elections to "identify and contact" the voter so that the voter "shall be notified of the omission and given the opportunity to complete the form at least by 5:00 P.M. on the day before the county canvass." *Id.* § 163-82.4(f).

The second registration law is section 163-82.12. That statute directs county boards to attempt to match identification numbers provided on a

registration form with an existing government database. *Id.* § 163-82.12(6)-(9).

The third registration law is section 163-166.12. That statute governs the requirements for certain voters who register by mail. These voters must provide, with their registration or upon voting for the first time, a "current and valid photo identification" or a copy of "a current utility bill, bank statement, government check, paycheck, or other government document" showing "the name and address of the voter"—a so-called "HAVA ID." *Id.* § 163-166.12(a), (b), (f)(1); *see id.* § 163-82.6B(e). If these voters provide an identification number that matches with an existing government database, they are exempt from this requirement. *Id.* § 163-166.12(f)(2). In addition, this statute provides that "[r]egardless of whether an individual has registered by mail or by another method," if the identification number on the voter's registration form does not match with an existing government database, the individual may vote by presenting a HAVA ID when they vote for the first time. *Id.* § 163-166.12(d). The statute specifically clarifies that "[i]f that identification is provided and the board of elections does not determine that the individual is otherwise ineligible to vote a ballot, the

failure of identification numbers to match shall not prevent that individual from registering to vote and having that individual's vote counted." *Id.* Once a voter's registration form has been accepted by state officials, that voter is added to the state voter registration system, "the official voter registration list for the conduct of all elections in the State." *Id.* § 163-82.10(a).

2. Petitioner has not established probable cause of any violation of the voter-registration laws.

Petitioner has not shown probable cause of a violation of the voter-registration laws here. Probable cause requires "a reasonable ground for belief" that the law has been violated, a belief that must be "particularized with respect to" the individual who allegedly committed the violation. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The question is whether an objectively reasonable decisionmaker can reach a "reasonable conclusion to be drawn from the facts known . . . at the time" that a legal violation "has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

Under this standard, Petitioner has failed to show probable cause of any state-law violation. Petitioner's protest is based on a list of over 60,000 registered voters—provided to him by the Board—who lack a recorded driver's license or social security number in the Board's database and who

voted early or absentee in the 2024 elections. Petitioner carelessly assumes that all of these voters are improperly registered. Br. 9. But this assumption is indisputably false.

For numerous reasons, a voter may lack a driver's license or social security number in their records and still be registered in accordance with state law. For example: (1) a voter does not have a driver's license or social security number; (2) a database-matching failure resulted in identification numbers not being retained in the record; (3) voters who registered before the effective date of HAVA have a new post-HAVA registration that is not linked to their pre-HAVA registration; and (4) voters provided an identification number in a previous application under a registration record different than the one that is contested. (Doc. Ex. II 226-27 ¶ 9, 229-30 ¶ 14)

First, voters who have not been issued a driver's license or social security number will necessarily lack this information in the Board's database. But these voters are nonetheless allowed to register to vote using a number assigned to them by the Board. N.C. Gen. Stat. § 163-82.4(b). (Doc. Ex. II 230 ¶ 14(f))

Second, many voters who *did*, in fact, provide an identification number when they registered may nevertheless not have that number recorded in the

Board's database because of a database-matching failure. (Doc. Ex. II 226-27 ¶ 9; Doc. Ex. I 5383 ("Unvalidated identification numbers are not retained in a voter's registration record.")) As discussed, state law instructs election officials to establish a system to attempt to "match" the identification number provided in an application with existing government records. N.C. Gen. Stat. § 163-82.12(6)-(9). But county workers may make "routine data entry errors" that do not enable a match and cause the database to lack a recorded identification number. (Doc. Ex. I 5391-92 n.16) Voters may also make a data-entry error in their registration form causing the database to lack this information. (*See* Doc. Ex. I 5383) The matching error may also result from voters having different names at different points in their lives—for example, differences between married and maiden names or hyphenated last names.

