

STATE OF NORTH CAROLINA  
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

*In re Protests of Jefferson Griffin, Ashlee Adams, Frank Sossamon, and Stacie McGinn*

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**BRIEF OF SECURE FAMILIES INITIATIVE AND CERTAIN MEMBERS OF COUNT  
EVERY HERO, AN UNINCORPORATED ASSOCIATION, IN SUPPORT OF  
DISMISSING THE “FPCA” ELECTION PROTESTS**  
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**INTEREST OF SECURE FAMILIES INITIATIVE AND CERTAIN MEMBERS OF  
COUNT EVERY HERO**

Secure Families Initiative (“SFI”) is a nonpartisan 501(c)(4) not-for-profit organization comprising military spouses and family members that advocates for federal and state policies to increase accessibility for absentee voters, especially registered military-affiliated and overseas voters. Because voting remains less accessible for its members and the broader military and overseas community, SFI also educates and registers those voters and engages in non-partisan “get-out-the-vote” efforts for military voters in all elections.

Count Every Hero is a nonpartisan unincorporated association of nine retired four-star admirals and generals, and former secretaries of the Army, Navy, and Air Force. The following seven members have signed on to this brief: Admiral Steve Abbot, United States Navy (Retired); Admiral Thad Allen, United States Coast Guard (Retired); Former Secretary of the Army Louis Caldera; General George Casey, United States Army (Retired); General Carlton W. Fulford, Jr., United States Marine Corps (Retired); General Craig McKinley, United States Air Force (Retired); and Former Secretary of the Navy Sean O’Keefe (together, the “CEH Brief Members”). The CEH Brief Members have served under every President from John F. Kennedy to Donald Trump.

SFI and the CEH Brief Members have a strong interest in the resolution of these Protests given their mission of ensuring that all military and overseas Americans voting in North Carolina are not unduly burdened in exercising their right to vote or outright disenfranchised. Indeed, the North Carolina Court of Appeals accepted an amicus brief from these parties in *Telia Kivett et al. v. the North Carolina State Board of Elections et al.*, a case raising similar issues and risking similar harm that remains pending before the North Carolina Supreme Court. As in that case, SFI and the CEH Brief Members aim to inform the North Carolina State Board of Elections (the “Board”) how the elections protests of Jefferson Griffin, Ashlee Adams, and Stacie McGinn (the

“Protesters”<sup>1</sup> would work to disenfranchise the very voters both groups seek to protect. SFI and the CEH Brief Members speak not to favor any one political party but rather to safeguard the voices of the broad coalition of voters they represent, who are far from a monolith in terms of party preference.<sup>2</sup> United States citizens living abroad—including members of the military and their families—deserve a voice in their government’s electoral process.

### **INTRODUCTION**

The Board should deny the Protesters’ attempt to disqualify voters who relied on the express terms of a longstanding state statute to properly cast their ballots in the 2024 General Election. These North Carolinians, who are living and working abroad and include family members of North Carolinians serving honorably in the United States Armed Forces, followed the rules set by North Carolina’s Uniform Military Overseas Voters Act (“UMOVA”), § 163-258.2 *et seq.* Nevertheless, they now face the risk of disenfranchisement due to pending protests filed with this Board that challenge, among other things, the constitutionality of a provision of UMOVA that, for more than a decade, has expressly guaranteed the children and dependents of military and overseas North Carolinians the right to register and vote in North Carolina, regardless of whether they themselves have lived in the state and as long as they have never registered to vote in any other state. *See* N.C. Gen. Stat. § 163-258.2(1)(e).

The Protesters’ effort to redefine well-settled eligibility requirements not only unfairly targets overseas voters who reasonably relied on the rules as they were written for this election; it

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<sup>1</sup> SFI and the CEH Brief Members are aware that Frank Sossaman has also filed election protests with the Board on similar grounds as the Protesters. *See* November 11, 2020 Order on Protests (“Protests Order”) at 1. Mr. Sossaman, however, did not join Mr. Griffin’s, Ms. Adams’ and Ms. McGinn’s Brief in Support of Election Protests, to which SFI and the CEH Members are responding. However, for all the same reasons outlined in this brief, SFI and the CEH Members similarly object to Mr. Sossaman’s election protests.

