No. COA25-181 TENTH JUDICIAL DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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JEFFERSON GRIFFIN, Petitioner-Appellant, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, Respondent-Appellee, and ALLISON RIGGS, Intervenor-Respondent-Appellee.	From WAKE COUNTY Nos. 24CV040619-910 24CV040620-910 24CV050622-910

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BRIEF OF *AMICI CURIAE* ACLU OF NORTH CAROLINA LEGAL FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT-APPELLEE NORTH CAROLINA STATE BOARD OF ELECTIONS

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BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT-APPELLEE NORTH CAROLINA STATE BOARD OF ELECTIONS

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INTRODUCTION[1]

North Carolinians rely on government officials to instruct them on the procedures they must follow to register to vote and cast a ballot. If those officials give mistaken instructions, it would be inequitable and impractical to make voters pay for that mistake by negating their votes. As explained below, it would also be unconstitutional and contrary to binding precedent.

The petition in this case asks this Court to scrap tens of thousands of votes cast in reliance on government instructions. It claims that, for nearly 20 years, the Board of Elections incorrectly invited and accepted voter registrations unaccompanied by the registrant's driver's license or the last four digits of their social security number. Pet. COA Br. 9. It also alleges that the Board improperly invited and accepted overseas absentee ballots without accompanying photo identification. *Id.* at 6–7. But petitioner does not deny that, precisely because these supposedly unlawful practices were formally communicated to voters, voters *relied on them* when they registered and voted. Petitioner points to no evidence

[1] No person or entity other than amici, their members, or counsel wrote this brief or contributed money for its preparation.

that these same voters are categorically ineligible to vote under North Carolina law. Nor does he present any proof that, if properly instructed, these voters would have failed to follow what petitioner deems to be the right procedures. Nevertheless, he asks this Court to negate roughly 65,500 of their votes from the 2024 election.

Granting that relief would be profoundly unfair to thousands of voters, no matter their political party. Even if the Board had implemented unlawful procedures—which, as the Board and the respondent have shown, it did not—otherwise eligible voters should not pay for the procedural errors of government officials. Indeed, negating 65,500 votes cast in reliance on government instructions is not just unfair, it is foreclosed by the North Carolina Constitution and binding precedents of the Supreme Court of North Carolina.

North Carolina's Constitution vests all political power with the people. N.C. Const. art. I, § 2. That foundational principle—popular sovereignty—compels erring on the side of counting people's votes rather than discarding them based on alleged procedural errors induced by the government itself. Consistent with that principle, the Supreme Court long ago held that an otherwise qualified voter "cannot be deprived of his

right to vote" based on procedural irregularities arising from "the willful or negligent acts of the registrar." *State v. Lattimore*, 120 N.C. 426, 26 S.E. 638, 639 (1897). Rejecting such a person's vote, the Court held, would be a "fraud on the electors." *Id.*; *see also McPherson v. City Council of City of Burlington*, 249 N.C. 569, 573, 107 S.E.2d 147, 150 (1959).

In North Carolina, voters choose their judges; judges do not choose their voters. Accordingly, this Court should affirm the superior court's dismissal of the petition.

NATURE OF AMICI CURIAE'S INTEREST

The American Civil Liberties Union and the ACLU of North Carolina Legal Foundation are non-profit, nonpartisan organizations dedicated to the principles of liberty and equality enshrined in the U.S. and state constitutions and the nation's civil rights laws.

ISSUES ADDRESSED

Whether the petition's requested relief is prohibited by the popular sovereignty principle in the North Carolina Constitution and binding precedent of the Supreme Court of North Carolina.

ARGUMENT

I. Throwing out someone's vote because they followed government instructions violates the North Carolina Constitution and controlling case law.

The North Carolina Constitution reflects a deep commitment to popular sovereignty: the principle that all legitimate state power flows from the people. The sovereign status of the people is guaranteed by a broad-based right to vote, such that the will of popular majorities controls the identity of the people's representatives in the various branches of elected government. Those essential precepts, reflected today in controlling case law from the Supreme Court of North Carolina, forbid courts from discarding eligible voters' ballots based on alleged errors induced by government officials.

