

EXHIBIT A

**GOVERNOR**

	Ballot Name	Party	Votes	Percentage	Gain/Loss
	Christine Gregoire	Democratic	1,373,361	48.8730%	+919
	Dino Rossi	Republican	1,373,232	48.8685%	+748
	Ruth Bennett	Libertarian	63,465	2.2585%	+50

3 Candidate(s)

You can find this information at: <http://vote.wa.gov/general/recount.aspx?>

EXHIBIT B

**SECRETARY
of STATE**

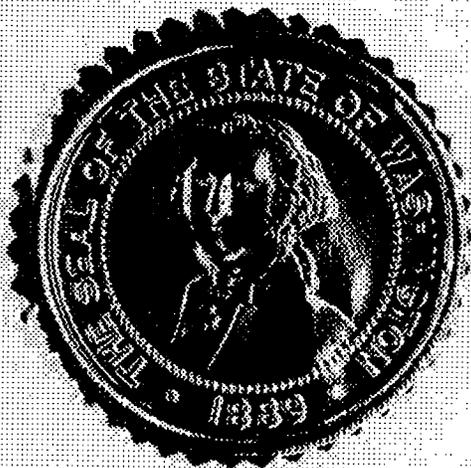
Sam Reed



ELECTIONS DIVISION
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**CANVASS OF THE RETURNS
OF THE REQUESTED HAND RECOUNT
OF THE GENERAL ELECTION
HELD ON NOVEMBER 2, 2004
FOR THE OFFICE OF GOVERNOR**

I, Sam Reed, pursuant to RCW 29A.64.061, do hereby file this amended abstract of the results for the office of Governor at the November 2, 2004 general election. This amended abstract of votes is the result of a requested statewide hand recount of the ballots cast for that office. Attached is a summary of the results as certified and transmitted by the county canvassing boards for the thirty-nine counties of the State of Washington pursuant to RCW 29A.64.061 and RCW 29A.64.070.



IN WITNESS WHEREOF, I have set
my hand and affixed the seal of the
State of Washington this 30th day
of December, 2004.

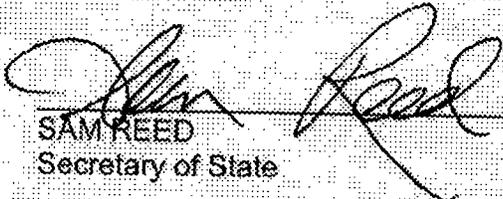
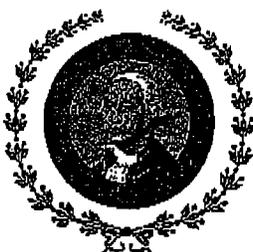

SAM REED
Secretary of State

EXHIBIT C

UNITED STATES OF AMERICA

The State of Washington



Certificate of Election

This is to Certify, That at the General Election held in the State of Washington on November 2, 2004,

Christine Gregoire

received the highest number of votes cast for the office of Governor

of said state of Washington, and was therefore duly elected to said office as appears from the official returns of said election as canvassed and certified in the manner provided by Law.

In Testimony Whereof, We have hereunto set our hands and caused the Seal of the State of Washington to be affixed this 10th day of January, A.D. 2005, at Olympia, the State Capital.



Attest:

Secretary of State

President of the Senate

Speaker of the House of Representatives

EXHIBIT D

SUPREME COURT OF NORTH CAROLINA

WILLIAM JAMES, an elector, for)
himself and others similarly)
situated, WILLIAM "BILL" FLETCHER,)
candidate for Superintendent of)
Public Instruction, and TRUDY WADE,)
candidate for Guilford County)
Commissioner at large.)
Plaintiffs,)

v.)

GARY O. BARTLETT, as Executive)
Director of the North Carolina)
State Board of Elections;)
LARRY LEAKE, ROBERT CORDLE,)
GENEVIEVE C. SIMS, LORRAINE)
G. SHINN, and CHARLES WINFREE, in)
their official capacity as members)
of the State Board of Elections,)
and the STATE BOARD OF ELECTIONS;)
ROY COOPER, in his official)
capacity as Attorney General of)
the State of North Carolina,)
Defendants,)
and)
JUNE S. ATKINSON, candidate for)
Superintendent of Public)
Instruction; and W. BRITT COBB,)
candidate for Commissioner)
of Agriculture,)
Intervenor-Defendants.)

In re Election Protest of Bill)
Fletcher in the November 2, 2004)
General Election for Superintendent)
of Public Instruction)

In re Election Protest of Dr.)
Trudy Wade in the November 2, 2004)
General Election for Guilford)
County Commissioner At-Large)

From Wake County
File No. 04 CVS 15863

From Wake County
File No. 04 CVS 16823

From Wake County
File No. 04 CVS 16850

BRIEF OF INTERVENOR-DEFENDANTS (04 CVS 15863),
RESPONDENT JUNE S. ATKINSON (04 CVS 16823) AND
RESPONDENT JOHN PARKS (04 CVS 16850)

INDEX

TABLE OF CASES AND AUTHORITIES.....iii

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....4

ARGUMENT

I. SUBJECT MATTER JURISDICTION DOES NOT
LIE WITH THE SUPREME COURT IN A
CONTESTED ELECTION FOR AN OFFICE
CREATED IN ARTICLE III OF THE NORTH
CAROLINA CONSTITUTION.....5

 A. A CONTESTED ELECTION IS ONE IN
 WHICH AN ELECTION PROTEST HAS
 BEEN MADE AND THE VALIDITY OF
 THE ELECTION HAS BEEN CALLED
 INTO QUESTION.....6

 B. STATES WITH SIMILAR CONSTITUTIONAL
 PROVISIONS RECOGNIZE THAT
 JURISDICTION IS VESTED IN THE
 LEGISLATURE AND NOT IN THE
 JUDICIARY.....9