<sup>2</sup> *See, e.g.,* Niall McCarthy, *U.S. Military Voting Intention in 2016 and 2020*, STATISTA (Sept. 1, 2020), <https://www.statista.com/chart/22761/us-military-voting-intention-in-the-november-election/>.

also represents a fundamentally anti-democratic attempt to choose their voters after the fact, in contravention of “the core principle of republican government . . . that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015).

Moreover, while putatively targeting a discrete number of ballots, the Protestors’ challenge is in fact a stalking horse for a wide-ranging, highly politicized effort to exclude overseas voters from North Carolina elections, and indeed from state and federal elections across the country. The result of this effort is that similarly-situated voters will be treated differently, which is especially troublesome since UMOVA reflects the legislature’s correct judgment that these voters are valuable members of the North Carolina community, who deserve a voice in their state’s elections.

While the Protesters present themselves as victims in need of protection from the allegedly unconstitutional acts of North Carolina’s election administrators, the only people actually in harm’s way are the voters the Protesters seek to disenfranchise. SFI and the CEH Brief Members submit this brief to stress the substantial irreparable harm the Protesters’ requested relief would inflict on SFI members and other eligible overseas and military voters.

## **ARGUMENT**

### **I. THE BOARD SHOULD REJECT THE PROTESTERS’ ANTI-DEMOCRATIC ATTEMPT TO REVERSE NORTH CAROLINA’S LONGSTANDING LEGAL RULE RECOGNIZING THAT CHILDREN OF NORTH CAROLINIANS BORN OVERSEAS ARE PART OF THE NORTH CAROLINA COMMUNITY**

In seeking to disqualify the ballots of voters who have never lived in the United States—who the Protesters label “Never Residents,” Brief in Support of Election Protests Filed By Jefferson Griffin, Ashlee Adams, and Stacie McGinn (“Protesters’ Brief”) at 7—the Protesters request to change the governing rules of play after the 2024 General Election based on a novel constitutional challenge to a longstanding state statute and punish voters whose only “errors” were (1) being the child or dependent of a North Carolinian serving or working abroad; and (2) faithfully

following operative state law permitting them to register and vote in North Carolina. Protesters do not dispute that those ballots were cast in faithful conformity with existing statutory rules and election procedure. In other words, this is not an ordinary challenge to the validity of ballots based on settled law. Rather, by requesting that the Board “refuse to enforce” UMOVA, Protesters’ Brief at 16, and discard cast and counted ballots, the Protesters request that this Board *change* existing law, *after* the election, and *after* ballots have already been counted, in order to achieve their desired outcome.

This is fundamentally unfair and represents a subversion of foundational democratic principles. When the right to vote is extended to citizens—as UMOVA undeniably does for the challenged voters—that fundamental right is protected, *inter alia*, by the due process clause of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (holding that once a state enfranchises voters, “the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter”). As such, it is axiomatic that “[w]hen an election is close at hand, the rules of the road must be clear and settled.” *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring) (“Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.”). That is because due process demands that the state “give[] people confidence about the legal consequences of their actions.” *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994). Indeed, courts have long recognized that discarding ballots that have been cast and counted in good-faith reliance of the law runs afoul of equal protection and due process. *Griffin v. Burns*, 570 F.2d 1065, 1075, 1078–79 (1st Cir. 1978) (intervening where absentee voters relied on justifiable expectations that their votes would be counted); *see also Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 581 (11th Cir. 1995) (ruling that “a post-election departure from previous practice” violates due

process); *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (holding that board of elections violated voters' substantive due process rights by changing voting rules without informing voters of new requirements for voting and then refusing to count their votes).

