STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 24CV040619-910

JEFFERSON GRIFFIN,

Petitioner,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Respondent,

and

ALLISON RIGGS,

Intervenor-Respondent.

BRIEF OF INTERVENOR ALLISON RIGGS

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INTRODUCTION

Judge Griffin filed three petitions for judicial review in this Court to protest his election loss to Justice Allison Riggs for Associate Justice of the North Carolina Supreme Court.[1] For the Court's convenience, Justice Riggs filed a lead brief in Case No. 24CV040622 (Photo ID for Military and Overseas Voters).

This brief incorporates most of the lead brief by reference and addresses only the facts and legal issues specific to Case No. 24CV040619 (U.S. Citizens Whose Parents are N.C. Residents). A separate brief addresses the issues specific to Case No. 24CV040620 (Allegedly Incomplete Registrations)

With this Petition, Judge Griffin seeks to reverse the decision of the General Assembly in 2011 to extend the franchise to North Carolinians who have lived overseas while their parents are stationed or living abroad. These U.S. Citizens may visit the state regularly and have extended family here and often feel more connected to North Carolina than to the country in which they live abroad. Judge Griffin challenged 266 ballots of these children of overseas voters because he claims that someone who has never lived in the United States cannot be a "resident" of North Carolina in accordance with Article VI of the North Carolina Constitution. App. 5370. For reasons discussed below, that is not North Carolina law.

[1] This Court consolidated the three petitions into one lead case for purposes of filing a single administrative record (No. 24CV040619) and invited the parties to inform the Court whether they consented to consolidation for any other case management purposes. Justice Riggs proposed consolidation for briefing to simplify matters for the Court. Judge Griffin opposed that proposal. As the parties did not all consent, the parties are filing separate briefs in each action.

Accordingly, not only should this protest be denied because (like the others) it reflects an unlawful attempt to change the election rules after the game has been played, and because Judge Griffin failed to give these voters proper notice, but also because the protest fails on its own merits under state and federal law.

More fundamentally, this 266-vote protest by itself comes nowhere close to the 734-vote margin between Justice Riggs and Judge Griffin, and it should be denied on that ground alone. Trying to use his brief to *expand* the scope of his protest *three months after the election*, Judge Griffin now claims for the first time that he wants to toss the votes of 516 North Carolinians on this ground. That effort not only flouts the protest rules, it *still* is not enough to overcome his 734-vote deficit. Judge Griffin cannot fashion his own rules for election protests to allow him to keep protesting until he wins. Nor can he rely on speculation and unsupported claims regarding *yet additional voters* he did not even challenge as part of the record before the Board.

INCORPORATION OF BRIEF FROM NO. 24CV040622

For ease of this Court's review, this brief incorporates by reference the following from the lead brief filed in Case. No. 24CV040622:

- The Introduction
- The Statement of Facts:
    - Section A: Judge Griffin Protests the Election Results
    - Section C: The State Board Dismisses Judge Griffin's Protests
    - Section D: Judge Griffin Bypasses the Superior Court and Court of Appeals to File an Unprecedented Supreme Court Petition

  - Section E: The Fourth Circuit Evaluates Whether this Action Belongs in Federal Court

- Summary of Argument

- Argument

  - I. The Protests Are an Unlawful Attempt to Change the Election Rules After the Votes Have Been Cast and Counted

  - II. The Board Correctly Dismissed All Protests Because Judge Griffin Failed to Provide Voters with Due Process

ADDITIONAL BACKGROUND

In June 2011, while under the control of the Republican Party, the General Assembly unanimously adopted the Uniform Military and Overseas Voters Act (Article 21A of Chapter 163). The UMOVA expressly expanded voting rights in state elections to certain voters living abroad. In doing so, the General Assembly provided that various categories of "uniformed-service" and "overseas" voters could use unique procedures to register and vote absentee that are unavailable to civilian voters in the United States. *See* N.C. Gen. §§ 163-258.2–258.15.