 C. SIMILAR GRANTS OF SUBJECT MATTER
 JURISDICTION TO THE GENERAL
 ASSEMBLY ARE FOUND IN OUR
 CONSTITUTION AND IN THE
 CONSTITUTIONS OF OTHER STATES.....13

 D. THE GENERAL ASSEMBLY HAS CREATED
 AN ADMINISTRATIVE PROCEDURE THAT
 MUST BE EXHAUSTED PRIOR TO
 ADJUDICATION IN THE GENERAL
 ASSEMBLY.....16

II. ARTICLE VI, § 2 OF THE NORTH
CAROLINA CONSTITUTION DOES NOT
DISENFRANCHISE VOTERS WHO
COMPLETED PROVISIONAL BALLOTS IN A
PRECINCT OTHER THAN THEIR PRECINCT
OF RESIDENCE.....20

III. PLAINTIFFS KNEW OR SHOULD HAVE KNOWN OF THE BASIS FOR THEIR CHALLENGE TO "OUT OF PRECINCT" PROVISIONAL VOTING, BUT CHOSE TO WAIT FOR THE INITIAL RESULTS OF THE ELECTION BEFORE FILING THIS POST-ELECTION CHALLENGE.....21

IV. THE VOTES OF LAWFULLY REGISTERED VOTERS, VOTING IN ACCORDANCE WITH THE INSTRUCTIONS OF STATE, COUNTY AND PRECINCT ELECTION OFFICIALS, SHOULD NOT BE DISCARDED, EVEN IF THIS COURT SHOULD DETERMINE THAT PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF WITH RESPECT TO THEIR PRINCIPAL CLAIM.....26

CONCLUSION.....30

CERTIFICATE OF SERVICE.....32

TABLE OF CASES AND AUTHORITIES

CASES

Alexander v. Pharr, 179 N.C. 699, 103 S.E. 8 (1920) 14

Attorney General ex rel. Brooks v. Baxter (MS. Op. 1873) . . . 12

Auditor General v. Board of Supervisors of Menominee County,
89 Mich. 552, 567, 51 N.W. 483, 488 (1891). 15, 16

Baxter v. Brooks, 29 Ark. 173, 1874 W.L. 1156 (Ark. 1874)
. 11, 12, 19

Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929) 8

Britt v. Board of Canvassers, 172 N.C. 797, 90 S.E. 1005
(1916) 14

Broughton v. Young, 119 N.C. 915, 27 S.E. 277 (1896) 7

Burgin v. Board of Elections, 214 N.C. 140, 198 S.E. 592
(1938) 17

Davis v. Board of Education of Beaufort County, 186 N.C. 227,
119 S.E. 372 (1923). 7, 8

Hendon v. North Carolina State Board of Elections, 710 F.2d
177 (4th Cir. 1983). 24, 25

Overton v. Mayor & City Com'rs of Hendersonville,
253 N.C. 306, 115 S.E.2d 808 (1960). 27

People ex rel Hirsh v. Wood, 148 N.Y. 142, 42 N.E. 536
(1895). 27, 28

Ponder v. Joslin, 262 N.C. 496, 501, 138 S.E.2d 143, 147
(1964) 17

Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979) 20

Reynolds v. Sims, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393,
12 L.Ed 2d 506 (1964) 25

Roe v. Mobile County Appointment Board, 676 So.2d 1206
(Ala. 1995) 9, 10, 11

Shell Island Homeowners Association, Inc. v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999) 20

Stone v. Leatherman, 343 S.C. 484, 541 S.E.2d 241 (2001) . . . 15

Taylor v. Beckham, 178 U.S. 548, 20 S.Ct. 890, 44 L.Ed. 1187 (1900) 12, 13

Toney v. White, 488 F.2d 310, 314 (5th Cir. 1973). 25

Vass v. Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, 324 N.C. 402, 379 S.E.2d 26 (1989) 20

Waldrep v. Gaston County Board of Elections, 575 F.Supp. 759 (W.D.N.C. 1983). 25, 26

Williamson v. Indianapolis Life Ins. Co., 741 So.2d 1057 (Ala. 1999) 10

CONSTITUTIONAL PROVISIONS

ALA. CONST., art. V, § 115 10

ARK. CONST., art. VI, § 19 11

N.C. CONST., art. II, § 20 14, 18

N.C. CONST., art. III, § 7 6

N.C. CONST., art. VI, § 5 6, 18

Ky. CONST. OF 1891, § 90 13

S.C. CONST. art. III, § 11 15

STATUTORY PROVISIONS

42 U.S.C. §§ 15481, *et seq.* 21

N.C.G.S. § 120-10 19

N.C.G.S. § 120-11 19

N.C.G.S. § 163-22(a) 17

N.C.G.S. § 163-81.15	29
N.C.G.S. § 163-166.11(5)	22
N.C.G.S. § 163-182.9	17
N.C.G.S. § 163-182.10	17
N.C.G.S. § 163-182.11	18
N.C.G.S. § 163-182.14	18
S.C. Code Ann. § 7-17-250 (1976)	15
S.C. Code Ann. § 7-17-270 (Supp. 2000)	15

SUPREME COURT OF NORTH CAROLINA

WILLIAM JAMES, an elector, for)
himself and others similarly)
situated, WILLIAM "BILL" FLETCHER,)
candidate for Superintendent of)
Public Instruction, and TRUDY WADE,)
candidate for Guilford County)
Commissioner at large.)
Plaintiffs,)

v.)