A. Popular sovereignty is the foundation of the North Carolina Constitution.

The text, structure, and history of the North Carolina Constitution express a "revolutionary faith in popular sovereignty." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 48 (2d ed. 2013) [hereinafter Orth & Newby]. Under popular sovereignty, the people are the source of all political power. Preventing people from exercising

the power of the vote merely because they followed the supposedly flawed instructions of public servants, would unduly undermine that power.

Popular sovereignty is spelled out in the North Carolina Constitution's plain text, which vests "all political power" in "the people" and provides that "all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. It also grants "the people" the "inherent, sole, and exclusive right of regulating the internal government" and "of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness." *Id.* § 3. These provisions make the people—not the Governor, not the Legislature, and not the Judiciary—the source of all political power in North Carolina. Recognizing elections as "the principal means of translating" popular sovereignty into reality, Orth & Newby at 56, the Constitution goes on to declare that "for redress of grievances and for amending and strengthening the laws, elections shall be often held," and that "all elections shall be free." N.C. Const. art. I, §§ 9, 10.

The Constitution's commitment to this form of government extends from specific textual provisions to the document's overarching structure.

The framers placed the Declaration of Rights at the very beginning of the Constitution, in Article I, emphasizing the primacy of individual rights and liberties. After the Declaration of Rights, the Constitution establishes the three branches of government and, critically, subjects each one to direct popular control through frequent and free elections. *See id.* arts. II, III, IV.

The North Carolina Constitution's unique history also reflects a commitment to popular sovereignty and democracy. The revolutionaries who framed the 1776 Constitution asserted "popular sovereignty as the basis of American democracy." Orth & Newby at 48 (cleaned up). By "declar[ing] the people, as opposed to the Crown, the source of sovereignty, they seized for themselves the highest power in the state." *Id.* at 10. North Carolina's 1868 Constitution went even further in effectuating popular sovereignty and democratic self-rule. Whereas the 1776 Constitution's preamble described the adopting authority as "the Representatives of the Freemen of North Carolina," the 1868 Constitution's preamble (still in place today) began with the "vigorous phrasing 'We, the people of the State of North Carolina,'" thus "emphasizing the people as the source of political power." Orth & Newby

at 44. In fact, the 1868 Constitution was ratified by a body of over 170,000 eligible voters, as compared to the small group of elected representatives that adopted the 1776 Constitution. *Id.*; Judge Robert N. Hunter, Jr., *The Past as Prologue: Albion Tourgée and the North Carolina Constitution*, 5 Elon L. Rev. 89, 97 (2013) [hereinafter Hunter].

The 1868 Constitution, ratified after the Civil War, also extended participation in popular sovereignty. It "began the task of implementing" in earnest the "recognition of the divinely ordained equality of all humankind." Paul Martin Newby, *Author's Foreword to Second Edition* to Orth & Newby at xxii. The 1868 Constitution was intended to "not only guarantee the continuation of the franchise to the newly expanded electorate, but … also [to] ensure a series of constitutional benefits not previously included in the Constitution," including equal civil and political rights for Black North Carolinians, an expanded franchise for non-property holders, and the direct election of the Governor, judges, and other officials by the people, rather than by the General Assembly. *See* Hunter at 97. According to commentators from the time, these changes were "founded on the assumption that 'the representatives may be untrustworthy,'" and that the people should directly exercise more power.

Orth & Newby at 37 (quoting Kemp P. Battle, president of the University of North Carolina from 1876 until 1891).

Since 1868, North Carolina's constitution has continued to evolve. But with each change, "the best guarantee of North Carolinians' basic rights must ever be what it has always been: above all a thoughtful and informed citizenry, conscious of its constitutional history and zealous to preserve the best for posterity." Orth & Newby at 38 (cleaned up).

B. Consistent with popular sovereignty, controlling case law prohibits discarding votes based on alleged procedural deficiencies induced by government instructions.

Longstanding precedents from the Supreme Court of North Carolina, implementing the popular sovereignty principles described above, directly control this case. Those precedents hold that, once voters have done what election officials asked of them to register and vote, courts cannot discard their ballots based on allegations that the officials' instructions were legally insufficient.