This group of "covered voters" specifically included U.S. citizens "born outside the United States" who have never *lived* in this state, but whose parents were eligible North Carolina voters before moving abroad. N.C. Gen. Stat. § 163-258.2(1)(e). These voters often grew up while their parents were serving their countries as uniformed military or serving as foreign aid workers or missionaries. For example, the most natural example of such a "covered voter" would be an individual born to a North Carolina servicemember stationed overseas who—because of their parent's service—has never "lived in" North Carolina. UMOVA "specifically authorized" these "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." App. 5397 (Board Order).

The General Assembly enacted this statute without a single nay vote and these voters have routinely voted in every North Carolina election ever since (43 elections in all).

For the very first time—barely 30 days before the election—in October 2024, the North Carolina Republican Party filed suit and sought an emergency injunction alleging that the Board "allows and has allowed persons to register to vote under N.C. Gen. Stat. § 163-258.2(1)(e), including persons who were never and are not presently residents of North Carolina." Compl. ¶ 78, *Kivett v. N.C. State Bd. of Elections*, No. 24CV031557-910 (N.C. Super. Ct. filed Oct. 2, 2024).

The Wake County Superior Court denied the plaintiffs' request for a preliminary injunction, finding that they had "failed to make a threshold showing that they are likely to succeed on the merits." Order Denying Pls.' Mot. at 4 ¶ 2, *Kivett*, No. 24CV031557-910 (N.C. Super. Ct. Oct. 21, 2024). The plaintiffs immediately appealed, and the Court of Appeals unanimously denied their Petition. Order, *Kivett v. N.C. State Bd. of Elections*, No. P24-735 (N.C. Ct. App. Oct. 29, 2024). Then, four days before the election, the plaintiffs filed in the Supreme Court a Petition for Writ of Supersedeas and for Discretionary Review, but that Court declined to intervene before the election. *See* Pls.' Pet. Writ Supersedeas & Discret. Rev., *Kivett v. N.C. State Bd. of Elections*, No. 281P24 (N.C. filed Nov. 1, 2024, and

still pending). The November 2024 general election thus proceeded under the current rules.

After he lost the election, Judge Griffin argued for the first time that overseas voters who were eligible to vote under N.C. Gen. Stat. § 163-258.2(1)(e), some of whom may have voted in dozens of North Carolina elections, should have their votes thrown out (*only for his race*) because that statute is unconstitutional under N.C. Const. art. VI, § 2(1).

On December 13, 2024, the State Board served its Decision and Order rejecting this argument. As the Board reasoned, the Act is "very clear that such voters are entitled to cast an absentee ballot" under the procedures set forth in Article 21A. App. 5394. The Board concluded that it could not "ignore a statute of the General Assembly under the theory that the State Board should deem that statute unconstitutional." App. 5396. As an administrative agency, the Board is "bound to follow the law that governs it." App. 5397. In any event, "even if it were later determined" that the statute were unconstitutional, "it would violate the federal constitution's guarantee of substantive due process to apply such a newly announced rule to remove voters' ballots after an election." *Id.*

ARGUMENT

If the Court does not dismiss the Petition (i) because it is too late to change the rules after the election or (ii) because Judge Griffin failed to provide adequate notice to voters under state law and the U.S. Constitution, it should reject the instant protest on the merits under state law.

Judge Griffin claims that such individuals who have "never lived" in North Carolina are ineligible to vote because they do not satisfy the "voter residency" requirement of Article VI of the North Carolina Constitution. This argument is meritless. These North Carolina voters may not have their votes invalidated when a plainly applicable statute enacted by the General Assembly in 2011 extended the franchise to these voters, and North Carolina law recognizes these individuals are "residents" on multiple grounds.