GARY O. BARTLETT, as Executive)
Director of the North Carolina)
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LARRY LEAKE, ROBERT CORDLE,)
GENEVIEVE C. SIMS, LORRAINE)
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of the State Board of Elections,)
and the STATE BOARD OF ELECTIONS;)
ROY COOPER, in his official)
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Defendants,)

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From Wake County
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BRIEF OF INTERVENOR-DEFENDANTS (04 CVS 15863),
RESPONDENT JUNE S. ATKINSON (04 CVS 16823) AND
RESPONDENT JOHN PARKS (04 CVS 16850)

STATEMENT OF THE CASE

The Plaintiffs, William "Bill" Fletcher, candidate for the statewide office of Superintendent of Public Instruction, William James, an unopposed candidate for County Commissioner in Mecklenburg County, and Trudy Wade, a candidate for County Commissioner in Guilford County, filed this action via a Verified Complaint on Monday, November 15, 2004. Contained within the Verified Complaint was a Motion by the Plaintiffs for both a Temporary Restraining Order and a Preliminary and Permanent Injunction. A hearing was held On Plaintiffs' Motion for a Temporary Restraining Order on November 15, 2004.

The Intervenor-Defendants appeared at the hearing on November 15th and filed their Motion to Intervene in this matter, which was allowed by the Court in open court during the course of the hearing. The Court denied Plaintiffs' Motion by an Order dated November 16, 2004.

On Monday, November 29, 2004, the Superior Court of Wake County, Judge Henry W. Hight, Jr., presiding, heard Plaintiffs' Motion for a Preliminary Injunction. The Court denied Plaintiffs' Motion. On December 3, 2004, this Court granted

discretionary review for the purpose of entering an Order denying all the relief sought by the Plaintiffs and remanding the case to the Wake County Superior Court for further proceedings.

On November 30, 2004, the State Board of Elections heard election protests filed by Fletcher and Wade. The Board denied both protests by Order issued December 13, 2004, and Dr. Atkinson and John Parks, Dr. Wade's opponent, were ordered certified as the winners of the respective races. Mr. Fletcher was served with the Order on December 13, 2004, and Dr. Wade was served on December 16, 2004.

Both Fletcher and Wade appealed the State Board's Order to the Wake County Superior Court, and the appeals were heard along with the Defendants' and Intervenor-Defendants' Motions to Dismiss the underlying litigation on December 16, 2004. By Orders issued on December 17, 2004, the trial court converted the Defendants' Motions to Dismiss to a Motion for Summary Judgment and granted summary judgment in favor of the Defendants in the declaratory judgment action. The Court also affirmed the rulings of the State Board with respect to the election protests of Fletcher and Wade.

On December 22, 2004, this Court granted the Plaintiffs' Motion to Accept Discretionary Review Before Consideration by the Court of Appeals, and to Suspend the Rules to Allow

Expedited Review and Motion for Writ of Supersedeas and Temporary Stay in the *James et al. v. Bartlett et al.* case. On December 28, 2004, this Court issued an amended Order, clarifying that the election protests of Bill Fletcher and Dr. Trudy Wade were also being accepted by the Court for its discretionary review.

The effect of the Court's order, entering a stay and issuing its writ of supersedeas, has been to maintain the status quo. Because of this Court's Order, the State Board of Elections has not issued a Certificate of Election to Dr. Atkinson, the successful candidate in the race for Superintendent of Public Instruction. Dr. Atkinson was certified the winner of that race on November 30, 2004, and the State Board's Order was served on Mr. Fletcher on December 13, 2004. Because no stay was issued by the Superior Court of Wake County, the certification was to be issued on December 23, 2004. This Court's order precluded the issuance of the certificate. Similarly, issuance of a Certificate of Election to Mr. Parks by the Guilford County Board of Elections was precluded by the Court's Order.

STATEMENT OF THE FACTS

These appeals arise out of the general election held November 2, 2004. The Plaintiffs' allegations arise from the acceptance, counting and tabulation of the provisional ballots

of North Carolina voters that the Plaintiffs claim were not qualified to vote according to the provisions of the North Carolina Constitution.

Plaintiffs' constitutional challenges are leveled at those voters who voted in a precinct other than the one in which they were properly registered. The Plaintiffs have claimed, through their respective counsel, that they are not challenging those voters who voted either absentee or in the "one-stop no excuse" (hereinafter "one-stop" or "early") voting prior to Election Day, even though those voters, or at least the majority of them, did not vote in their proper precinct. Nevertheless, the Plaintiffs claim that any voters who voted on Election Day in a precinct other than the one in which they are registered ("out of precinct voters") were improper, not properly qualified under the North Carolina Constitution, and should be disenfranchised.

ARGUMENT

I. SUBJECT MATTER JURISDICTION DOES NOT LIE WITH THE SUPREME COURT IN A CONTESTED ELECTION FOR AN OFFICE CREATED IN ARTICLE III OF THE NORTH CAROLINA CONSTITUTION.

The office of Superintendent of Public Instruction was created in Article III, § 7 of the North Carolina Constitution, which provides as follows:

(1) Officers. A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner

of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

N.C. CONST., Art. III, § 7 (emphasis added). Thus, as an executive office created by Article III of our Constitution, a "contested election" for the office of Superintendent of Public Instruction falls under the jurisdictional purview of Article VI, § 5 of the North Carolina Constitution which provides as follows:

All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce. A contested election for any office established by Article III of this Constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law.

N.C. CONST., Art. VI, § 5 (emphasis added). The constitutional provision is mandatory with respect to the jurisdiction of the General Assembly, stating that the contest "shall" be determined by the General Assembly.

A. A CONTESTED ELECTION IS ONE IN WHICH AN ELECTION PROTEST HAS BEEN MADE AND THE VALIDITY OF THE ELECTION HAS BEEN CALLED INTO QUESTION.