Starting in the late 1800s, the Supreme Court considered several cases brought by parties seeking to exclude ballots cast by voters they alleged to have been "improperly" registered. The most common complaint was that voters had been allowed to register without taking

the constitutionally required oath.[2] At the time, the North Carolina Constitution unequivocally provided 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 constitution." N.C. Const. art. 6, § 2 (1868). Challenges to other voters included allegations that they had been improperly registered because the oath was given incorrectly,[3] because registrars used the telephone,[4] or because registrars allowed others—such as their children—to register voters without supervision.[5] The challengers claimed that because the voters had been illegally registered "in an irregular manner," their ballots had to be discarded. *See, e.g.*, *Lattimore*, 120 N.C. 426, 26 S.E. at 640.

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[2] *State v. Lattimore*, 120 N.C. 426, 26 S.E. 638 (1897); *Gibson v. Bd. of Comm'rs of Scotland Cnty.*, 163 N.C. 510, 79 S.E. 976 (1913); *Woodall v. W. Wake Highway Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918); *Plott v. Bd. of Comm'rs of Haywood Cnty.*, 187 N.C. 125, 121 S.E. 190 (1924); *Glenn v. Culbreth*, 197 N.C. 675, 150 S.E. 332 (1929); *McPherson v. City Council of Burlington*, 249 N.C. 569, 107 S.E.2d 147 (1959); *Overton v. Mayor & City Comm'rs of Hendersonville*, 253 N.C. 306, 116 S.E.2d 808 (1960).

[3] *State v. Nicholson*, 102 N.C. 465, 9 S.E. 545 (1889).

[4] *Glenn*, 197 N.C. 675, 150 S.E. 332.

[5] *See Glenn*, 197 N.C. 675, 150 S.E. 332; *Lattimore*, 120 N.C. 426, 26 S.E. at 638.

Without exception, the Supreme Court of North Carolina rejected those challenges. It drew a distinction between persons inherently ineligible to vote—*i.e.*, "persons incompetent to vote for want of the necessary qualifications"—and otherwise eligible voters who were alleged to have registered and voted improperly only because the "prerequisite conditions for such registration have not been observed." *Nicholson*, 102 N.C. 465, 9 S.E. at 546. A vote cast by someone who had failed to satisfy the prerequisite conditions for registration could perhaps be set aside if the would-be voter had simply "refus[ed] to take the oath," *Lattimore*, 120 N.C. 426, 26 S.E. at 639, but not if government registrars had induced the allegedly deficient registration. On that point the Court was unequivocal: An eligible voter "cannot be deprived of his right to vote," by "either the willful or negligent acts of the registrar." *Lattimore*, 120 N.C. 426, 26 S.E. at 639.[6]

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[6] *See also McPherson*, 249 N.C. at 572, 107 S.E.2d at 150 (government's "failure" to properly register voters "will not deprive the elector of his right to vote or render his vote void after it has been cast"); *Gibson*, 163 N.C. 510, 79 S.E. at 977 (laws governing voter registration "should not be so construed as to make the right to vote by registered voters depend upon a strict observance by the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of sufferage liable to be defeated, without the fault of

The Court grounded those decisions in principles of popular sovereignty and democracy. "In cases of contested elections," the Court noted, "the ultimate purpose of the proceeding is to ascertain and give expression to the will of the majority, as expressed through the ballot box." *Woodall v. Western Wake Highway Commission*, 176 N.C. 377, 97 S.E. 226, 232 (1918). "This is a government of the people, by the people, and for the people," and "the will of the people, legally expressed, must control." *Lattimore*, 120 N.C. 426, 26 S.E. at 638. Discounting the ballots based on procedural mistakes would deny eligible voters of their fundamental rights, would "destroy" the state's theory of government, and "would be self-destruction." *Id.*; *see Woodall*, 176 N.C. 377, 97 S.E. at 232 (same).

Those decisions leave no room whatsoever for a court to disenfranchise eligible voters based on allegations that election officials failed to conduct the steps necessary to perfect their registrations or

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the elector, by fraud, caprice, ignorance, or negligence of the registrars"); *Woodall*, 176 N.C. 377, 97 S.E. at 232 (noting that "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," and holding that "[i]t cannot be successfully contended that it is the duty of the voter to see that he is duly sworn").

ballots. Once election officials allow someone to register and vote, even if "the registration books show that he had not complied with all the minutiae of the registration law, *his vote will not be rejected*." *Woodall*, 176 N.C. 377, 97 S.E. at 232 (emphasis added). Pulling the rug out from under such a voter, after the election, would be worse than incorrect. Rejecting their votes would be, according to the Supreme Court of North Carolina, "a fraud on the electors," "on the parties for whom they voted," and "upon the state." *Lattimore*, 120 N.C. 426, 26 S.E. at 639. It would be a betrayal of the foundational principle of popular sovereignty, the bedrock of free government in North Carolina.

