

No. 320P24

SUPREME COURT OF NORTH CAROLINA

JEFFERSON GRIFFIN,

Petitioner,

v.

NORTH CAROLINA STATE BOARD
OF ELECTIONS,

Respondent,

From the North Carolina
State Board of Elections

**BRIEF OF AMICUS CURIAE RESTORING INTEGRITY AND TRUST IN
ELECTIONS, IN SUPPORT OF PETITIONER**

TABLE OF CONTENTS

INTRODUCTION	3
INTEREST OF AMICUS CURIAE	4
ISSUE ADDRESSED IN THE BRIEF	4
ARGUMENT	5
I. Allowing Never Residents to Vote in North Carolina’s Elections Violates the Constitution	6
a. UMOVA cannot plausibly be read to “reduce” the Constitution’s residency requirement to zero	6
b. North Carolina’s residency requirement is a <i>bona fide</i> standard which remains enforceable post- <i>Dunn</i>	8
c. Residency is not an inheritable characteristic	9
II. Never Resident Votes are Easily and Readily Identifiable	10
III. The NCSBE’s Practice of Allowing Never Resident Voting is Akin to Forum-Shopping One’s Vote	12
IV. Federal Law Does Not Preempt North Carolina’s Prohibition on Never Resident Voting	13
CONCLUSION	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Berry v. Wilcox</i> , 62 N.W. 249 (Neb. 1895).....	10
<i>Bouvier v. Porter</i> , 386 N.C. 1, 900 S.E.2d 838 (2024).....	9
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1974).....	8
<i>Hall v. Wake Cnty. Bd. of Elections</i> , 280 N.C. 600, 187 S.E.2d 52 (1972).....	5, 10
<i>Hoke Cnty. Bd. of Educ. v. State</i> , 382 N.C. 386, 879 S.E.2d 193 (2022).....	6
<i>Lloyd v. Babb</i> , 296 N.C. 416, 251 S.E.2d 843 (1979).....	8, 10
 <u>Constitution</u>	
N.C. Const. art. VI.....	Passim
 <u>Statutes</u>	
52 U.S.C. § 20301.....	13
52 U.S.C. § 20302(a)	13
52 U.S.C. § 20310.....	14
 N.C.G.S. §163-57.....	10
N.C.G.S. § 163-182.19.....	11
N.C.G.S. § 163-258.11.....	12
N.C.G.S. § 163-258.2.....	5, 6, 7, 14

No. 320P24

SUPREME COURT OF NORTH CAROLINA

JEFFERSON GRIFFIN,

Petitioner,

v.

NORTH CAROLINA STATE BOARD
OF ELECTIONS,

Respondent,

From the North Carolina
State Board of Elections

**BRIEF OF AMICUS CURIAE RESTORING INTEGRITY AND TRUST IN
ELECTIONS, IN SUPPORT OF PETITIONER¹**

¹ Pursuant to Rule 28.1(b)(3)(c) of the North Carolina Rules of Appellate Procedure, no persons or entities other than amicus curiae, its members, and its counsel, assisted in the preparation of this brief or financially contributed to its preparation.

INTRODUCTION

The North Carolina Constitution establishes certain bedrock principles which dictate who may participate in the state's elections and who may not. One of those foundational prerequisites is that of residency; specifically, only residents of North Carolina may vote in its elections. N.C. Const. art. VI § 2. This requirement has existed since 1868, and for good reason. North Carolinians have a vested interest in deciding their elected officials at all levels. Persons who have never resided in the state do not.

Despite this threshold requirement, the North Carolina State Board of Elections ("NCSBE") allowed individuals who were born overseas and have never resided in North Carolina ("Never Residents"), to vote in the November 5, 2024 general election, including in Petitioner's contest. This is a direct violation of the Constitution and an affront to state sovereignty. The NCSBE spurned its duties when it allowed Never Residents' votes to be counted, and qualified North Carolinian voters and candidates suffered the consequences.

Although Never Resident voters being readily identifiable, the NCSBE refused to act. It is without serious dispute that counting the votes of Never Residents is unconstitutional. No person can plausibly contend that those who ratified the Constitution could have so radically surrendered the rights of North Carolinians to have an unencumbered say in who they elect. Yet that is exactly what the NCSBE has allowed to happen here. Under the NCSBE's approach, persons anywhere from South Carolina to far-flung territories such as Guam or even foreign countries could

determine who the next local mayor, representative, or even state Supreme Court Justice could be, despite that same person having no colorable interest in the state itself. This is plainly unconstitutional and demands redress.

Amicus respectfully requests that this Court grant the pending petition for a writ of prohibition insofar as it would require the NCSBE to remove Never Resident votes from Petitioner's final contest count.