Article VI, § 5 of the Constitution applies to "contested elections". While there is no definition provided for a

"contested election" in our Constitution, this Court has previously made reference to "contested elections" on several occasions, all of which dealt with elections that had been challenged for various reasons. In *Broughton v. Young*, 119 N.C. 915, 27 S.E. 277 (1896), application was made to Justice Clark of this Court to require the Clerk of Wake County Superior Court to turn over sealed duplicate ballot boxes for the purpose of conducting a recount for a race for a seat in the House of Representatives between N. B. Broughton and James H. Young. A justice of the peace had been appointed by the General Assembly to be the commissioner to take evidence in the contest for the legislative seat. The Court noted that "in contested elections for members of the General Assembly and members of Congress, the evidence is taken not before a jury but before a Commissioner, and submitted upon depositions." *Id.* This Court used the phrase to indicate that a challenge had been made to the validity of the election.

In *Davis v. Board of Education of Beaufort County*, 186 N.C. 227, 119 S.E. 372 (1923), this Court was called upon to determine the validity of an election called in Pungo School District No. 1 to determine whether a special tax should be levied and whether certain bonds should be issued for the purpose of purchasing property and building schools. Certain absentee ballots were called into question, and the Court used

the phrase "contested elections" when speaking about the respective duties of the absent voter and election officials in receiving absentee ballots: "In several cases of contested elections, in which these principles have been applied, the distinction is drawn between the duties imposed by law upon the election officers and those imposed as conditions precedent upon the absent voter." *Id.* at _____, 119 S.E. at 374 (emphasis added).

Similarly, in *Bouldin v. Davis*, 197 N.C. 731, 150 S.E. 507 (1929), the Court was called upon to determine whether it had jurisdiction to determine an action in the nature of quo warranto for a seat on the city council for the City of High Point. In so doing, the Court noted, "the answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the State on subjects of contested elections and quo warranto." *Id.* at _____, 150 S.E. at 509(emphasis added).

In each of the instances above, the Court was referring to "contested elections" in a general context to mean all elections in which protests have been lodged. The race for Superintendent of Public Instruction falls within that category, because Bill Fletcher filed election protests, challenging the use of out of precinct provisional ballots. For this reason, Article VI, § 5

of the Constitution applies to the Election Protest of Bill Fletcher, and the Court is without jurisdiction to hear it.

B. STATES WITH SIMILAR CONSTITUTIONAL PROVISIONS RECOGNIZE THAT JURISDICTION IS VESTED IN THE LEGISLATURE AND NOT IN THE JUDICIARY.

Several of our sister states have similar constitutional provisions that place subject matter jurisdiction over election contests for statewide office in the legislature or general assembly. These states have interpreted their constitutional grants to be exclusive, divesting the courts of jurisdiction.

In *Roe v. Mobile County Appointment Board*, 676 So.2d 1206 (Ala. 1995), the Alabama Supreme Court answered a certified question from the Eleventh Circuit Court of Appeals. Following the general election of 1994, the races for the offices of Chief Justice of the Supreme Court and State Treasurer were very close. Questions arose regarding the validity of 2000 absentee ballots that had been improperly completed, and whether those ballots should be counted for the races at issue, both of which had margins within that number. After a series of restraining orders and injunctions were entered in both state and federal court, the Eleventh Circuit Court of Appeals asked whether the absentee ballots at issue were in sufficient compliance with state law so that they should be counted. See *Roe v. Mobile County Appointment Board*, 676 So.2d 1206 (Ala. 1995), overruled

on other grounds, *Williamson v. Indianapolis Life Ins. Co.*, 741 So.2d 1057 (Ala. 1999).

The Alabama Supreme Court performed an exhaustive analysis in determining whether, under both state and federal precedent, the federal court had authority and jurisdiction to hear a state election matter. Article V, § 115 of the Constitution of Alabama of 1901 provides, in pertinent part, that "contested elections for governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, and commissioner of agriculture and industries, shall be determined by both houses of the legislature in such manner as may be prescribed by law." ALA. CONST., art. V, § 115. Stating their belief that the federal court did not have jurisdiction and that the matter was subject to state court jurisdiction, the Court held that those absentee ballots that were in substantial compliance with the statutes should be counted. See *Roe*, 676 So.2d at 1226. In doing so, the Alabama Supreme Court recognized that, ultimately, when the results of the election were certified, an aggrieved party had the right under Section 115 of the Alabama Constitution

to file a contest of the election in the legislature. No court, state or federal, has jurisdiction to hear evidence in an election contest for a statewide election, such as is involved here. A losing candidate, when the votes are certified, has a right to contest the election in the state

legislature under the procedures established by § 17-15-1 et seq., of the Code.

Id. at 1218.

The Court recognized that it did not have jurisdiction to hear an election contest in a statewide election and that power resided solely with the legislature. In this case, the results in the Superintendent of Public Instruction race are known and have been certified by the State Board of Elections. Any protest of those election results, therefore, should have been, pursuant to Article VI, § 5 of the North Carolina Constitution, and after the requisite utilization of administrative procedures, the subject of a petition to the General Assembly.

The State of Arkansas has a similar election contest provision in its state Constitution. Article VI, § 19 of the Constitution of 1868 provides that "contested elections shall likewise be determined by both houses of the General Assembly in such manner as is or may hereafter be prescribed by law." ARK. CONST., art. VI, § 19.

In *Baxter v. Brooks*, 29 Ark. 173, 1874 W.L. 1156 (Ark. 1874), the Supreme Court of Arkansas, in a case involving a contest for the office of governor in that state, noted its previous ruling that the jurisdiction of the legislature with respect to a contested election for governor was "exclusive".