The injustice of excluding these votes is compounded by the lack of a reliable process through which affected voters can be heard on this issue. In the face of severe "time, distance, and mobility challenges,"<sup>3</sup> affected overseas voters are unlikely to be able to participate in any hearing or appeal in this matter, many of which require in-person attendance and/or very short notice requirements.<sup>4</sup> This is impracticable, if not impossible, for many overseas voters, leaving them without means to be heard, let alone any chance to challenge or overcome a decision rejecting the validity of their already-cast ballots.

The bait-and-switch the Protesters seek to inflict upon these voters is particularly unjust given the clarity with which the North Carolina General Assembly expressed its desire to protect the right of children and dependents of North Carolinians to be heard in state elections. *See* N.C. Gen. Stat. § 163-258.2(1)(e). The General Assembly did this because such voters are part of their families' home state communities and are passionate about their right to vote, despite needing to "navigate the[] added complexities of citizenship and residency, in addition to the time, distance, and mobility challenges many overseas voters face."<sup>5</sup> These voters may feel more connected to their family home state than the country where they currently live; they may still have close family residing in North Carolina; and they may frequently visit North Carolina for holidays or to visit family and friends. This population includes the more than 2,700 North Carolina registered voters

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<sup>3</sup> *A Policy Brief: Never Resided Voters*, Fed. Voting Assistance Program 5 (2017), [https://www.fvap.gov/uploads/FVAP/EO/FVAPNeverResidedPolicyBrief\\_20170222\\_FINAL.pdf](https://www.fvap.gov/uploads/FVAP/EO/FVAPNeverResidedPolicyBrief_20170222_FINAL.pdf).

<sup>4</sup> *See generally* N.C. Gen. Stat. §§163-182.10 (protest procedures at the county board), -182.11 (protest appeals to the state board), -182.14 (protest appeals to superior court).

<sup>5</sup> *A Policy Brief: Never Resided Voters*, *supra* note 3 at 5.

who are servicemembers, or their spouses or dependents, who are away from home because they are serving their country abroad.<sup>6</sup> In fact, the very voters that the Protesters target—the children of those living abroad—may very well have never lived in the United States *because* of their family member’s deployment abroad to safeguard freedom and democracy. If stripped of their ability to vote in their family home state—the state where they unequivocally have the strongest nexus—these individuals will be barred from having a voice in any local or state election in the whole country. These voters deserve the ability to participate in the very democratic processes their families serve to protect.

Moreover, punishing these overseas and military voters would be particularly perverse in light of the myriad barriers these individuals had to overcome to vote from overseas in the first place. In fact, when discussing the merits of enacting the federal statute protecting overseas voters, the Uniform Military and Overseas Voters Act (“UOCAVA”), Congress found that one reason military and overseas citizens faced difficulties voting was because States had enacted legal and administrative obstacles that “discourage[d] or confuse[d] overseas citizens.” H.R. REP. NO. 99-765, at 9 (1986), *reprinted* in 1986 U.S.C.C.A.N. 2009, 2012. Despite laws like UOCAVA, the Military and Overseas Voter Empowerment Act, and North Carolina’s UMOVA, such difficulties persist across the nation and in North Carolina. From the outset, overseas voters find it difficult to register to vote, to request and return absentee ballots, and to know key absentee ballot deadlines. In 2020, 14% of overseas citizens reported difficulties “[r]equesting a ballot.”<sup>7</sup> And even if an overseas voter knows how to request her ballot, doing so may still require internet access. In 2020, however, 14% of overseas voters characterized their internet connection as “very unreliable” or

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<sup>6</sup> U.S. ELECTION ASSISTANCE COMMISSION, 118th CONG., ELECTION ADMIN. AND VOTING SURVEY 2022 COMPREHENSIVE REP. 211 (2023).

<sup>7</sup> 2020 *Overseas Citizen Population Analysis Report*, FED. VOTING ASSISTANCE PROGRAM 35 (2021), [https://www.fvap.gov/uploads/FVAP/Reports/OCPA-2020-Final-Report\\_20220805.pdf](https://www.fvap.gov/uploads/FVAP/Reports/OCPA-2020-Final-Report_20220805.pdf).



