No. 320P24

SUPREME COURT OF NORTH CAROLINA

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JEFFERSON GRIFFIN v. NORTH CAROLINA BOARD OF ELECTIONS	From N.C. Board of Elections

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ORDER

Petitioner filed a petition for writ of prohibition and motion for temporary stay on 18 December 2024 which was subsequently renewed on 6 January 2025.[1] This Court entered an Amended Special Order on 7 January 2025 in which petitioner's emergency motion for a temporary stay was allowed and an expedited briefing schedule was established. Although the time for filing petitioner's reply brief has not expired, the arguments of the parties have been thoroughly developed.

Petitioner contests three categories of potentially illegal votes: (1) 5,509 overseas voters who purportedly violated state law by not providing photo ID; (2) 267 voters who were born abroad and have never resided in this state; and (3) 60,273 voters who failed to provide required information when they registered to vote.

This Court has stated that "[t]o permit unlawful votes to be counted along with lawful ballots in contested elections effectively 'disenfranchises' those voters who cast

[1] Respondent removed this matter to the United States District Court for the Eastern District of North Carolina on 19 December 2024. The matter was remanded to this Court on 6 January 2025.

legal ballots, at least where the counting of unlawful votes determines an election's outcome." *James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005). Indeed, "votes are not accurately counted if ineligible voters' ballots are included in the election results." *Bouvier v. Porter*, 386 N.C. 1, 3 (2024). *See also Swaringen v. Poplin*, 211 N.C. 700 (1937) ("A free ballot and a fair count must be held inviolable to preserve our democracy."); *Harper v. Hall*, 384 N.C. 292, 363 (2023) (Free elections under art. I, § 10 of the North Carolina Constitution includes the right to an accurate counting of votes.).

But a writ of prohibition is an extraordinary writ. The writ "does not lie for grievances which may be redressed, in the ordinary course of judicial proceedings, [or] by appeal . . . it is to be used, like all such, with great caution." *State v. Whitaker*, 114 N.C. 818 (1894); see also *Holly Shelter R. Co. v. Newton*, 133 N.C. 132 (1903) (a writ of prohibition "will not issue when there is any sufficient remedy by ordinary methods, as appeal, injunction, etc., or when no irreparable damage will be done.").

State law allows an aggrieved party to appeal the final decision of the State Board of Elections on an election protest to the Superior Court of Wake County. N.C.G.S. § 163-182.14(b). After filing his petition for writ of prohibition with this Court, petitioner sought judicial review in the Superior Court of Wake County

pursuant to N.C.G.S. § 163-182.14(b) on the same grounds as those set out in his petition (file numbers 24CV040619-910, 24CV040620-910, and 24CV040622-910).[2]

The Court on its own motion dismisses the petition for writ of prohibition so that the Superior Court of Wake County may proceed with the appeals that petitioner filed in 24CV040619-910, 24CV040620-910, and 24CV040622-910. Absent further action by this Court, the temporary stay allowed on 7 January 2025 shall remain in place until the Superior Court of Wake County has ruled on petitioner's appeals and any appeals from its rulings have been exhausted. The Superior Court of Wake County is ordered to proceed expeditiously.

IT IS SO ORDERED.

By order of the Court in Conference, this the 22nd day of January 2025.

/s/ Allen, J.
For the Court

Riggs, J., recused

[2] Respondent also removed the petitions for judicial review to the United States District Court for the Eastern District of North Carolina.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of January 2025.

Grant E. Buckner
Clerk of the Supreme Court

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Chief Justice NEWBY concurring.

I concur in the decision to dismiss petitioner's petition for writ of prohibition. Our General Statutes clearly provide that petitioner's right of appeal from the decision of the State Board of Elections lies with the Superior Court of Wake County. N.C.G.S. § 163-182.14(b) (2023). Petitioner needs to follow this procedure.

I write separately to emphasize that this case is not about deciding the outcome of an election. It is about preserving the public's trust and confidence in our elections through the rule of law. On the night of the election, petitioner led his opponent by almost 10,000 votes. Over the course of the next several days, his lead slowly dwindled, and he now trails his opponent by 734 votes out of the 5,540,090 total votes cast. That is a highly unusual course of events. It is understandable that petitioner and many North Carolina voters are questioning how this could happen. Petitioner has a legal right to inquire into this outcome through the statutorily enacted procedures available to him. *See generally id.* §§ 163-182.9 to -182.15; N.C. Const. art. I, § 18.