Id. at *7 (citing *Attorney General ex rel. Brooks v. Baxter* (MS. Op. 1873)). In the earlier case, the court held

Under this constitution the determination of the question as to whether the person exercising the office of governor has been duly elected or not, is vested exclusively in the general assembly of the state, and neither this nor any state court has jurisdiction to try a suit in relation to such contest, be the mode or form what it may; whether at the suit of the attorney general or on the relation of a claimant through him, or by an individual alone claiming a right to the office. Such an issue should be made before the general assembly; it is their duty to decide, and no other tribunal can determine the question. We are of opinion that this court has no jurisdiction to hear and determine a writ of *quo warranto* for the purpose of rendering a judgment of ouster against the chief executive of this state, and the right to file an information and issue a writ for that purpose is denied.

Id. at *12 (citing *Attorney General ex rel. Brooks v. Baxter* (MS. Op. 1873) (emphasis in original)). The Supreme Court left no doubt in its analysis that the jurisdiction rested solely with the general assembly and that the courts had no jurisdiction to act.

In *Taylor v. Beckham*, 178 U.S. 548, 20 S.Ct. 890, 44 L.Ed. 1187 (1900), the United States Supreme Court was asked to review a case from the Commonwealth of Kentucky, wherein the elections for governor and lieutenant governor were contested. At the time, the Constitution of Kentucky of 1891 provided that

"Contested elections for governor or lieutenant governor shall be determined by both houses of the General Assembly, according to such regulations as may be established by law." See Ky. CONST. OF 1891, § 90. After the plaintiffs in the case were certified as governor and lieutenant governor by the canvassing board, their opponents filed election contests in the General Assembly. Both houses met, convened committees to accept evidence, and upon joint vote, found that the defendants had been rightfully elected governor and lieutenant governor. Subsequently, the plaintiffs filed an appeal to the Court of Appeals of Kentucky, which affirmed the actions of the General Assembly. Two of the six judges in the majority wrote separately to note that "there is no power in the Courts of the state to review the finding of the General Assembly in a contested election for the offices of governor and lieutenant governor as shown by its duly authenticated records." *Id.* at 567, 20 S.Ct. at 897.

In each of these cases, the courts of the respective states recognized and held that they were without the constitutional authority to adjudicate the election contest with which they were presented. Dr. Atkinson believes that this Court must act in a similar fashion, according to Article VI, § 5 of our Constitution.

**C. SIMILAR GRANTS OF SUBJECT MATTER
JURISDICTION TO THE GENERAL ASSEMBLY**

**ARE FOUND IN OUR CONSTITUTION AND IN
THE CONSTITUTIONS OF OTHER STATES.**

Similar provisions of our state Constitution and in the constitutions of other states illustrate that a constitutional grant of jurisdiction should be strictly construed. This Court has previously considered and addressed a similar provision of the North Carolina Constitution, found at Article II, § 20, which deals with the powers of the General Assembly and provides as follows: "each house shall be judge of the qualifications and elections of its own members...." N.C. CONST. art. II, § 20.

In *Alexander v. Pharr*, 179 N.C. 699, 103 S.E. 8 (1920), this Court was asked to hear the appeal in an action of quo warranto to try title to the office for a member of the House of Representatives. This Court refused, stating

This court is without jurisdiction, because the action is to try title to a seat in the General Assembly of North Carolina, and the Constitution of this state (Art. 2, Sec. 22) provides, 'each house (of the General Assembly) shall be judge of the qualifications in elections of its own members,' thereby withdrawing the inquiry from the consideration of the courts.

Id. The Court also noted that it had previously construed in a like manner the similar section contained in the United States Constitution at Article I, § 5 in *Britt v. Board of Canvassers*, 172 N.C. 797, 90 S.E. 1005 (1916). Thus, this Court has previously held that where the Constitution bestows on the

General Assembly a specific jurisdictional grant to hear election contests, this Court is without jurisdiction to hear the matter.

Our sister state, South Carolina, has a similar provision in its state constitution. Article III, § 11 of the South Carolina Constitution provides that the Senate has the authority to judge the election returns and qualifications of its own members. See S.C. CONST., art. III, § 11. In addition, § 7-17-250 of the South Carolina Code holds that appeals from protests concerning election of Senate members are to the Senate itself. See S.C. Code Ann. § 7-17-250 (1976). The Supreme Court of South Carolina confronted the issue in *Stone v. Leatherman*, 343 S.C. 484, 541 S.E.2d 241 (2001). The Court was asked to accept the appeal of a Senate candidate because a separate section of the South Carolina Code, § 7-17-270, provided that appeals from the Election Commission were to the Supreme Court via writ of certiorari. See S.C. Code Ann. § 7-17-270 (Supp. 2000). The court held that the specific rules concerning the election of members of the Senate superseded the more general election rules contained in § 7-17-270, and therefore, dismissed the appeal filed by the Senate candidate. *Id.* at 485, 541 S.E.2d at 241.

Similarly, in Michigan, the legislature is made the judge of the election and qualifications of its own members. See *Auditor General v. Board of Supervisors of Menominee County*, 89

Mich. 552, 567, 51 N.W. 483, 488 (1891). The Supreme Court of Michigan noted that

[t]he rule is well established by our own decisions that where legislative bodies are made the judges of the elections and qualifications of their own members, and are vested with the power to determine contested elections, their action is final, and not subject to review by this Court.

Id. (emphasis added).

These constitutional provisions that are similar to Article II, § 20 in our own North Carolina Constitution illustrate that it is a well-accepted practice across our country that a court in which review is sought should decline to exercise jurisdiction when the respective constitution places that jurisdiction elsewhere. The respondent, Dr. June S. Atkinson, requests that this Court similarly decline to exercise its jurisdiction in this matter and hold that the election protests filed by her opponent should be heard and determined by our General Assembly.

D. THE GENERAL ASSEMBLY HAS CREATED AN ADMINISTRATIVE PROCEDURE THAT MUST BE EXHAUSTED PRIOR TO ADJUDICATION IN THE GENERAL ASSEMBLY.

