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November 19, 2024

VIA EMAIL

RE: Election Protests on Behalf of Hon. Jefferson Griffin

Dear Director,

This law firm represents the Hon. Jefferson Griffin (“Judge Griffin”), Candidate for North Carolina Supreme Court Associate Justice, Seat 6.

Today we have timely-filed election protests on behalf of Judge Griffin pursuant to N.C. Gen. Stat. §§ 163-182.9 *et seq.* Copies of the protests submitted to your county Board of Elections are included with this correspondence.

As you are aware, election protests are the quasi-judicial proceedings by which “North Carolina citizens [] freely raise concerns about the election process and give the county boards of elections a chance to address those concerns before the vote counts are finalized. The process is simple so that everyone, not just lawyers, can use it.” *Bouvier v. Porter*, 386 N.C. 1, 4, 900 S.E.2d 838, 843 (2024). “Election protests are meant ‘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.* (quoting N.C. Gen. Stat. § 163-182.12). “The public has an interest in judicial and quasi-judicial bodies arriving at the truth in matters brought before them and in the due administration of justice. This interest is especially strong when the quasi-judicial proceeding implicates accuracy in elections.” *Id.* at 13, 900 S.E. 2d at 849.

Given that Judge Griffin is exercising his statutory rights to assure that the election was determined without taint or fraud, corruption, or irregularities that changed the election’s result, we write to draw your attention to the following relevant matters in connection with the protests he has filed.

- I. We request notice and an opportunity to be present and be heard at the Board’s preliminary consideration meeting under N.C. Gen. Stat § 163-182.10(a)(1).**

Pursuant to N.C. Gen. Stat. § 163-182.10(a)(1), the Board must promptly “meet to determine whether the protest substantially complies with G.S. § 163-182.9 and whether it establishes probable cause to believe that a violation of election law or irregularity or misconduct has occurred.” That

meeting must occur within two (2) business days of when the protest is filed. 08 NCAC 02 .0110(c). In the interests of fairness and a complete consideration of this matter by this Board, we respectfully request notice and an opportunity to be heard through counsel at any such meeting of the Board under N.C. Gen. Stat § 163-182.10(a)(1).

II. The standard applicable at a preliminary consideration meeting.

“[A]s soon as possible after the protest is filed, the county board of elections meets to preliminarily determine (1) whether the protest “substantially complies with statutory filing requirements, and (2) whether the protest establishes probable cause to believe that a violation of election law, an irregularity, or misconduct has occurred. If both requirements are met, the county board of elections schedules a full hearing to resolve the matter.” *Bouvier*, 386 N.C. at 15, 900 S.E.2d at 850 (internal citations and quotation marks omitted).

Given the probable cause standard to be applied by the Board, and the limited ability of the Board to develop the record at the preliminary stage, the Board must take the allegations in the protest as true for purposes of the preliminary consideration meeting. Furthermore, it is universally accepted that “[p]robable cause is a flexible, common-sense standard. *It does not demand any showing that such a belief be correct or more likely true than false.* A practical, nontechnical probability is all that is required.” *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984) (emphasis added). *See also Bouvier*, 386 N.C. at 16, 900 S.E.2d at 850 (“[E]lection protests proceed rapidly, and the process does not lend itself to exhaustive discovery and absolute precision.”).

The enclosed protests substantially comply with the requirements of N.C. Gen. Stat. § 163-182.9 and Chapter 2 of Title 08 of the North Carolina Administrative Code. The enclosed protests also demonstrate probable cause to believe that a violation of election law or irregularity or misconduct has occurred and, accordingly, the protests must be afforded a full hearing under N.C. Gen. Stat. § 163-182.10(c).

III. We request that the Board subpoena witnesses and documents in advance of the protest hearing.

The General Assembly has granted the Board authority to subpoena witnesses and documents in advance of an election protest hearing. *See* N.C. Gen. Stat. § 163-182.10(c)(1); 08 NCAC 02 .0110(e)(1). A subpoena “**shall**” be issued by the Board chair or by any two members of the Board “when the chair or two members of the county board conclude that the witnesses or documents are likely to provide information that is both relevant and material to the questions the county board must adjudicate in the protest, the information sought is not unnecessarily duplicative of other available evidence, and the subpoena is not likely to subject the recipient to undue burden or expense.” 08 NCAC 02 .0110(e)(1).