II. The North Carolina Constitution and binding precedent prohibit throwing out 65,500 votes cast by voters who relied on government instructions.

The petition asks this Court to toss out the ballots of 65,500 North Carolinians based on supposed errors induced by the Board's instructions. But the *Lattimore* line of cases remains good law and is binding on this Court. Because the thousands of voters targeted by the petition cast those ballots in reliance on instructions from the Board, discarding their ballots would violate the principle of popular sovereignty

guaranteed by the North Carolina Constitution and would amount to an impermissible "fraud on the electors." *Id.*

A. The *Lattimore* line of cases forbids discarding the votes at issue here.

The petition seeks to disqualify 60,000 votes cast by North Carolinians whose registrations allegedly lacked a driver's license number or social security number, and to disqualify an additional 5,500 votes cast by overseas North Carolinians whose absentee ballots allegedly lacked photo identification. But the petition nowhere denies that these alleged deficiencies occurred *because* voters followed the Board's express instructions, application forms, and formal rules. *See* Pet. COA Br. 9, 17, 24, 39. Nor does the petition deny that these voters "might have provided" the missing documents, and in some cases did provide them, if only someone had told them they were needed. *See* Pet. SCONC Br. in Support of Petition 36, 38; Pet. COA Br. 40. On this record, discarding the contested votes would be unlawful.

Even if the supposedly missing documents were required by law, that problem would perhaps warrant adjusting the Board's instructions for future elections. But it cannot justify retroactively throwing out ballots cast by otherwise eligible voters who relied on the Board's

instructions in *this past election*. However wrong the Board's instructions, these voters simply "cannot be deprived of [their] right to vote," by "either the willful or negligent acts of the [Board]." *Lattimore*, 120 N.C. 426, 26 S.E. at 639; *see McPherson*, 249 N.C. at 572, 107 S.E.2d at 150; *Woodall*, 176 N.C. 377, 97 S.E. at 232.

The petition's contrary argument contravenes binding case law, which holds that votes "will not be rejected" once election officials have allowed voters to be registered using procedures that the officials themselves prescribed. *Woodall*, 176 N.C. 377, 97 S.E. at 232. Nor can there be any doubt about the reach of cases like *Lattimore* and *Woodall*. The rule announced in those cases, our Supreme Court has held, "cannot be confined to" the cases themselves "and will be authority in many others." *Gibson v. Bd. of Comm'rs of Scotland Cnty.*, 163 N.C. 510, 79 S.E. 976, 977 (1913). That includes this one.

B. *James v. Bartlett* is distinguishable.

Petitioner's submissions in this litigation fail to discuss or even cite *Lattimore*. Instead, petitioner seeks to distinguish two cases that applied *Lattimore*—*Woodall* and *Overton*—while arguing that this case is instead

controlled by *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005). *See* Pet. COA Br. 13–16, 72–73. In fact, the opposite is true.

Woodall and *Overton*, like *Lattimore*, cannot be distinguished from this case. Petitioner contends that *Woodall* and *Overton* are limited to situations where registrars violate the law, as opposed to cases where voters allegedly violated "*their duty*" under the law. Pet. COA Br. 73. That is not accurate. At the time of those cases, the Constitution provided that "no person shall be allowed to vote without registration, or to register, without first taking an oath or affirmation." N.C. Const. art. 6, § 2 (1868). By its plain terms, that provision required voters to follow two commands: to register before voting, and to take an oath before registering. Both commands appeared in the same sentence, and the oath command is no less directed to voters than the registration command.

Accordingly, while also stating that this constitutional provision is a directive to registrars, the Court in *Lattimore* expressly held that a voter could not vote if he refused to take the oath. 120 N.C. 426, 26 S.E. at 639. By contrast, the Court stated in *Lattimore*, and repeated in *McPherson* and *Woodall*, that "where 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.*; *McPherson*, 249 N.C. 569 at 573, 107 S.E.2d at 150; *Woodall*, 120 N.C. 426, 97 S.E. at 232. To be clear: the "he" in that sentence refers to *the voter's* noncompliance with election law, not the registrar's.