INTEREST OF AMICUS CURIAE

Amicus Restoring Integrity and Trust in Elections ("RITE") is a 501(c)(4) non-profit organization whose mission is to protect the rule of law in elections throughout the United States. RITE supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. RITE also opposes unlawful executive and administrative actions such as allowing the counting of votes by ineligible nonresident voters. Pursuant to this mission, RITE has successfully litigated against unlawful ballot access practices across the nation and routinely files briefs in state and federal courts across the country on important issues regarding the qualifications for voting, including residency requirements. RITE has a very direct interest in the outcome of the petition pending before the Court as it relates to Never Resident voting, an unlawful practice striking at RITE's core organizational mission.

ISSUE ADDRESSED IN THE BRIEF

Does North Carolina law permit Never Residents to vote in elections for state office?

ARGUMENT

To allow Never Residents to vote in North Carolina’s elections is a direct violation of the state Constitution. The North Carolina Constitution explicitly limits voting eligibility to residents of the state, providing: “Any person who has resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days next preceding an election, and possesses the other qualifications set out in this Article, shall be entitled to vote at any election held in this State.” N.C. Const. art. VI § 2(1). This principle has been repeatedly reaffirmed by this Court. *See, e.g., Hall v. Wake Cnty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972). Nothing in state or federal law permits the NCSBE to extend the voting franchise to Never Residents, but that is exactly what it has done here.

Article 21A of the North Carolina General Statutes—the Uniform Military and Overseas Voting Act (“UMOVA”)—enumerates several categories of United States citizens who may vote in the state’s elections despite living overseas. Many of these categories are non-controversial, mirroring those same persons who are enfranchised courtesy of federal law, including military personnel, their spouses and dependents, and certain civilians. However, North Carolina law contains a category of covered person which federal law does not: an overseas person “who was born outside the United States . . . and, except for a State residency requirement” would be eligible to vote if their parent was eligible to vote in North Carolina and the person has not registered in another state. N.C.G.S. § 163-258.2(1)(e). Record evidence reveals that

the NCSBE applied this provision to allow Never Residents to cast ballots in Petitioner's contest.

I. Allowing Never Residents to Vote in North Carolina's Elections Violates the Constitution

The NCSBE's decision to allow Never Residents to vote in Petitioner's contest is "quite plainly unconstitutional." *Griffin v. NCSBE*, No. 320P24 (N.C. Jan. 7, 2025) (Dietz, J, dissenting) (citing N.C. Const. art. VI § 2). Because Never Residents admitted to having never resided and never intending to reside in North Carolina, they are Constitutionally prohibited from voting in the state's elections. *See id.* There is simply no plausible reading of the state Constitution which could permit the NCSBE's actions here. The NCSBE's unlawful actions have very real consequences, including in Petitioner's contest. It is incumbent upon this Court to offer redress from such egregious violations of North Carolina law. *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 457, 879 S.E.2d 193, 238 (2022) ("[C]onstitutional violations demand a just remedy," and this Court "has the responsibility to protect the constitutional rights of the citizens.") (citation omitted).

a. UMOVA cannot plausibly be read to "reduce" the Constitution's residency requirement to zero

The NCSBE and others, including the North Carolina Democratic Party and the Democratic National Committee, have argued that a separate sub-section of the North Carolina Constitution allows N.C.G.S. § 163-258.2(1)(e) to be read as a

“reduction” of the state residency requirement down to zero.² Specifically, Article VI § 2(2) allows the General Assembly to “reduce the time of residence for persons voting in *presidential elections*.” (emphasis added). This, the NCSBE argues is exactly what it reads UMOVA to do in allowing Never Residents to vote. This premise is false on numerous levels.

First, assuming *arguendo* that the NCSBE’s arguments were plausible, they would have no effect on Petitioner’s contest as Article VI Section 2(2) only applies to federal contests for President and Vice President. N.C. Const. art. VI § 2(2). There is no evidence that the NCSBE limited any Never Resident ballots to only these two contests, rendering their arguments in this regard both disingenuous and ineffective. Second, there is no evidence in the history or text of UMOVA that the General Assembly intended to reduce the residency requirement at all, let alone to zero. In fact, the provision of UMOVA which the NCSBE utilized to allow Never Resident voting expressly contemplates the existence of the state’s residency requirement. *See* N.C.G.S. § 163-258.2(1)(e) (a voter eligible “except for a State residency requirement”). Third, the plain language meaning of “reduction” does not mean a wholesale elimination. But the NCSBE’s arguments and interpretation of UMOVA would effectively write the residency requirement out of the Constitution. There is nothing in the text, history, or tradition of either UMOVA or the Constitution supporting such a reading.