Importantly, state law explicitly contemplates that these kinds of matching errors might occur and that voters are not improperly registered as a result—"[r]egardless of whether an individual has registered by mail or by another method." N.C. Gen. Stat. § 163-166.12(d). If a matching error occurs, voters must provide a HAVA ID before or upon voting for the first time. *Id.* In doing so, the General Assembly made clear that "[i]f that identification is

provided and the board of elections does not determine that the individual is otherwise ineligible to vote a ballot, the failure of identification numbers to match shall not prevent that individual from registering to vote and having that individual's vote counted." *Id.*

Third, although Petitioner purports to challenge only those voters who were registered after HAVA's effective date, some of these voters actually "registered *prior* to the effective date of HAVA but a new registration was created for them that is not linked to that older registration." (Doc. Ex. I 5391-92 n.16 (emphasis added); *see also* Doc. Ex. II 229 ¶ 14(a)) Yet nothing in state law required voters who registered to vote before HAVA's effective date to re-register in compliance with HAVA's requirements.

Fourth, voters may lack this information in the Board's database because they "supplied such a number in a previous application under a different registration record than the one challenged." (Doc. Ex. I 5392 n.16; *see also* Doc. Ex. II 229-30 ¶¶ 14(b) and (c)). But again, nothing in state law provides any basis to conclude that such voters would be improperly registered.

As these examples show, a voter may have registered to vote in full compliance with state law, but their records nevertheless lack an

identification number in the Board's database. Petitioner has failed to even *attempt* to establish probable cause that *any* of the 60,000 voters he targets fall outside these circumstances. Lacking any particularized, objectively reasonable facts with respect to any individual voter, Petitioner cannot meet the probable-cause standard. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (probable cause must be "particularized with respect to that person").

3. Petitioner's contrary arguments are unpersuasive.

At the outset, Petitioner confuses voter registration with voter *eligibility*. Br. 36-37. Under Article VI, section 1 of our State's constitution, to vote, an individual must (1) be at least 18 years old, (2) be a U.S. citizen, and (3) meet "the qualifications set out in this Article." N.C. Const. art. VI, § 1. In turn, Article VI, section 2 lists the three additional "Qualifications" required to vote: an individual must (1) be permitted to vote at least so long as the individual has, before the election, resided in the State for a year and in the precinct for 30 days; (2) not have been adjudged guilty of a felony without having citizenship rights restored; and (3) for in-person voters, present photo ID or meet a qualifying exception. N.C. Const. art. VI, § 2(1), (3)-(4). Petitioner has never suggested that the more than 60,000 voters he

challenges in this protest category are *actually* ineligible to vote in North Carolina elections for failure to meet one of these requirements.

To be sure, our constitution separately provides that "[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. But the constitution expressly chose not to classify a valid registration as a voter "qualification." To the contrary, qualifications are instead set out in the preceding sections, Article VI, sections 1 and 2. Our Supreme Court, moreover, has many times rejected the argument that a technical error in registration could ever be a basis for canceling a vote under substantively similar constitutional provisions. *See supra* Part I.B.

In any event, Petitioner is wrong that he has established probable cause of a violation of the registration laws. Petitioner's entire argument is built on a false premise: that when the statewide database lacks an entry for a voter's driver's license or social security number, that voter necessarily failed to register in accordance with state law. To the contrary, as discussed above, state law expressly contemplates that many lawfully registered voters will not have a validated identification number in their voter records and creates a process for verifying their identity to allow them to vote. N.C. Gen.

Stat. § 163-166.12(d). And state law elsewhere allows some voters to register and cast ballots absent this information entirely. *Id.* § 163-82.4(b).

Petitioner's reference to section 163-82.4(f) as the only way to cure voter registrations that lack a driver's license or social security number reflects a simple misunderstanding of the statute. Petitioner claims that if a voter fails to provide the omitted information by the deadline set out in this provision, that person is not allowed to vote. Br. 38. But section 163-82.4(f) applies *before* a voter has been registered by a county board. N.C. Gen. Stat. § 163-82.4(f). And it requires the *county board*, not the voter, to take steps in the event of an incomplete voter registration by contacting the voter and giving the voter an opportunity to correct the application. *Id.* Here, by contrast, Petitioner is challenging the votes of voters whom the county boards have *already* admitted to the voter rolls. And again, there are numerous ways that a voter may be registered in compliance with state law, but lack an identification record in the Board's database. In any event, section 163-82.4(f) only applies to a "required item," and the registration law at issue provides that a registration form "request"—rather than "require"—this information. That is another textual clue that section 163-82.4(f) is not a ground for invalidating these votes.