“unreliable.”<sup>8</sup> To return their ballot by mail, overseas voters likewise need a printer, but 82% of overseas voters who did not return a ballot in 2020 did not vote because they “couldn’t complete [the] process.”<sup>9</sup> The votes Protesters seek to disqualify thus belong to people who went above and beyond to ensure that their voices were heard in this election, underscoring the degree to which they have cultivated ties to their family home state of North Carolina.

The Protesters’ sought-after relief will have the ultimate effect of harming a population the State of North Carolina has singled out for special protection in recognition of their desire and ability to maintain strong ties to the family home state. These voters have had a clear right to vote in North Carolina elections since at least 2011. The Protesters should not be able to overturn the will of the General Assembly and rush a judgment that would disenfranchise countless North Carolina voters who reasonably and in good faith relied on this statutory right to vote in North Carolina elections, particular where doing so amounts to an attempt to shape the electorate in a manner in tension with the foundational principle that voters should be able to fairly elect their representatives. *Ariz. State Legislature*, 576 U.S. at 824.

## **II. THE PROTESTERS’ CHALLENGE WOULD TREAT LIKE VOTERS UNEQUALLY**

The basis for the Protesters’ challenge to the specific ballots they claim to have identified as belonging to so-called “Never Residents” is a broad constitutional attack on a provision of UMOVA that, since at least 2011, has specifically empowered the children and dependents of North Carolinians to vote in North Carolina elections. N.C. Gen. Stat. § 163-258.2(1)(e). Yet, by proposing a discrete category of ballots to remove, Protesters’ challenge, targeted for a political result, would cause non-uniformity and unequal treatment in the application of the laws, and would

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<sup>8</sup> *Id.* at 101.

<sup>9</sup>2020 Report to Congress, FED. VOTING ASSISTANCE PROGRAM 17 [https://www.fvap.gov/uploads/FVAP/Reports/FVAP-2020-Report-to-Congress\\_20210916\\_FINAL.pdf](https://www.fvap.gov/uploads/FVAP/Reports/FVAP-2020-Report-to-Congress_20210916_FINAL.pdf)

force the Board to make a consequential decision, in a rushed, abbreviated, post-hoc process, about the eligibility of a significant swath of voters who could previously vote pursuant to well-settled rules. As a result, a ruling for the Protesters would have consequences far beyond these individual challenges.<sup>10</sup>

The discrete category of ballots the Protesters have identified in their protests represent a fraction of the people whose right to vote is implicated by Protester’s legal challenge to UMOVA. To identify these ballots, the Protesters relied on how voters completed the Federal Post Card Application (“FPCA”), namely whether they checked a box affirming they have never lived in the United States. Protesters’ Brief at 8; *see also* Affidavit of Ryan Bonifay (“Bonifay Aff.”) ¶¶ 12–19. The Protesters then “matched [these] self-identified overseas never-resident voters . . . to the list of North Carolina voters who cast a ballot in the November 2024 election in the statewide voter list.” Bonifay Aff. ¶ 18. This methodology, however, failed to capture all of the so-called “Never-Resident” voters the Protesters claim should be disqualified from the 2024 election, for two reasons, raising fundamental fairness concerns about equal treatment.

*First*, the FPCA is not the only voting method available to overseas voters. Overseas voters, including North Carolina overseas voters, may—and commonly do—request ballots using a state or local form from their state of legal voting residence or from non-government websites.<sup>11</sup> *See* N.C. Gen. Stat. § 163-258.7 (noting that military and overseas voters may “us[e] either the regular [state absentee ballot] application . . . or the federal postcard application”). In 2020, for example, the Federal Voting Assistance Program reported that only 31% of active duty military members

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<sup>10</sup> Indeed, while Protesters claim that they “are not challenging the votes of military voters,” Protesters Brief at 16, the long-term effect of their challenge will be to disenfranchise military voters and their dependents living abroad who may simply not check Protesters’ desired box.