Specifically, our General Statutes provide for the filing of election protests to inquire into the integrity of the election process. *See* N.C.G.S. § 163-182.9. Election protests allow candidates and voters to "alert" election officials "to perceived problems" in an election so that any errors may be rectified before the result is finalized. *See Bouvier v. Porter*, 386 N.C. 1, 4, 900 S.E.2d 838, 843 (2024). Election

protests may address any "irregularity" or "misconduct" in the election process, N.C.G.S. §§ 163-182.9(b)(2), -182.10, including the counting and tabulation of unlawful ballots, *see id.* §§ 163-182.9(b)(2), -182.12, -182.13(a)(1). They are intended "to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election." *Id.* § 163-182.12. Every lawful vote must be counted; every illegal vote must be disregarded. *See James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 645 (2005).

There is nothing anti-democratic about filing an election protest. The process was designed by the people's representatives in the General Assembly as the lawful way to inquire into elections and is transparently set out in the General Statutes. *See* N.C.G.S. §§ 163-182.9 to -182.15. Accordingly, election protests are not unusual; they are established by law and intended to promote "the public's trust and confidence in our system of self-government." *Bouvier*, 386 N.C. at 4, 900 S.E.2d at 842.

This statutory scheme contemplates that throughout the entire protest process, certification of the election will be stayed until all protests are fully resolved. *See* N.C.G.S. §§ 163-182.15(b)(1), (2). In other words, election protests are a crucial step in ensuring integrity in an election result before the result becomes final.

While designed to proceed expeditiously, *see Bouvier*, 386 N.C. at 16, 900 S.E.2d at 850, the election protest process can take months. For example, a 2004 race for Guilford County commissioner was not certified until a candidate's appeals of her

election protests were fully resolved eighteen months after the election.[1] *See In re Wade*, 360 N.C. 481, 632 S.E.2d 773 (2006) (declining to grant further review of candidate's election protests). In the 2004 election for Superintendent of Public Instruction, this Court did not rule on the relevant election protests until three months after the election. *James*, 359 N.C. at 260, 607 S.E.2d at 638. Ultimately, that election result was not finalized or certified until August 2005—almost ten months after election night.[2] The 2004 election for Commissioner of Agriculture was also disputed for three months after the election.[3] After all, it is more important to ensure the result is accurate than to hurriedly finalize the process as quickly as possible. This is particularly true here where both candidates continue in their current judicial positions during the pendency of petitioner's protests.

The election protest process preserves the fundamental right to vote in free elections. *See* N.C. Const. art. I, § 10. "It is well settled in this State that" this fundamental right includes " 'the right to vote on equal terms,' " and "to participate in an electoral process that is necessarily structured to maintain the integrity of the

[1] Gary D. Robertson, *Court resolves 2004 election*, Star News Online (May 6, 2006, 12:01 AM), https://www.starnewsonline.com/story/news/2006/05/06/court-resolves-2004-election/30265518007/.

[2] Robert P. Joyce, *The Last Contested Election in America*, Popular Gov't, Winter 2007, at 43, 49.

[3] *Cobb Concedes Ag Commissioner Race to Troxler*, WRAL News (Feb. 4, 2005, 4:02 AM), https://www.wral.com/story/115340/.

democratic system." *James*, 359 N.C. at 270, 607 S.E.2d at 644 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990)). This right is violated when "votes are not accurately counted [because] [unlawful] [ ] ballots are included in the election results." *Bouvier*, 386 N.C. at 3, 900 S.E.2d at 842. Further, the inclusion of even one unlawful ballot in a vote total dilutes the lawful votes and "effectively 'disenfranchises' " lawful voters. *James*, 359 N.C. at 270, 607 S.E.2d at 644. Election protests protect against this risk of vote dilution by enabling candidates and voters to rigorously investigate the election process, identify unlawful ballots, and ensure those ballots are not counted. *See* N.C.G.S. § 163-182.10(d)(2)e (providing that the remedy for a meritorious election protest may be correction of the vote total). This process is even more important in very close elections like this one because it could affect the outcome. *See Bouvier*, 386 N.C. at 5, 900 S.E.2d at 843.