B. Military and overseas voters did not have to submit a copy of photo ID with their absentee ballots.

Petitioner seeks to cancel the votes of military and overseas voters who did not include a copy of their photo ID with their absentee ballot. Br. 16-27.[9] One of the Board's rules, however, has provided that "[m]ilitary and [o]verseas [v]oters" are "not required to submit a photocopy of acceptable photo identification" or an affidavit explaining their reason for not doing so. 08 N.C. Admin. Code 17 .0109(d). This rule, as shown below, accurately describes North Carolina law.

1. North Carolina law does not require military and overseas voters to submit a copy of a photo ID.

Absentee ballots in North Carolina may be submitted under two different sets of statutes—one for civilian residents, and another for military and overseas voters. For civilian residents, absentee ballots must be cast under Article 20 of Chapter 163 of the General Statutes. Under that article,

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[9] Petitioner implies that he only seeks to cancel ballots cast by "overseas" voters. Br. 16. In fact, his protests explicitly challenge votes cast by military voters, many of whom do not reside overseas. (*See* Doc. Ex. I 1504-51, 3792-831, 3893-924, 4008-42); *N.C. Absentee & Early Voting Statistics for the 2024 General Election* 2-4, N.C. State Bd. of Elections (showing that total votes that Petitioner challenges necessarily includes votes cast by military voters), https://tinyurl.com/4jyz2fh8 (last visited Feb. 26, 2025).

all absentee ballots must be "accompanied by a photocopy of [an] identification" or an exception "affidavit," also known as a Photo ID Exception Form. N.C. Gen. Stat. § 163-230.1(f1). By its own terms, however, this requirement is limited only to voters who cast ballots under Article 20. The statutory requirement states that "ballots [voted] *under this section* [in Article 20] shall be accompanied by a photocopy of identification." *Id.* (emphasis added).

Military and overseas voters, however, may choose to cast absentee ballots under a distinct set of rules. In 2011, the General Assembly enacted model legislation known as UMOVA, which is codified in Article 21A of Chapter 163. *See* Act of June 16, 2011, S.L. No. 2011-182, sec. 1, 2011 N.C. Sess. Laws 687, 687-92. Military and overseas voters may choose to vote under UMOVA's rules rather than Article 20's rules. *See, e.g.*, N.C. Gen. Stat. §§ 163-258.2(1), -258.7(a).

Unlike Article 20's rules for civilian residents, UMOVA contains no provision that requires military and overseas voters to provide a copy of a photo ID with their ballots. *See id.* §§ 163-258.1 to -258.31. UMOVA rather contains distinct provisions that provide for a voter's identity to be verified by other means, which do not require submission of copied identification.

See, e.g., *id.* §§ 163-258.4(e), -258.13 (requiring voters to make sworn declaration affirming their identity and eligibility to vote).

UMOVA's lack of a photo ID requirement is not accidental, because UMOVA was written to carry out federal law that also lacks any such rule. UMOVA implements federal legislation called UOCAVA for North Carolina elections. *See, e.g.*, *id.* § 163-258.11. UOCAVA requires states to allow military and overseas voters to register, request ballots, and vote by mail in federal elections using specific federal forms and procedures. *See* 52 U.S.C. §§ 20301-11. These forms do not require submission of copies of a military or overseas voter's photo ID. (*See* Doc. Ex. I 5405) And the instructions given to voters in every state using these forms, including those states that require civilian absentee voters to comply with a photo ID requirement, likewise do not instruct military and overseas voters of any such photo ID requirement. (*See* Doc. Ex. I 5405)

Federal law also exempts military and overseas voters from having to offer such ID to vote in federal elections. *See* 52 U.S.C. § 21083(b)(3)(C). Accordingly, when certain states once considered imposing a state-law identification requirement on UOCAVA voters, the Trump Administration informed them that such a rule would likely violate federal law. It explained

that military and overseas voters "face complexities in the voting process" that other voters "do not face," and that requiring "additional identification" unlawfully "adds to the burden" that these voters already "face when attempting to vote."[10]

This federal law is relevant here in construing UMOVA's rules under state law for this state election. UMOVA not only implements UOCAVA for federal elections in North Carolina; it also allows military and overseas voters to vote in both federal *and* state elections under the *same* set of rules. *See, e.g.*, N.C. Gen. Stat. § 163-258.3. Indeed, UMOVA's purpose is "to extend to state elections the assistance and protections for military and overseas voters currently found in federal law," under which military and overseas voters need not present a photo ID to vote.[11]

Thus, Petitioner is wrong that state law required military and overseas voters to submit a copy of photo ID with their ballots. That requirement appears in a provision of the rules for civilian residents in Article 20, and it

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[10] *See* Letter from David Beirne, Director, Fed. Voting Assistance Program, to Edgardo Cortes, Comm'r, Va. Dep't of Election (Feb. 6, 2017), https://tinyurl.com/2me8w77n (last visited Feb. 27, 2025).