I. This Protest Should Be Rejected Because It Does Not Challenge Enough Votes to Change the Outcome of the Race

To start, this protest should be dismissed because it does not implicate enough voters to change the outcome of the race. To succeed in an election protest, a protest must establish that any irregularities in the election were "sufficiently serious to cast doubt on the apparent results of the election." N.C. Gen. Stat. § 163-182.10(d)(2)(e). Absent such a showing, the protest must be dismissed. *Id.* § 163-182.10(d)(2)(c). In other words, a protest is not warranted only to change the "vote count." It must be sufficient to affect the outcome. Here, Judge Griffin protested just 266 votes before the protest deadline. App. 5370. That is *hundreds* of votes shy of the 734-vote margin by which Justice Riggs won this race. Accordingly, the Court may reject this protest without the need to reach the merits.

Judge Griffin knows this. For that reason, he is trying to amend his protests more than two months after the statutory deadline to shoehorn hundreds of new voters into his protests. Without any legal basis, Judge Griffin claims he can keep on amending his protests—to include even voters who were *never* presented to the Board

and are not anywhere in the record before the Court—to change the outcome of the election in his favor. Specifically, while Judge Griffin only protested 266 voters in his "Never Residents" category in protests filed before the statutory deadline, he now attempts to bring this total to 516 and claims that number can increase going forward. *See* Griffin -619 Br. at 4 n.2; *cf.* Decision & Order at 3, App. 5370 (referring to just "266 voters challenged"). That effort is *months* too late, procedurally improper, and should be rejected outright.

"In all election protests, swiftness is the order of the day." *Bouvier v. Porter*, 386 N.C. 1, 16, 900 S.E.2d 838, 850 (2024). Accordingly, the General Assembly has carefully crafted a set of election protest rules that seek "to balance the public's interest in achieving accurate election results with the need to finalize those results in a short period of time." *Id.* at 4, 900 S.E.2d at 843. N.C. Gen. Stat. § 163-182.9 sets forth the procedures and deadlines for filing an election protest. "The timing of election protests is measured relative to the county boards of elections' canvasses, which are normally held ten days after an election." *Bouvier*, 386 N.C. at 15, 900 S.E.2d at 850; *see* N.C. Gen. Stat. § 163-182.5(b). "*At the latest*" an "election protest may be filed by '5:00 P.M. on the second business day after the county board of elections has completed its canvass and declared the results.'" *Bouvier*, 386 N.C. at 15, 900 S.E.2d at 850 (quoting N.C. Gen. Stat. § 163-182.9(b)(4)) (emphasis added). That deadline expired more than 75 days ago on November 19, 2024. Accordingly, Judge Griffin's ongoing campaign to expand and supplement those protests comes much too late.

This is not the first time Judge Griffin has tried to shoehorn belated voter protests. During the proceedings before the Board, the Board noted that Judge Griffin "sought to add voters to the second and third protest categories in supplemental filings submitted *after* the deadline to file an election protest." *See* Decision & Order at 3 n.2, App. 5370 n.2 (citing N.C. Gen. Stat. § 163-182.9(b)(4)) (emphasis added). "Because the Board determine[d]" that those "protests [were] legally deficient," it did not expressly "determine whether such supplementations are allowable under the General Statutes and Administrative Code." *Id.*

While the Board did not need to reach the procedural defects with Judge Griffin's belated supplementation, Judge Griffin cited no law that would authorize him to file supplements to amend his protests after the statutory deadline in N.C. Gen. Stat. § 163-182.9(b)(4). *See, e.g.*, App. 4550-4552 ("Amendment and Supplementation of 'Never Resident' Protest in Pitt County"). Nor does he cite any law in his Brief before this Court.

Yet even if the supplementations he tried to include before the Board were included, Judge Griffin concedes that this "supplemental data" when combined with his "original protests" only brings the total to "405" voters protested in this election. Griffin -619 Br. at 5 n.2. That is 329 votes shy of the margin.

Now Judge Griffin wants to supplement his protests yet again—this time based on unsupported and extra-record claims that he is in the possession of records from five additional counties identifying another 111 North Carolina voters who voted in this election in compliance with N.C. Gen. Stat. § 163-258.2(1)(e). He further

speculates that if he received additional information from "60 counties" it is "possible" this issue could have "changed the outcome of the election." Griffin -619 Br. at 5 n.2.