The General Assembly set up the State Board of Elections to have "general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries

and elections as it may deem advisable so long as they do not conflict with any provisions of this Chapter." See N.C.G.S. § 163-22(a). Thus, the State Board of Elections has been given by the General Assembly general supervisory powers over the elections process in North Carolina. Further, this Court has considered the powers retained by the State Board of Elections and determined that

the State Board of Elections is a quasi-judicial agency and may, in a primary or election . . . , investigate alleged frauds and irregularities in elections in any county upon appeal from a county board or upon a protest filed in apt time with the State Board of Elections, and may take such action as the findings of fact may justify, and may direct a county board of elections to amend its returns in accordance therewith.

Ponder v. Joslin, 262 N.C. 496, 501, 138 S.E.2d 143, 147 (1964) (citing *Burgin v. Board of Elections*, 214 N.C. 140, 198 S.E. 592 (1938)) (emphasis in original).

As part of the procedures set up by the General Assembly, the State Board of Elections has been provided with a statutory framework for the consideration of election protests. Initially, election protests are to be filed with the respective county boards of elections where the alleged cause for complaint occurred. See N.C.G.S. § 163-182.9. After consideration of the election protest by the county board of elections, see N.C.G.S. § 163-182.10, the protest decision may be appealed to the State

Board of Elections. See N.C.G.S. § 163-182.11. After determination by the State Board of the election protest, an appealing party is provided the opportunity for judicial review of the final decision of the State Board of Elections in the Wake County Superior Court. See N.C.G.S. § 163-182.14. These specific procedures are set forth in Chapter 163, which contains all of the election laws, by the General Assembly. Thus, the General Assembly has provided a very specific administrative procedure and mechanism for the hearing of election protests for elective offices in North Carolina, including Article III offices. However, the administrative process ends with the appellate review by the Wake County Superior Court, as described in N.C.G.S. § 163-182.14. The statutory scheme is silent with respect to further review, and it is respondent's contention that any further review is to be made by the General Assembly in accordance with its constitutional mandate.

Article VI, § 5 of the North Carolina Constitution states that the General Assembly is to determine the contested election "in a manner prescribed by law." N.C. CONST., art. VI, § 5. In the other instance in the North Carolina Constitution where the General Assembly is given subject matter jurisdiction over a contested election, see N.C. CONST., art. II, § 20, the legislature has provided specific statutory provisions that govern the procedure for such contests. In N.C.G.S. § 120-10,

the General Assembly makes specific rules for notice of the contest to be given to the opponent and to the General Assembly for hearing prior to its first convening. See N.C.G.S. § 120-10. In N.C.G.S. § 120-11, the General Assembly provides that depositions may be taken to accept the evidence in such an election contest. See N.C.G.S. § 120-11.

No such statutes currently exist to provide a mechanism for the grant of subject matter jurisdiction contained in Art. VI, § 5. However, as noted in *Baxter v. Brooks*, 29 Ark. 173, 1874 W.L. 1156 (Ark. 1874),

But without any law to regulate the proceedings in such case before the General Assembly, the jurisdiction of the case would remain there, if it is exclusive. The mere failure on the part of the legislature to provide a mode of conducting the trial would no more oust the jurisdiction than a failure to establish laws governing actions before a justice of the peace or probate courts, would destroy their constitutional jurisdiction, and give the power to bestow it somewhere else, by a simple enactment. Constitutions would be worth but little, if they could be thus evaded.

Id. at *6. The fact that no specific statutory scheme has been created in the first instance or has been held over by the General Assembly from previous codes does not mean that the General Assembly has abandoned its jurisdiction, nor could it.

The procedures set forth in Chapter 163, however, set out a specific and appropriate administrative procedure for the

hearing of election contests for Article III offices before they reach the General Assembly. Dr. Atkinson, the respondent herein, has not previously invoked the authority and jurisdiction of the General Assembly because it was necessary that all administrative remedies be exhausted before the jurisdiction of the General Assembly was invoked.

This Court and the Court of Appeals have, on many previous occasions, recognized the doctrine of exhaustion of administrative remedies and given it effect. See, e.g., *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979); *Vass v. Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan*, 324 N.C. 402, 379 S.E.2d 26 (1989); and *Shell Island Homeowners Association, Inc. v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

Having exhausted the specific statutory administrative procedures contained in Chapter 163 of the General Statutes, Respondent Atkinson respectfully contends and believes that this Court is without jurisdiction to hear the election protest of Bill Fletcher and that this Court should decline to exercise jurisdiction over the matter. Instead, Mr. Fletcher should have invoked the jurisdiction of the General Assembly in accordance with Article VI, § 5 of the Constitution.

**II. ARTICLE VI, § 2 OF THE NORTH CAROLINA
CONSTITUTION DOES NOT DISENFRANCHISE VOTERS
WHO COMPLETED PROVISIONAL BALLOTS IN A**

**PRECINCT OTHER THAN THEIR PRECINCT OF
RESIDENCE.**

The intervenor-defendants and respondents herein hereby adopt and incorporate by reference the arguments made in their Memorandum in Opposition to the Plaintiffs' Petition for Writ of Supersedeas. They also adopt and incorporate by reference herein the arguments made in behalf of the State Board of Elections with respect to the constitutionality of "out of precinct" provisional ballots.

**III. PLAINTIFFS KNEW OR SHOULD HAVE KNOWN OF THE
BASIS FOR THEIR CHALLENGE TO "OUT OF
PRECINCT" PROVISIONAL VOTING, BUT CHOSE TO
WAIT FOR THE INITIAL RESULTS OF THE ELECTION
BEFORE FILING THIS POST-ELECTION CHALLENGE.**

Notwithstanding the arguments advanced by the Plaintiffs for their delay in initiating this constitutional challenge in the election contest before this Court, the Plaintiffs could, in fact, have initiated this challenge in a timely manner well prior to the November 2, 2004 general election. Plaintiffs' preference, however, was to ascertain the initial results of the election before commencing the challenge.