[11] *See* Unif. Mil. & Overseas Voter Act, at 2 (Nat'l Conf. of Comm'rs on Unif. State Laws 2010), https://tinyurl.com/4jnwh54k (last visited Feb. 27, 2025).

expressly applies only to persons who cast ballots "under [that] section." *Id.* § 163-230.1(f1). In contrast, UMOVA contains no such rule. And the Board's rule was approved by the legislatively appointed Rules Review Commission without controversy, and the bipartisan Board rejected this protest in a unanimous vote because the rule was in place before and during the election. (Doc. Ex. I 5404, 5406)

2. Petitioner fails to show that military and overseas voters had to submit a copy of their photo ID.

Petitioner advances a series of arguments to try to show that military and overseas voters, like other voters, had to present a copy of a photo ID with their absentee ballots. Br. 16-27. None of his arguments are persuasive.

First, Petitioner argues that "federal law" has no relevance with respect to the proper interpretation of UMOVA. Br. 26. As shown, however, the purpose of UMOVA is "to extend to state elections the assistance and protections for military and overseas voters currently found in federal law." Unif. Mil. & Overseas Voter Act, at 2. And those federal rules, as the Trump Administration has advised, do not impose identification requirements on UOCAVA voters in federal elections. *See supra* Part II.B.1.

Second, Petitioner argues that the "general absentee voting provisions of Article 20 [for civilian residents] apply to overseas absentee voting under Article 21[A]"—where UMOVA is codified. Br. 17. In support, he cites Article 20's final provision, entitled "Article 21A relating to absentee voting by military and overseas voters not applicable." N.C. Gen. Stat. § 163-239. This provision states that "[e]xcept as otherwise provided therein, Article 21A of this Chapter shall not apply to or modify the provisions of this Article [20]." *Id.* Petitioner reads this provision as applying all of Article 20's rules, including its photo ID requirement, to persons voting under UMOVA's provisions in Article 21A.

Petitioner has things backwards. This provision states that the rules in "Article 21A . . . shall not apply to or modify . . . Article [20]." *Id*. The provision thus simply serves to clarify that *Article 21A* does not apply to civilian voters who vote under Article 20.

Third, Petitioner asserts that Article 20's photo ID requirement applies to military and overseas voters because Article 20 "has many general provisions about absentee voting" that apply to UMOVA voters, "even though Article 20 does not say so expressly." Br. 20.

But Article 20's photo ID requirement is not one of these general provisions. The requirement states expressly that only "ballots [voted] *under this section* shall be accompanied by a photocopy of identification." N.C. Gen. Stat. § 163-230.1(f1) (emphasis added). And the relevant "section" at issue—section 163-230.1—lies in Article 20, *not* in Article 21A.

Fourth, Petitioner argues that Article 20's provisions concerning "container-return envelope[s]" show that persons voting under UMOVA must provide a copy of their photo ID with their ballots. Br. 18. Again, however, that provision says nothing at all about what voters casting ballots under UMOVA's distinct provisions in Article 21A must do. That provision, as noted, instead mandates only that "voted ballots *under this section*" in Article 20 "shall be accompanied by a photocopy of identification." N.C. Gen. Stat. § 163-230.1(f1) (emphasis added). Ballots cast under UMOVA, however, are not cast under "th[at] section." Nor are those ballots required to be transmitted in a "container return envelope," unlike those submitted under Article 20. *See id.* §§ 163-258.4(d), -259.9(b), -258.10.

Fifth, Petitioner notes that UMOVA provides that military and overseas voters "may apply for an absentee ballot by using 'the regular application provided by Article 20.'" Br. 20 (quoting N.C. Gen. Stat. § 163-

258.7(a)). But Petitioner overlooks that military and overseas voters may choose to vote under *either* Article 20's *or* Article 21A's distinct rules. *See, e.g.*, N.C. Gen. Stat. § 163-231(b)(1) (recognizing that absentee ballots may be "issued" under either "Article [20]" or "Article 21A"). This point does not show that persons voting under Article 21A *also* vote under Article 20's rules.