This Court's judicial review is limited to the "official record" that was before the Board. *See* N.C. Gen. Stat. § 150B-51(c) (determination of whether petition is entitled to relief "based upon [the court's] review of the final decision and the official record"); Local Civ. R. Super. Ct., Tenth Judicial District, Rule 9.1 (requiring the agency to provide "the original or a certified copy of the official record in the case under review from which the final agency decision was entered"). Judge Griffin's representations regarding yet additional voters from yet additional counties are outside the record before the Board. Even if these claims were part of the record, the "total" of "516" votes he claims are subject to his protest are *still* nowhere close to being enough to change the outcome of the election.

Judge Griffin speculates that still-outstanding public records requests to 60 counties could increase that total. But the fact that Judge Griffin has received no responses after *months* just as likely reflects that those counties *do not have any more voters to identify* in this extremely narrow category. To the extent the counties have information and failed to comply with public records laws in providing that information to Judge Griffin, he could, and should, have taken action long ago to enforce his public records requests under state law. *See* N.C. Gen. Stat. § 132 *et seq*.

Moreover, Judge Griffin's speculative forecast of a "possible" impact on the election would require not just 734 voters subject to his protest, but many more than that number. 734 votes would be enough only if—extremely implausibly—*every one*

of those voters voted for Justice Riggs. To win, Judge Griffin must protest enough votes to *decrease the margin* Justice Riggs enjoys over Judge Griffin by 734 votes or more. That will take many more than 734 votes—and Judge Griffin is still more than 200 votes short even when ignoring the election protest rules.

As the Supreme Court recognized in *Bouvier*, "[i]n all election protests, swiftness is the order of the day." *Bouvier*, 386 N.C. at 16, 900 S.E.2d at 850. Judge Griffin would turn that rule on its head by making an election protest a never-ending, open-ended process that continues until a candidate achieves his preferred outcome. This Court should reject that effort to circumvent the elections protest process.

II. Article VI Does Not Prohibit Overseas Citizens Who Have "Never Lived" in North Carolina from Voting

Judge Griffin's claims also fail on the merits. Article VI guarantees the right to vote to eligible individuals who have "resided in" North Carolina for 30 days preceding an election. N.C. Const. art. VI, § 2(1). Citing this Constitutional right, Judge Griffin argues that any voter who "never lived in the United States" is ineligible to vote in North Carolina elections because "[s]omeone who has never lived in the United States has never resided in North Carolina." Griffin -619 Br. 16. This argument is wrong because "living" and "residing" in North Carolina are not synonymous under Article VI.

The term "resided" is not defined in the North Carolina Constitution. The North Carolina Supreme Court has therefore "held . . . without variation that residence within the purview of this constitutional provision [Article VI] is synonymous with domicile." *Owens v. Chaplin*, 228 N.C. 705, 708, 47 S.E.2d 12, 15

(1948) (collecting cases); *see also Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972) ("Residence as used in Article VI of the North Carolina Constitution of 1970 continues to mean domicile."). Domicile does not merely mean where someone temporarily "lives." *See Hall*, 280 N.C. at 606, 187 S.E.2d at 55 ("One who lives in a place for a temporary purpose . . . effects no change of domicile."). Rather, domicile is an individual's "permanent" home. *Id.* North Carolina law therefore recognizes "three kinds" of domicile: "domicile of origin, domicile of choice, and domicile by operation of law." *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E.2d 307, 308 (1924). It is true that someone who has never lived in North Carolina cannot make North Carolina his or her domicile *of choice. Id.* ("A domicile of choice is a place which a person has chosen for himself."). But an individual need not live in North Carolina for the state to be their domicile of origin or domicile by operation of law.