<sup>11</sup> *2020 Overseas Citizen Population Analysis Report*, *supra* note 7, at 97.

“[u]sed the FPCA to request a ballot.<sup>12</sup> The Program likewise reported that only 50% of responding overseas voters used “an FPCA to request an absentee ballot,” while the remaining 50% used either a state or local form (37%), a non-government website (4%), or another method (9%).<sup>13</sup> Among active-duty military members, only 20-26% surveyed between 2018 and 2022 even knew how to use the FPCA to register and request an absentee ballot.<sup>14</sup> Data thus makes clear that overseas voters who never previously lived in North Carolina are not relying solely—or even primarily—on the form Protesters used to identify them. Therefore, some number of voters who Protesters allege suffer the same infirmity would not face removal simply because they have not self-identified in the form the Protesters chose to scrutinize.

*Second*, even if they used the FPCA, the broad category of voters implicated by the Protesters’ challenge—the children and dependents of North Carolinians born abroad—may not have checked the box Protesters used to identify them. On the FPCA, a voter is instructed to choose one from among five “classifications.” One option, as Protesters note, confirms that the voter is an American citizen who has never resided in the country. But there is another option, one specifically for “an eligible spouse *or dependent*” of a member of the Uniformed Services or Merchant Marine on active duty.

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<sup>12</sup> *2020 Post-Election Voting Survey: Active Duty Military*, FED. VOTING ASSISTANCE PROGRAM 21, (2021), [https://www.fvap.gov/uploads/FVAP/Reports/FVAP\\_ADM-Technical-Report-2020\\_FINAL\\_20210831.pdf](https://www.fvap.gov/uploads/FVAP/Reports/FVAP_ADM-Technical-Report-2020_FINAL_20210831.pdf).

<sup>13</sup> *2020 Overseas Citizen Population Analysis Report*, *supra* note 7, at 97.

<sup>14</sup> *2023 Post-Election Voting Survey: Active Duty Military (ADM)*, FED. VOTING ASSISTANCE PROGRAM 50 (2023), <https://www.fvap.gov/uploads/FVAP/Reports/2022-PEVS-ADM-Tech-Report-Final-20230823.pdf>.

**1. Who are you? Pick one.**  
I request an absentee ballot for all elections in which I am eligible to vote AND:  I am on active duty in the Uniformed Services or Merchant Marine **-OR-**  I am an eligible spouse or dependent.  
 I am a U.S. citizen living outside the country, and I intend to return.  
 I am a U.S. citizen living outside the country, and my intent to return is uncertain.  
 I am a U.S. citizen living outside the country, I have never lived in the United States.

*Screenshot of FPCA*

Based on the forms' plain language, dependents of eligible voters may have checked the "spouse or dependent" box rather than the final box, even if both could apply. Thus, the Protesters' identification method would also miss so called "Never Residents" who ticked the other box.<sup>15</sup> And as a result, Protesters' sought-after relief would improperly treat similarly-situated voters differently.

The Board should thus consider the broad consequences accepting the Protesters' challenge may have, which will result in unequal application of the law and even further prejudice the voters who are affected by such unequal treatment.

### **CONCLUSION**

For the foregoing reasons, the Court should deny the Protesters' protests.

Respectfully submitted this the 6th day of December, 2024.

/s/ Jeffrey Loperfido \_\_\_\_\_

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<sup>15</sup> The Protestors have not suggested segregation of ballots where voters checked the box identifying them as an "eligible spouse or dependent" likely because that request would violate federal law, which specifically permits spouses to derive their residence from their military-affiliated spouse. *See* 50 U.S.C. §§ 4027, 4025(b)(2).

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was submitted electronically to the State Board through its counsel and served upon the parties listed below via e-mail, addressed as follows:

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*Pro se*

This the 6th day of December, 2024.

/s/ Jeffrey Loperfido

Jeffrey Loperfido