Sixth, Petitioner claims that if the General Assembly had meant to exempt UMOVA voters from photo ID rules in Article 20, it would have done so expressly. Br. 18. Petitioner again gets things backwards. If the legislature had meant to add a photo ID requirement to UMOVA's preexisting provisions in Article 21A, then it would have amended Article 21A to provide so, as it did with Article 20. But the 2019 session law that newly required civilian voters to provide "a photocopy of identification" with their absentee-by-mail ballot did not amend *any provision* in Article 21A, thereby leaving its preexisting rules in place. *See* Act of Nov. 6, 2019, S.L. No. 2019-239, 2019 N.C. Sess. Laws 1118.

The legislature may have chosen not to amend UMOVA to add a photo ID requirement because it knew that the Trump Administration had recently advised states that requiring military and overseas voters to present a copy of their identification in federal elections would violate federal law. *See supra*

Part II.B.1. And it may have also understood that imposing divergent rules for state elections would defeat UMOVA's purpose of extending "to state elections the assistance and protections for military and overseas voters currently found in federal law." Unif. Mil. & Overseas Voter Act, *supra*, at 2.

Seventh, Petitioner maintains that the Board's administrative rule that confirms that military and overseas voters need not submit a copied photo ID with their ballots is based on an "unconstitutional" legislative "delegation." Br. 25-26. As shown, however, the Board's rule is entirely consistent with the statutes that the General Assembly has enacted on this subject. Indeed, the legislatively-appointed Rules Review Commission, on *three occasions*, concluded that this rule was "within the authority delegated to the [Board] by the General Assembly." N.C. Gen. Stat. § 150B-21.9(a)(1); *see also* Doc. Ex. I 5404.

Eighth, Petitioner argues that allowing military and overseas voters to cast absentee ballots without providing a copy of photo ID is irrational and thus unconstitutional. Br. 26. The State, however, surely has a compelling interest in reducing the many "logistical obstacles" that military and overseas Americans face in voting. Unif. Mil. & Overseas Voter Act, *supra*, at 1. As the Trump Administration has explained, military and overseas voters "face

complexities in the voting process" that other voters "do not face." Letter from David Beirne, *supra*. Helping these voters participate in our democracy and addressing their unique challenges is hardly irrational.

C. Petitioner's protest based on inherited-residence voters fails on the merits.

1. Petitioner's protest cannot affect the results of the election.

Petitioner challenged the votes of 266 overseas citizens who the General Assembly has explicitly allowed to vote even though they have never resided in North Carolina. Br. 8 n.2. Even including the "additional" voters Petitioner cites in his brief, the number of challenged voters in this category is below the margin between the two candidates. Br. 8 n.2. This protest therefore fails because, unless Petitioner prevails on his other protests, this category of voters is not "sufficient to cast doubt on the results of the election." N.C. Gen. Stat. § 163-182.10(d)(2)(c); *see In re Appeal of Ramseur*, 120 N.C. App. 521, 525, 463 S.E.2d 254, 256 (1995) ("North Carolina law on this issue is well settled. An election or referendum result will not be disturbed for irregularities absent a showing that the irregularities are sufficient to alter the result.").

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

If this Court were to overlook the threshold reasons these protests fail, then only the merits of Petitioner's claims would remain. At that point, however, this Court could not proceed on this protest because it attacks the facial constitutionality of a state statute and must therefore be first decided by a three-judge panel.

The inherited-resident statute allows an overseas voter who has never lived in the United States to vote in state elections if they have never registered in another state and their parent or legal guardian last lived in North Carolina. N.C. Gen. Stat. § 163-258.2(1)(e). Petitioner claims that this statute violates our state constitution because, in his view, the constitution requires a voter to have "resided in the State of North Carolina for one year" before the election. Br. 27-28 (quoting N.C. Const. art. VI, § 2)).

This is a classic facial constitutional challenge. Under Petitioner position, subsection (1)e would be unconstitutional in all circumstances. The test for whether a challenge is facial is whether the "claim and the relief that would follow *could* reach beyond the particular circumstances" of a given case. *Singleton v. N.C. Dep't of Health & Hum. Servs.*, 386 N.C. 597, 599, 906 S.E.2d 806, 808 (2024) (cleaned up) (emphasis added). Here, if Petitioner's

arguments are correct, then the entire statutory provision is unconstitutional and therefore *any* votes of inherited residents—even those whose votes Petitioner did not challenge—are invalid. *See* Br. 31-33.