The Plaintiffs' contention ignored several significant and indisputable facts. First, pursuant to the Help America Vote Act (HAVA), 42 U.S.C. §§ 15481 et seq., the state of North Carolina adopted procedures to implement HAVA, including, in particular, procedures for the use and counting of provisional

ballots. The General Assembly of North Carolina, in response to the adoption of HAVA, amended its statutory scheme to include, among other things, the provisions of N.C.G.S. § 163-166.11(5) that has been cited by Plaintiff. See N.C.G.S. § 163-166.11(5). Second, this provision and others adopted in accordance with North Carolina's obligations under HAVA were submitted for review and preclearance by the United States Department of Justice's Voting Rights Act section pursuant to Article V of the Voting Rights Act. Preclearance was granted by the Department of Justice. See letter dated October 25, 2004 from D. Wright to W. James, attached to Complaint and in the Record.

The State Board of Elections, in furtherance of its duties and pursuant to HAVA and the Voting Rights Act, and in the implementation of its statutory mandate, disseminated instructions to its various county boards of elections with respect to the availability and counting of provisional ballots. These materials, contained in the Affidavit of Johnnie F. McLean, which is in the Record herein, establishes the policies and intentions of the State Board of Elections and its county boards to count "out of precinct" provisional ballots. These materials were made available well prior to the November 2, 2004 election. Lastly, the State Board of Elections, in fact, implemented the practice of counting "out of precinct" provisional ballots for the first time, not in the November 2,

2004 general election, but instead, in the primary election contests held statewide in July and August of 2004, well prior to the November 2 general election. See, Affidavit of J. McLean, Exhibit 2, p. 10 and Exhibit 18 ("out of precinct" provisional ballots counted in 95 of 96 reporting counties in SEIMS system.).

The Plaintiffs thus knew, or should have known, from the public records and filings available to them and from the actual primary conducted within the state of North Carolina in which the Plaintiff Fletcher appeared on the ballot, that "out of precinct" provisional ballots were to be counted in accordance with the state's HAVA plan, the preclearance procedure for the Voting Rights Act filing, and pursuant to and in accordance with the instructions made available to our county boards of election by the State Board of Elections. The Plaintiff James contends, based on his experience from an earlier election cycle, pre-HAVA, that he was entitled to make assumptions with respect to how the "out of precinct" provisional ballots would be counted in the November 2 general election. See Amended Appellants' Brief at 38. This faulty "assumption" on his part did not entitle Mr. James to delay his challenge until after the election. Of course, neither Mr. Fletcher nor Ms. Wade was entitled to rely on Mr. James' peculiar knowledge or false assumption. Neither does the purported ignorance of Ms. Wade

and Mr. Fletcher with respect to vote counting practices in elections in which they participated entitle them to lie in wait until after the election to initiate their challenge.

Plaintiff, however, correctly cites *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177 (4th Cir. 1983) for consideration by this Court. In *Hendon*, the Plaintiffs challenged, after the election, a statutory scheme by which a straight party vote and a cross over vote were counted only as straight ticket votes. In that decision, the Fourth Circuit found the statutory scheme to be unconstitutional, but refused to upset the results of the election, finding that the Plaintiff waited until after the election to bring the action. *Id.* at 183.

The Plaintiff attempts to distinguish *Hendon* by suggesting that the statute in question in *Hendon* had been on the books for over 15 years before the lawsuit was brought, missing the obvious and significant point that the plaintiff in *Hendon* brought the action after the election rather than before. It was not incumbent upon the North Carolina General Assembly and State Board of Elections to make specific effort to make these Plaintiffs aware of the State Board's implementation of provisional balloting in the fulfillment of its HAVA obligations. It was, however, the obligation of these Plaintiffs to commence these proceedings in a timely manner, and

such proceedings clearly could have been commenced in a timely manner, had Plaintiffs made inquiry into the public records available both at the State Board of Elections' offices and each of the county board offices in each of the 100 counties of this state.

As recognized by the Fourth Circuit in *Hendon*, "[e]ven though laws governing elections are found to be unconstitutional, courts in the exercise of their equitable jurisdiction may withhold immediate relief when restraint is justified." *Id.* at 182 (citing *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393, 12 L.Ed 2d 506 (1964)). The Fourth Circuit further reasoned that "failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate' and then upon losing, seek to undo the ballot results in a court action.'" *Id.* (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)).

The United States District Court for the Western District of North Carolina in *Waldrep v. Gaston County Board of Elections*, 575 F.Supp. 759 (W.D.N.C. 1983) applied these principles to deny the election challenge to ballot counting in a Gaston County Sheriff's race. Although District Judge McMillan found the plaintiff in that case to be a "victim of manifest injustice", Judge McMillan held that in cases

challenging procedural "irregularity in elections, the Plaintiff must demonstrate his inability to have challenged the irregularities before the election if he is to hope for retroactive relief." *Id.* at 760.

Sound policy reasons support the requirement that grievances regarding election practices be commenced prior to, rather than subsequent to, the election. This Court should not favor these Plaintiffs for their delay in bringing this challenge, which has resulted in delay and disruption in the resolution of this electoral process.

IV. THE VOTES OF LAWFULLY REGISTERED VOTERS, VOTING IN ACCORDANCE WITH THE INSTRUCTIONS OF STATE, COUNTY AND PRECINCT ELECTION OFFICIALS, SHOULD NOT BE DISCARDED, EVEN IF THIS COURT SHOULD DETERMINE THAT PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF WITH RESPECT TO THEIR PRINCIPAL CLAIM.