It is unfortunate that petitioner has been repeatedly chastised for pursuing his election protests in the manner authorized by law. Various filings in this matter have accused petitioner of seeking to "disenfranchise" voters in order to "overturn" the results of this election and of intentionally "delay[ing]" its certification. Such statements mischaracterize the election protest process, hindering its efficacy and breeding distrust in our elections. Blaming citizens for using the legal processes afforded them by law only discourages some from voicing their concerns and

wrongfully taints those who do. *Cf. id.* at 16–17, 900 S.E.2d at 851.

Moreover, any delay in the resolution of petitioner's election protests was caused by the State Board. Pursuant to N.C.G.S. § 163-182.14(b), petitioner filed his appeals of the State Board's decision on his election protests in the Superior Court of Wake County on 20 December 2024. That same day, the State Board immediately removed those appeals to federal court, which automatically prevented the superior court from taking any action. *See* 28 U.S.C. § 1446(d). Seventeen days later, after considering the matter on an expedited briefing schedule, the district court remanded petitioner's election protest appeals to the superior court because they present issues that "arise purely under state law," and an avenue for "timely and adequate state court review is available." Nevertheless, it appears that the State Board once again has sought to delay the superior court's consideration of petitioner's appeals by immediately appealing the district court's remand order to the Fourth Circuit Court of Appeals and seeking a stay of the remand to prevent the superior court from regaining jurisdiction over the matter. If the Fourth Circuit grants that stay or reverses the district court's remand order, it will once again halt the statutory election protest process.

Over a month has passed since petitioner filed his appeals in the Superior Court of Wake County. Yet no progress toward finality has been made because the State Board has sought to elude the superior court's review. If the State Board is

concerned about delaying the certification of this election, why does it seek to circumvent the statutory process for reviewing petitioner's election protests?

There appear to be valid concerns that some of the State Board's actions in this election may violate the law. *See Order*, *Griffin v. State Board of Elections*, No. 320P24 (Jan. 7, 2025) (Dietz, J., dissenting). It is possible that these actions may affect the outcome of the election. No court has addressed the merits of petitioner's claims. Nevertheless, if petitioner seeks to pursue his right to ensure that only lawful votes are counted and that the result of the election is accurate, he needs to follow the statutorily provided procedures. We have ordered that this statutory process be carried out expeditiously. Thus, I respectfully concur in the Court's order.

Justices BERGER and BARRINGER join in this concurrence.

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Justice EARLS concurring in part and dissenting in part.

The Court today dismisses the petition that it improvidently indulged only two weeks ago, waiting until a possible future date to weigh in on the merits of Judge Jefferson Griffin's protests. It does so because it determines that it was improper for the petitioner Judge Jefferson Griffin to leapfrog over a direct appeal to the Wake County Superior Court, as state law requires, and instead to seek "an extraordinary writ" in our Court. *See* Order, *supra*. I agree with that conclusion, for the reasons I specified in the Court's last Amended Order in this matter. *Griffin v. N.C. State Bd. of Elections*, No. 320P24, Amended Order (Jan. 7, 2025) (Earls, J. dissenting).[1] However, I also continue to maintain, for the reasons explained in my dissent to that Order, that there is no merit to the Petition for a Writ of Prohibition in these circumstances and the Petition should be denied.

I dissent from the part of today's order that leaves in place the temporary stay that the Court issued on 7 January 2024. The Court has effectively ordered a preliminary injunction to keep the State Board of Elections from certifying the 2024 contest for the Supreme Court. Far from signaling that the "temporary stay should

[1] The Court apparently determined that this request for extraordinary relief was improper after ordering expedited briefing, on its own motion, two weeks ago. *See Griffin v. N.C. State Bd. of Elections*, No. 320P24, Amended Order (Jan. 7, 2025). This Court has since received over 700 pages of briefing in this matter, nearly half of which was submitted yesterday by 11:59 pm. Yet today the Court determined that "the issues before the Court are fully developed" and ready for resolution in its Order. It does so even as the briefing it ordered has not yet completed.