Because Petitioner's challenge to this statute is a facial one, it must be decided by a three-judge panel in the Superior Court of Wake County. Under North Carolina law, "[a]ny action that is a facial challenge to the validity of an act of the General Assembly" must be "heard and determined by a three-judge panel of the Superior Court of Wake County." N.C. Gen. Stat. § 1-267.1(a). However, as a general matter, North Carolina courts should "determine the constitutionality of a statute . . . only to the extent necessary to determine that controversy." *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974). Thus, a case is transferred to a three-judge panel only "if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly *must* be made in order to completely resolve any matters in the case." N.C. Gen. Stat. § 1A-42(b)(4) (emphasis added). As a result, if this Court resolves all of the threshold grounds for dismissing the protests in Petitioner's favor, *see supra* Part I,

then the only relief Petitioner could seek on this protest is a remand for a three-judge panel to address Petitioner's facial challenge.

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

Petitioner's challenge also fails on the merits.

Petitioner accuses the Board of "permitt[ing] people to vote in the general election who have never resided in North Carolina" "[d]espite the constitution's plain language." Br. 28. But of course *the Board* has not granted any such permission. Rather, the Board has implemented a statute enacted by the General Assembly exactly as it is written. Petitioner's argument is really that the *General Assembly* violated our state constitution.

This Court is required to presume that all "laws duly enacted by the General Assembly" are valid. *Fearrington v. City of Greenville*, 386 N.C. 38, 54, 900 S.E.2d 851, 867 (2024) (citations omitted). A challenged law can only be unconstitutional where it is "plainly and clearly the case." *Id.* Petitioner fails to meet this high bar.

Petitioner argues that the canon of constitutional avoidance applies here, but that canon cannot support an implausible reading of the statute. *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). The statute applies to military and overseas voters who meet all of the State's voter-eligibility requirements

"except for a State residency requirement." N.C. Gen. Stat. § 163-258.2(1)(e). "A State residency requirement" as used in Chapter 163 is not an ambiguous term: Since UMOVA was enacted, that term has never been understood to mean anything other than any residency prerequisite to voting. It is also used in two other subsections of UMOVA—including to describe *all* overseas voters—but Petitioner does not suggest that the term is ambiguous in those contexts. *Id.* § 163-258.2(1)(c), (d).

In fact, it is the Board's position that adheres to the constitutional-avoidance canon. By rendering durational residency requirements unconstitutional, the U.S. Supreme Court in *Dunn v. Blumstein* called into question the state constitution's eligibility requirements. 405 U.S. 330, 334 (1972). And since *Dunn*, our Supreme Court has only recognized the State's right to impose bona fide residency requirements that are "appropriately defined and uniformly applied." *Lloyd v. Babb*, 296 N.C. 416, 440, 251 S.E.2d 843, 859 (1979) (emphasis removed). As a result, it is no longer clear what force the clause "[a]ny person who has resided in the State of North Carolina for one year . . . shall be entitled to vote at any election held in this State" has now. N.C. Const. art. VI, § 2(1). If the phrase is to be given any meaning at all now, it can only be understood as conferring an affirmative *guarantee*

that otherwise-qualified citizens who reside here for at least a year "shall be entitled to vote." *Id.* As a result, the General Assembly was within its right to statutorily deem this group of inherited residents as meeting a bona fide residency requirement.

III. Petitioner's Proposed Remedy Is Improper and Unlawful

For all the above reasons, this Court should affirm the superior court's denial of the petition. But even if this Court were to agree with Petitioner that the Board erred in adjudicating his protests, Petitioner's proposed remedy—that a court order the Board to simply cancel the challenged ballots—is clearly improper. Under these circumstances, the only appropriate remedy would be for this Court to remand to the superior court, for a further remand to the State Board for additional proceedings, including factfinding hearings on Petitioner's protests.[12]

A. If this Court grants relief to Petitioner, the only proper remedy would be a remand to the Board.

As described above, the statutory framework for adjudicating elections protests involves multiple steps, including an evidentiary hearing to test a

[12] Given the individualized nature of Petitioner's protests, on remand, the State Board may direct initial hearings to be conducted at the county level where individual voter records are most conveniently available.