As is set forth in Section I of this Brief, Respondent Atkinson respectfully contends that this Court is without subject matter jurisdiction over the election contest initiated by her opponent Bill Fletcher, but acknowledges the jurisdiction of the Court in the declaratory judgment action. Respondent John Parks, however, acknowledges the jurisdiction of the Court of the declaratory judgment action as well as the election contest initiated by his opponent, Plaintiff-Appellant Trudy Wade. Both Respondents Atkinson and Parks respectfully contend that the Plaintiffs are in error with respect to their principal

contention in this action. Both also respectfully contend that even should the Court determine that the practices of counting "out of precinct" provisional ballots to be in violation of Article VI, § 2 of the North Carolina Constitution, the voting by such legally registered "out of precinct" voters, which voting has been encouraged by county and precinct election officials in accordance with practices and policies promulgated and disseminated prior to the November 2 general election, should not result in the disenfranchisement of these innocent voters. As this Court held in *Overton v. Mayor and City Com'rs of Hendersonville*, 253 N.C. 306, 115 S.E.2d 808 (1960), "in the absence of actual fraud participated in by an elected 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". *Id.* at 315, 115 S.E.2d at 815.

This principle finds abundant support in cases from across the country, but perhaps first and foremost in the decision *People ex rel. Hirsh v. Wood*, 148 N.Y. 142, 42 N.E. 536 (1895), an opinion by Chief Judge Andrews for the Court of Appeals of New York. That opinion, arising from an effort to deny the counting of certain ballots cast "for the reason that no nomination of any candidates for those offices was made by the party, and that no vote for any candidates for those offices could legally be cast", was rejected by the Court. *Id.* at 145,

42 N.E. at 536. In this often-cited decision, the Court said "we can conceive of no principle which permits the disenfranchisement of innocent voters for the mistake, or even the willful misconduct, of election officers in performing the duty cast upon them. The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly-qualified electors, and not to defeat them." *Id.* at 147, 47 N.E. at 537.

Even if the Court should accept Plaintiffs' contentions that they were not dilatory, this Court should not order the "out of precinct" provisional ballots cast in this election to be discarded, because of the policies set out above which disfavor disenfranchisement. See *id.*

Plaintiffs suggest that "out of precinct" provisional ballots are the product of badly intentioned voters seeking to cause delay for voters actually residing in the precinct. In fact, there are several good, valid and understandable reasons why voters may appear in the wrong precinct, and who having reached the front of the line, and having been offered a provisional ballot by a precinct election official, may choose to vote that provisional ballot. First, in the weeks leading up to the 2004 general election, as a result of voter interest in the election, there was a substantial increase in registration. It is probable that many voters registering before the deadline

did not receive the appropriate communication from their county board of elections as to the location of their precinct voting place.

Secondly, voters moving from precinct to precinct within their county more than thirty (30) days before the November 2 general election are designated as unreported moves voters by the provision of N.C.G.S. § 163-81.15. See N.C.G.S. § 163-81.15. These voters are entitled to be provided with a precinct transfer certificate which they may take either to their new precinct or to a central location provided by the county, typically the county board of elections. During the course of the 2004 general election, precinct election officials were encouraged by the State Board of Elections to make provisional ballots available to such voters, enabling such voters to vote in their old precinct by provisional ballot, notwithstanding the fact that they had moved and were eligible to vote in their new precinct or in a central location. It is probable that many such voters, lawfully registered and lawfully entitled to vote, voted provisionally in the precinct from which they moved, based upon the instructions of precinct election officials and to avoid a lengthy wait in yet another line (which of course would have resulted in delays in the voter's new precinct or in the county's central location).

Thirdly, voters may simply have erroneously selected the wrong precinct polling place. Again, these voters, in each instance, were lawfully registered in the county in which their vote was cast, and were found to meet other qualifications for voting. In accordance with county board and State Board policy and procedure, as well as in accordance with N.C.G.S. § 163-166.11, votes cast by any of these categories of voters were counted only in races in which the voters were eligible to vote, that is, races in which voters would have voted had they voted in their precinct of residence. Thus votes have not been counted in the elections in which voters were ineligible to vote, and this Court need not act out of fear or concern that any candidate received a vote from a voter who was otherwise ineligible to have voted for that candidate.

There is no evidence in the record that any votes were cast by any persons not registered in the county in which their votes were cast, nor that any such votes were counted in any race in which the voter was or would not have been eligible to vote had the voter voted in his or her own precinct. The fact that these voters accepted and relied on instruction and/or encouragement from election officials when casting their ballots provisionally, should not subject them to disenfranchisement.

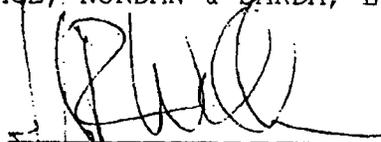
CONCLUSION

For the reasons stated herein, the Intervenor-Defendants and the Respondents June S. Atkinson and John Parks respectfully request that this Court affirm the Orders of the Superior Court of Wake County and dissolve its Writ of Supersedeas.

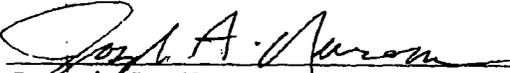
This the 13th day of January, 2005.

WALLACE, NORDAN & SARDA, L.L.P.

By:


John R. Wallace

By:

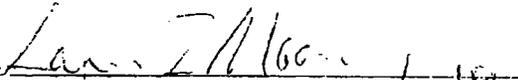

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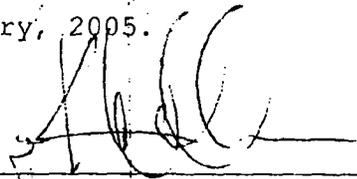
This is to certify that the undersigned attorney has served a copy of the foregoing **BRIEF OF INTERVENOR-DEFENDANTS, RESPONDENT JUNE S. ATKINSON, AND RESPONDENT JOHN PARKS**, via U.S. Mail addressed to:

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