not be taken to mean that Judge Griffin will ultimately prevail on the merits," *Griffin*, No. 320P24, Amended Order (Allen, J. concurring), a preliminary injunction is awarded only where the party requesting it "is able to show likelihood of success on the merits of his case." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983); *accord Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227 (1990); *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977). The Court today apparently determines that Judge Griffin has met that standard and so the continued injunction is appropriate. (I say apparently, because the Court does not explain what justifies its decision to keep in place the temporary stay.) It is unclear, as well, how we have jurisdiction under our Rules of Appellate Procedure to Order a stay of the certification of election while simultaneously dismissing the Petition. In maintaining the temporary stay, the Court prevents the Wake County Superior Court from deciding for itself whether Griffin is likely to succeed on the merits and whether a stay is justified—a decision which state law vests in that court specifically. *See* N.C.G.S. § 163-182.14 (2023). Faithfully executing the law here means that the trial court should, in the first instance, be deciding whether a stay is warranted.

If, however, the Court still believes that allowing the stay to continue is not a reflection of the likelihood of success on the merits, that opens a different Pandora's Box. It means that an injunction to prevent the certification of an elected official is warranted any time a losing candidate decides to appeal an adverse decision on an election protest from the State Board of Elections to the Superior Court. If any losing

candidate can make any sort of argument about votes in the election, no matter how frivolous, and automatically receive a court-ordered stay on appeal, preventing the winning candidate from being certified, nothing stops litigious losers from preventing duly elected persons from taking office for months or longer. Such a set-up incentivizes costly litigation of baseless claims for those candidates who can afford it, undermines confidence in our democratic system, and has no support in existing law. It sets up courts to be the arbiters of election outcomes instead of voters, and weakens faith in the democratic processes of this state. In seeking to invalidate the votes of over 60,000 voters, Judge Griffin cannot identify a single voter who fraudulently cast a ballot without being duly qualified under the laws of this state to do so.

I dissent finally on what I perceive to be a signal in this Order as to the Court's preferred outcome. The Order instructs the Superior Court to proceed expeditiously, while keeping in place a preliminary injunction against certification, which requires a showing of likelihood of the merits as I explained above. At the same time, the Order reiterates that the petitioner has identified "potentially illegal votes" while citing caselaw to suggest that a constitutional violation will result from "unlawful votes" diluting other ballots. I do not join in that signal. We cannot overturn the results of an election on potentials. Notwithstanding these signals, I am confident that the members of our judiciary who evaluate these claims shall do so fairly and in furtherance of our solemn obligation to administer "right and justice . . . without favor, denial, or delay." N.C. const. art. I, § 18.

Justice BERGER concurring.

The underlying question is straightforward – one with a clear and evident answer. Strip away politics and reality-optional hot takes, the question presented, at its core, is what should be done if it is determined that those charged with faithfully executing the law fail or otherwise decline to follow the law? Agencies, boards, and commissions operating outside the bounds of established rules is a familiar trope, as is sweeping bureaucratic incompetence and neglect under the rug.

But a merits-based resolution by this Court is not appropriate at this time because there is a procedure in place to resolve these claims in superior court. This Court correctly dismisses petitioner's request for a writ of prohibition and wisely maintains the stay.

Justice BARRINGER joins in this concurring opinion.

Justice BARRINGER concurring.

I concur with the result of the per curiam order of the Court and with the reasoning and philosophy well-articulated in Chief Justice Newby's concurrence. I also concur with Justice Berger's concerns about the existential need to carefully monitor and control those administrative agencies "charged with faithfully executing the law [when they] fail or otherwise decline to follow the law." However, I write separately to suggest a more expeditious path to resolve, rather than further prolong, the judicial, legal, and political maze in which this dispute is now lodged.

Petitioner has asked this Court to allow the extraordinary writ of prohibition in order "to promptly resolve a novel issue of great import." *See Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 506 (2009). In my view, our State finds itself in a most extraordinary circumstance requiring decisive action. The North Carolina Constitution provides this Court the power to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts." N.C. Const. art. IV, § 12(1). Those "other courts," *id.*, include "administrative agencies performing judicial functions." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 568 n.11 (2021). Here, the State Board of Elections is an administrative agency purporting to perform judicial functions: deciding how to apply the law, hearing and then deciding the outcome of election protests.