protester's allegations against the evidence. *See supra* pp 4-6. Here, the Board dismissed the protests at a preliminary, threshold stage of the process. Specifically, the Board held that the protests failed at the outset because he failed to comply with filing requirements and failed to "establish[] probable cause to believe that a violation of election law or irregularity or misconduct has occurred." N.C. Gen. Stat. § 163-182.10(a); (*see* R pp 13, 25)

Because the Board dismissed the protests at this initial stage, it never moved on to conducting a hearing, where it could receive evidence and engage in factfinding to test Petitioner's factual allegations. *See* N.C. Gen. Stat. §§ 163-182.10(a), (c). As a result, the question before this Court is limited to whether the Board's decision on its initial consideration of Petitioner's protests was legally correct. If this Court disagrees with the Board's legal decisions, the only appropriate remedy would be to remand to for evidentiary hearings. It is *at a hearing* that the State Board or county boards would apply the substantial-evidence standard to resolve Petitioner's protests. *Id.* § 163-182.10(d). Following hearings, the Board would then be

required to "make a written decision on each protest" stating its findings of facts and accompanying conclusions of law. *Id.*[13]

B. Petitioner is wrong that the appropriate remedy to any error is discounting the challenged ballots wholesale.

Petitioner asks this Court to simply "order the State Board to retabulate the vote with the unlawful ballots excluded." Br. 76. This remedy would clearly be improper at this stage of the process. And indeed, it is contrary to the remedy that Petitioner himself requested in his protests.

As detailed above, the State Board dismissed Petitioner's protests at the preliminary consideration stage. *See* N.C. Gen. Stat. § 163-182.10(a). If the Court were to find error in the Board's order dismissing at that preliminary stage, the only appropriate remedy would be a remand to the Board for further proceedings, including an evidentiary hearing, at which the State Board or county boards could conduct any necessary factfinding on an

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[13] Petitioner characterizes the preliminary consideration dismissal as akin to summary judgment, but that is inaccurate. Br. 5. Summary judgment typically follows a period of discovery and is based on uncontroverted material facts established by competent evidence. *See* R. 56. In contrast, at the preliminary consideration stage, the Board reviews threshold questions and must dismiss a protest if, on its face, it fails to substantially comply with filing requirements or fails to establish probable cause of an election-law violation. *See* N.C. Gen. Stat. § 163-182.10(a). This stage is therefore analogous to a Rule 12(b) motion to dismiss. *See* R. 12(b).

individualized basis rather than disenfranchising more than 60,000 voters *en masse* as Petitioner demands. *See id.* §§ 163-182.10(a), (c)-(d).

Petitioner has failed to establish that any voter *actually* registered to vote and cast ballots in violation of the law.[14] Petitioner's request that the Board simply discard all the challenged votes would therefore clearly be improper under the statutes and case law governing election protests. On remand, the Board would be authorized by statute to take a wide variety of measures, as appropriate, in response to an adjudicated election violation. Specifically, the General Assembly has authorized the Board, subject to judicial review, to correct vote totals, order a recount, or take any other action "necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the

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[14] The burden of proof is on the protestor, not the State Board. *In re Appeal of Ramseur*, 120 N.C. App. at 525, 463 S.E.2d at 257; *In re Cleveland Cnty. Comm'rs: Protest of Crawford*, 56 N.C. App. 187, 191-92, 287 S.E.2d 451, 455 (1982); and *In re Clay Cnty. General Election*, 45 N.C. App. 556, 570, 264 S.E.2d 338, 346 (1980)). Nonetheless, as discussed, in response to some of Petitioner's arguments in this litigation, the Board chose to voluntarily perform a preliminary data analysis to evaluate Petitioner's assertions. (Doc. Ex. II 226-29 ¶¶ 8-13) That analysis shows that, as predicted in earlier filings, roughly half, and likely many more, voters challenged by Petitioner did in fact provide a driver's license or social security number when they registered. (Doc. Ex. II 229 ¶ 13)

result of an election." *Id.* §§ 163-182.10(d), -182.12. In addition, under certain limited circumstances, the Board may also order a new election. *Id.* § 163-182.13(a).