A. North Carolina Can Be the Domicile of Origin of Overseas Voters Who Have Never Lived in North Carolina

At birth, a person inherits their parents' or legal guardian's domicile as their "domicile of origin." *Id.* ("As a general rule the domicile of every person at his birth is the domicile of the person on whom he is legally dependent."). This is true even if the person is born away from home and, by some twist of fate, never visits their parents' or legal guardian's domicile. It is therefore "entirely logical that on occasion, a child's domicile of origin will be in a place where the child has never been." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

Judge Griffin posits North Carolina cannot be the domicile of origin of an overseas voter who has never lived in this State by arguing—without citing to any

supporting legal authority—that a child's domicile of origin expires when they turn 18. *See* Griffin Br. 25–26. Judge Griffin is wrong. Domicile of origin cannot expire upon reaching majority, suddenly leaving a U.S. citizen without a domicile anywhere in the United States. Such a result would contravene the basic principle that "[t]he law permits no individual to be without a domicile." *Hall*, 280 N.C. at 608, 187 S.E.2d at 57. Thus, domicile of origin, like any domicile, "once acquired is presumed to continue until it is shown to have been changed." *Reynolds v. Lloyd Cotton Mills*, 177 N.C. 412, 99 S.E.2d 240, 244 (1919); *see also Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979) (holding that college students may retain their domicile of origin while living away from home).

Moreover, "[w]here a change of domicile is alleged, the burden of proving it rests upon the person making the allegation." *Reynolds*, 177 N.C. 412, 420-21, 99 S.E.2d at 244; *Hall*, 280 N.C. at 608, 187 S.E.2d at 57. Judge Griffin has made no evidentiary showing that any overseas voter has changed their domicile of origin since becoming an adult. Nor does he assert that such an evidentiary showing reasonably *could* be made.

B. North Carolina Can Be the Domicile by Operation of Law of Overseas Voters Who Have Never Lived in North Carolina

"A domicile by operation of law is one which the law determines or attributes to a person without regard to his intention or the place where he is actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308. For example, at common law, a wife obtained her husband's domicile by operation of law, without regard to where she actually lived. *Id.*; *see In re Cullinan's Est.*, 259 N.C. 626, 631, 131 S.E.2d 316, 319

(1963). The General Assembly has remedied that anachronistic voting rule by statute. N.C. Gen. Stat. § 163-57(11) (allowing a spouse to establish a separate domicile "for the purpose of voting"). But the law is that domicile may be established by operation of law, without respect to where a person is "actually living." *Thayer*, 187 N.C. at 574, 122 S.E.2d at 308; *see also generally* N.C. Gen. Stat. § 163-57 (defining residence in various contexts by statute for purposes of voting).

The General Assembly expressed its clear intent to protect the right of children and dependents of North Carolinians living abroad to be heard in North Carolina elections when it enacted N.C. Gen. Stat. § 163-258.2(1)(e), and confirmed that a person "born outside the United States" is eligible to vote—regardless of whether he or she has ever "lived in" North Carolina—if his or her "parent or legal guardian" was eligible to vote in North Carolina "before leaving the United States." N.C. Gen. Stat. § 163-258.2(1)(e) establishes domicile by operation of law for these voters. This is reaffirmed by N.C. Gen. Stat. § 163-258.8, which specifically assigns a residence for these voters: "a voter *described by G.S. 163-258.2(1)e* . . . shall be assigned an address" which constitutes his or her *residence* "for voting purposes" (emphasis added). This "assigned" address for a voter covered by N.C. Gen. Stat. § 163-258.2(1)(e) is "the last place of residence in this State of the parent or legal guardian of the voter." *Id.* Thus, the "residency requirement" exception set forth in N.C. Gen. Stat. § 163-258.2(1)(e) refers exclusively to the *residence* requirement of N.C. Gen. Stat. § 163-57(1) and is consistent with the requirement that these voters be

"residents" of North Carolina for purposes Article VI of the North Carolina Constitution.

This has "been the law of North Carolina for thirteen years" "faithfully implemented in 43 elections in this state since that time." App. 5398. Accordingly, Judge Griffin cannot invalidate their votes in a post-election protest.

CONCLUSION

It is time for this election to end. For the reasons stated above, Judge Griffin's Petition should be denied, and this action should be dismissed.

Respectfully submitted, this 3rd day of February, 2025.

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CERTIFICATE OF SERVICE

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