What is more, whereas the petition here alleges voter noncompliance with *statutory* election law, the *Lattimore* cases refused to scrap votes even though they involved voter noncompliance with *constitutional* election law. The voters in *Lattimore* (1897), *Gibson* (1913), *Woodall* (1918), *Plott* (1924), *Glenn* (1929), *McPherson* (1959), and *Overton* (1960) all failed to satisfy a constitutional voting requirement. Yet the Supreme Court held, again and again over the course of over sixty years, that their votes had to be counted because they followed the registrars' instructions. This case is no different.

While the decisions in *Lattimore*, *McPherson*, and *Woodall* control this case, the decision in *James* does not. *James* concerned provisional ballots cast in November 2004 by voters in precincts where they did not live. *James*, 359 N.C. at 266, 607 S.E.2d at 641. But unlike the voters in this case, and unlike the voters in the *Lattimore* cases, the out-of-precinct voters in *James* were not told before the election that they had done

enough to ensure their ballots would count. To the contrary, the voters in *James* were on notice that their ballots might not be counted.

Before the 2004 election cycle, North Carolina election officials had not counted out-of-precinct ballots. *James*, 359 N.C. at 265, 607 S.E.2d at 641. During the 2004 election, the Board's own rules and regulations provided that out-of-precinct votes should not have been accepted, and that out-of-precinct voters should have been directed to their "proper voting place." *Id.* at 643, 607 S.E.2d at 268–69 (citing 8 NCAC 10B.0103(d) (Supp. 2004)). And although the Board nevertheless allowed out-of-precinct voters to cast provisional ballots, those ballots were by definition *provisional*. The dispute in *James* centered on voters whose applications for provisional ballots were marked "Incorrect Precinct." Appellants' Amended Br. 8–9, *James v. Bartlett*, 607 S.E.2d 638 (2005) (No. 602PA04-2), https://www.ncappellatecourts.org/show-file.php?document_id=93936 [hereinafter *James* Appellants' Br.]. Moreover, election workers were required to provide each provisional voter with a "written information" explaining how they could later ascertain "whether and to what extent the ballot was counted" or "not counted." *Id.* at App. 3 (quoting N.C. Gen. Stat. § 163-166.11(3) (2004)).

In other words: *James* did not involve a situation, as in the *Lattimore* cases and this case, where voters duly followed all official instructions for registering and voting. Rather, it involved voters who were told, in writing, that they had come to the "Incorrect Precinct" and that casting provisional ballots in those precincts could result in their votes being "not counted."

To be sure, the Board argued in *James* that the out-of-precinct voters had relied on certain representations by election officials. *See* Pet. COA Br. 14. But the Supreme Court did not accept that argument. In concluding that the post-election challenge in *James* was timely, the Court observed that, in response to a pre-election query, the Board's general counsel had "failed to indicate that the [Board] would count out-of-precinct provisional ballots." *James*, 359 N.C. at 265, 607 S.E.2d at 641. That 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 out-of-precinct ballots. *Id.* Other voters were in the same boat. The *James* plaintiffs noted that "neither plaintiffs *nor any other voters* were given

notice" that the contested ballots would be counted. *James* Appellants' Br. at 36 (emphasis added).

That is completely unlike this case. Here, as in *Lattimore*, *McPherson*, and *Woodall*, public servants told the voters who cast the contested ballots that they had done enough to register and vote. These voters had no reason to believe their votes might not count. The Constitution and precedent require this Court to honor their faith that, if they followed government instructions, their votes would be counted, and their voices would be heard.

CONCLUSION

The superior court's decision should be affirmed.

Respectfully submitted this 3rd day of March, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28 and 28.1 of the North Carolina Rules of Appellate Procedure, counsel for amici curiae certify that the foregoing brief, which was prepared using 14-point proportionally spaced font with serifs, is exactly 3,750 words (excluding covers, indexes, caption, tables of authorities, counsel's signature block, certificates of service, and this certificate of compliance) according to Microsoft Word's processing software.

This the 3rd day of March, 2025.

/s/ *Kristi Graunke*
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CERTIFICATE OF SERVICE

I certify that on March 3, 2025, this brief and accompanying motion was served on all counsel of record via email to the following:

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