Moreover, here, Petitioner does not contest that the vast majority (if not all) of the voters he challenges in this protest are lawful, eligible voters. As a result, on remand, any remedy provided by the state and county boards would have to provide challenged voters an opportunity to address any deficiencies that this Court identifies before their voters are discarded. Indeed, this is exactly the remedy that Petitioner himself requested in his protests. Petitioner did not ask the Board to cancel votes outright in his protests. Instead, in all of his protests on this issue, he asked that:

> The State Board of Elections should (1) notify all voters who registered by a voter registration form since January 1, 2004, and failed to provide a drivers license or social security number that their voter registration was deficient and, absent correction, their vote cannot be counted; (2) inform such voters that they have a cure period during which the voter can provide the missing information; (3), for all such voters who provide a validated drivers license or social security number during the cure period, count the ballots in the election contest identified above; (4), for all such voters who fail to provide a validated drivers license or social security number during the cure period, not count the ballot in the election contest identified above; and (5), after the cure period, correct the vote count accordingly in the election contest identified above.

(*See, e.g.*, Doc. Ex. I 22-23)

This request appropriately recognizes that the outright cancelling of votes cast by lawful, eligible North Carolina voters—without any opportunity to cure—would be inappropriate if this protest ever proceeds to the evidentiary hearing and remedial phases.

In addition, any appropriate remedy on remand would have to be applied in an evenhanded manner, treating all similarly situated voters alike.

In sum, should this Court reverse the Board's initial legal determinations and order a factfinding hearing, and should the Board ultimately find that Petitioner has adduced substantial evidence of an election law violation, discounting ballots is only one of several remedies authorized by law.

IV. Reservation of Rights under *England*

The Fourth Circuit "direct[ed] the district court . . . 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." (R p 145) The district court has modified its order to do so. *Griffin v. N.C. State Bd. of Elections*, No. 24-cv-731, D.E. 35. Those issues include, but are not limited to, the Board's arguments that:

- Petitioner's request to retroactively cancel votes cast in compliance with official guidance from election officials violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177 (4th Cir. 1983).

- Petitioner's request to cancel the votes of only some similarly situated voters violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

- Petitioner's failure to provide voters with adequate notice that he was challenging their votes violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950).

- Petitioner's request to cancel the votes he challenges would violate HAVA, 52 U.S.C. § 20901, *et. seq.*; the NVRA, 52 U.S.C. § 20501, *et seq.*; and the Voting Rights Act, codified in relevant part at 52 U.S.C. § 10307.

The Board identifies these federal issues only to comply with the U.S. Supreme Court's decision in *Windsor*. The Board does not seek to submit any federal issues, including these, to the state courts or to litigate any federal issues in the state courts. The Board "intends, should the state courts hold against [it] on the question of state law, to return to the District Court for disposition of [its] federal contentions." *England*, 375 U.S. at 421. In light of this reservation, the federal district court retains jurisdiction over the federal issues here and the Board's "right to return [to federal court] [is] in all events be preserved" and Petitioner "cannot impair the corresponding

right of the [Board]" "to return to the District Court." *England*, 375 U.S. at 421-22 & n.13.

Petitioner argues that this Court should reject the Board's *England* reservations and reach the federal issues anyway. Br. 47-52. Petitioner's arguments are for the federal courts. The adequacy of an *England* reservation is a federal-law issue that only the federal courts can resolve if this case returns to a federal forum. *See England*, 375 U.S. at 421. For purposes of state-court litigation, however, once an *England* reservation has been made, "no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question." *Id.* at 421 n.13.

As a result, the only issues properly before this Court are questions of state law. Petitioner cannot "impair" the exercise of those federal rights in a state forum. *England*, 375 U.S. at 421 n.13. The Board is not aware of a single case in which the North Carolina courts have so much as analyzed a party's *England* reservations, much less issued a definitive ruling. This issue should be determined by the federal courts at a later juncture, should the matter so return. *Id.* at 421 n.12 ("We are confident that state courts . . . will respect a litigant's reservation of his federal claims for decision by the federal courts.").

CONCLUSION

For the reasons stated above, this Court should affirm the superior court's denial of Petitioner's petitions for judicial review.

Respectfully submitted, this 27th day of February, 2025.

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N.C. R. App. P. 33(b) Certification:
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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with this Court's February 13, 2025 order. According to Microsoft Word, the body of the brief (including footnotes and citations) contains fewer than 17,500 words.

This 27th day of February, 2025.

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CERTIFICATE OF SERVICE

I certify that today, I caused the above document to be served on counsel by e-mail, addressed to:

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