This Court has held that a writ of prohibition is appropriately allowed when the writ prevents another court, or an administrative agency in this case, from "proceeding . . . after a manner which will defeat a legal right." *State v. Allen*, 24 N.C. (2 Ired.) 183, 188–89 (1841). Here, that is the right of every North Carolinian to an election "free" from the outcome-determinative influence of ineligible votes. N.C. Const. art. I, § 10.

Therefore, it is my view that this Court should "not hesitate to exercise" its constitutional authority in this extraordinary and historic circumstance, because there is a need for "the expeditious administration of justice." *Park Terrace, Inc. v. Phoenix Indem. Co.*, 243 N.C. 595, 597 (1956). My suggested better course of action would be for this Court to utilize its long-standing power in our State Constitution, as implemented through Rule 2 of the North Carolina Rules of Appellate Procedure, to suspend the ordinary procedure, maintain the stay against further action by the administrative agency in question, and proceed to a decision on the merits. *See* N.C. Const. art. IV, § 12(1); N.C. R. App. P. 2 ("this Court has the power to suspend the rules to expedite decision in the public interest").

This approach requires this Court to decide whether the State Board of Elections erred when it determined that the protests submitted were legally deficient. In light of the thousands of pages of evidentiary documentation and argumentative briefs from all parties and amici, this question of law requires no further factfinding.

Accordingly, I do not see any need for this case, nor any party therein, to twist in the jurisprudential winds for the upcoming months before ultimately landing before this Court for the requisite de novo review. Instead, the citizens of North Carolina deserve a fair and final resolution.

Nevertheless, I join in the concurrences of Chief Justice Newby and Justice Berger. I also reluctantly concur with the result of the per curiam order of the Court, which moves the case through the State system as expeditiously as possible. The Court's decision to dismiss the writ of prohibition but to continue the stay will allow that to happen, albeit at an inexorably slower pace.

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Justice DIETZ concurring.

I acknowledge that there are parallels between this case and *James v. Bartlett*, 359 N.C. 260 (2005). In *James*, this Court held that more than 11,000 ballots could not be counted under state law because the votes were "cast outside voters' precincts of residence on election day." *Id.* at 269.

At the time, the applicable election law stated that a voter must "vote in the precinct in which he resides." *Id.* at 266. The State Board of Elections nevertheless accepted out-of-precinct ballots, marked them with an "incorrect precinct" notation, and then included them in the final vote count. We held that those voters were ineligible to vote in that way and, thus, their votes were unlawful and could not be counted. *Id.* at 271.

Here, too, Judge Griffin has identified categories of voters that he alleges were unlawfully permitted to vote in our state elections, including those who are not residents of North Carolina and those who did not comply with our State's voter ID requirements.

But I see an important distinction between *James* and this case. In *James*, counting the out-of-precinct votes was unlawful under the election rules that existed at the time of the election. *Id.* at 269. In other words, the State Board of Elections *violated* the election rules by counting those votes.

Here, by contrast, the State Board of Elections *complied* with the election rules existing at the time of the election. Judge Griffin's argument is not that the Board violated the existing rules, but that the rules themselves are either unlawful or unconstitutional.

This scenario is more akin to the post-election challenge in *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177 (4th Cir. 1983). In *Hendon*, a North Carolina congressional candidate alleged that a state election law was unconstitutional and sought a recount that complied with the United States Constitution. The Fourth Circuit agreed that the law was unconstitutional and struck it down for future elections. *Id.* at 182. But the court declined to apply that ruling to the election that had just occurred, pointing to "the general rule that denies relief with respect to past elections." *Id.*

I acknowledge that this Court has never recognized the version of the *Purcell* principle described in *Hendon* and, until we do, our state courts are not bound to follow it. But I believe now is the time. Thus, although I concur in the Court's decision to dismiss this petition, I would also hold that the arguments raised in the petition are barred for the reasons articulated in my earlier dissent. *See Griffin v. State Bd. of Elections*, No. 320P24 (N.C. Jan. 7, 2025) (Mem.) (Dietz., J., dissenting).