In anticipation that the protests will proceed to a hearing on the merits, we respectfully request that the chair or any two members of the Board issue *subpoenas duces tecum* for a tabular data file (.csv,

.xlsx, or similar format) containing a list of voters who cast a ballot on November 5, 2024, with identifying information. We also request that the chair or any two members of the Board issue a *subpoena ad testificandum* for a records custodian in possession of the subpoenaed data.

The foregoing documents and witnesses are necessary to a full and fair development of the critical factual issues alleged in the protest, and collectively, these witnesses and documents will show that a violation of election law or irregularity or misconduct has occurred and that our client is entitled to relief.

IV. To succeed on an election protest, a protestor needs to only present more than a scintilla of evidence.

The “substantial evidence to believe” standard applies to the final decision of the Board at the protest hearing under N.C. Gen. Stat. § 163-182.10(c). At the Section 182.10(c) hearing, the Board can receive documents, data, and other evidentiary exhibits, question witnesses, hear argument from counsel, and fully consider and weigh the evidence offered by the parties to determine if the “substantial evidence” standard is satisfied.

Our Supreme Court has described the “substantial evidence” standard as creating a “low” bar. *State v. Taylor*, 379 N.C. 589, 611, 866 S.E.2d 740, 757 (2021). Thus, in *State v. Butler*, the Supreme Court stated: “To be substantial, the evidence need not be irrefutable or uncontroverted; it need only be such as would satisfy a reasonable mind as being adequate to support a conclusion.” 356 N.C. 141, 145, 567 S.E.2d 137 (2002) (quotation omitted). In plain terms, “substantial evidence is simply evidence that is “more than a scintilla” and is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238 (1982).

Courts routinely apply the “substantial evidence” standard, and have recognized for decades that “uncorroborated and untested testimony and hearsay testimony” can constitute substantial evidence, as long as that evidence is reliable and trustworthy. *EchoStar Commc'ns Corp. v. F.C.C.*, 292 F.3d 749, 753 (D.C. Cir. 2002). It is also generally accepted that the “substantial evidence” standard can be satisfied by something less than a preponderance of the evidence, *Louisiana Public Service Commission v. Federal Energy Regulatory Commission*, 20 F.4th 1 (D.C. Cir. 2021), and that the possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662 (Fed. Cir. 2019).

The protests before this Board raise weighty and important issues that are vital for the public’s faith in our electoral system. Election protests are meant “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,” and election protests, such as those before the Board, “enable North Carolina citizens to freely raise concerns about the election process. . . .” *Bouvier*, 386 N.C. at 4, 900 S.E.2d at 843. Given the critical role that election protests play in the democratic process, and the lenient standard

applicable to an election protest under state law, it is beyond debate that these protests should be fully and fairly considered by the Board.

V. The multi-county nature of the election is legally significant, and requires that the Board not consider the protests in isolation.

The fact that these election protests arise in the context of a multi-county election is an important consideration for the Board. Under G.S. § 163-182.10(d)(1)(d), a protest must be granted in a multi-county election if there is “substantial evidence to believe that a violation of the election law or other irregularity or misconduct did occur, and *might have affected* the outcome of the election but the board is unable to finally determine the effect because the election was a multicounty election.” Thus, in a multi-county election, the Board cannot deny a protest in isolation if the irregularity or misconduct, when aggregated with other irregularities in other counties, *might have* affected the outcome of the election. In such a case, the statute makes clear that the Board “shall order that the protest and the county board’s decision be sent to the State Board for action by it.” G.S. § 163-182.10(d)(1)(d)

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We are enclosing evidence supporting the petition in PDF format. We would be more than happy to provide any of this evidence in native format.

We thank the Board for its careful attention to this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'C. Schauer', is written over a faint, light blue circular background.

Craig D. Schauer

Enclosures