² *See* State Board Defendants’ Response in Opposition to Plaintiffs’ Petition for Writ of Supersedeas and For Discretionary Review, *Kivett, et al. v. NCSBE, et al.*, 281P24, at p.4.

b. North Carolina’s residency requirement is a *bona fide* standard which remains enforceable post-*Dunn*

Opponents to arguments similar to the ones raised by Petitioner have attempted to question the continuing efficacy of North Carolina’s residency requirement in the aftermath of the Supreme Court case *Dunn v. Blumstein*, 405 U.S. 330 (1974). Contrary to their assertions, *Dunn* and its progeny make clear that a state’s *bona fide* residency requirements, such as the one found in Article VI Section 2, remain in full force and effect. *See id.* at 343 (“We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision.”); *see also Holt Civic Club v. City of Tuscaloosa*, 439, U.S. 60, 68-69 (1978). *Dunn* struck down durational residency requirements while expressly carving out a state’s continuing authority to craft *bona fide* residency requirements limiting voting to only residents of that state. *Dunn*, 405 U.S. 334.

This Court confronted, and disproved, the theory that North Carolina’s residency requirement was no longer valid post-*Dunn*. *See Lloyd v. Babb*, 296 N.C. 416, 439, 251 S.E.2d 843 (1979). In analyzing the residency requirement this Court held that the state’s standards were “appropriately defined and [u]niformly applied bona fide residency requirements,” which are permissible. *Id.* at 440, S.E.2d at 859. In so holding this Court reaffirmed the validity of the Constitutional provision which the NCSBE now flaunts.

Similarly, this Court in *Bouvier v. Porter* reaffirmed the principle of residency as a prerequisite to voting in North Carolina, holding that “nonresidents [are]

categorically ineligible to vote” under the Constitution. 386 N.C. 1, 4 n.2, 900 S.E.2d 838, 843 n.2 (2024). This precedent makes clear that North Carolina’s Constitutional residency requirement remains in full force, making the NCSBE’s violation of it all the more palpable.

c. Residency is not an inheritable characteristic

The NCSBE and other proponents of Never Resident voting have argued that a child of a North Carolina resident somehow “inherits” their parent’s residency. As the NCSBE sees things, residency is some immutable characteristic which could pass from the Never Resident’s parents onto them. This argument is riddled with errors. First, Never Residents are adults, not children. Never Residents are at least eighteen years of age, have lived overseas (or at least outside the state) their entire lives, and know that they have no residential connection to North Carolina. They have made the conscious choice to not reside in North Carolina. The idea that an adult who has made the conscious choice to remain overseas could have their residency treated the same as a child is wholly unsupported. While a child may have limited autonomy to choose a different place of residence than their parent, the same is not true for an adult. Residency is not some immutable characteristic that is bestowed upon a child and carried with them through majority, and the NCSBE can cite no authority for such a proposition. A voter must be at least eighteen years of age to participate in the state’s elections. N.C. Const. art. VI § 1. No person can seriously contend that an eighteen year old adult who is competent enough to choose to vote is not equally as competent to choose their place of residency. By choosing to reside in a place other

than North Carolina, Never Residents have chosen to disqualify themselves from the state's elections.

This Court in *Hall* observed that in order to have residency in North Carolina, one must have a “presence” and an “intent to return.” 280 N.C. at 605, 187 S.E.2d at 55. North Carolina law expressly defines residency as being contingent on the place of one's fixed habitation with an intent to return, and common sense dictates that a person cannot have an intent to return to a place they have never lived. *See* N.C.G.S. §163-57. Further, any attempts to conflate principles of domicile and residency are equally ineffective. While both domicile and residence inquire into the person's physical presence in the state, the former requires legal capacity, physical presence, and intent to acquire a domicile, whereas the latter asks where the individual has established their home and is habitually present. *Compare Lloyd*, 296 N.C. at 444, *with id.* at 446, 251 S.E.2d at 862 (quoting *Berry v. Wilcox*, 62 N.W. 249, 251 (Neb. 1895)). Regardless, it is undisputed that Never Residents have never lived in the state and thus could not meet either standard.

II. Never Resident Votes Have Been Identified by Petitioner

Never Resident votes cast in Petitioner's contest have been identified, primarily because many Never Residents self-identify as being overseas citizens who have never lived in North Carolina. Specifically, the Federal Postcard Application (“FPCA”) and Federal Write-In Absentee Ballot (“FWAB”) which the NCSBE uses for overseas voter registration contains an option where a registrant can select the option “I am a US Citizen living outside the country, and I have never lived in the United

States.”³ By definition, anyone who selected this option in registering to vote is a Never Resident.

To be clear, there are conceivable, albeit highly unlikely, circumstances where an overseas person may have selected this option and still be eligible to vote. But those situations are narrow, and the NCSBE’s wholesale refusal to conduct any inquiry into the residency of these overseas registrants opens the door to Never Resident voting. Petitioner has provided this Court with evidence that the NCSBE received FPCAs with the Never Resident option selected and allowed those registrations to be accepted and ballots counted. Although the NCSBE chose to ignore this evidence, this Court is empowered to consider and weigh it in accordance with what is required of an election protest such as Petitioner’s. *See* N.C.G.S. §163-182.19, *et seq.* The NCSBE’s actions are unjustifiable under any reading of North Carolina law.

The NCSBE was afforded an opportunity to identify and segregate these ballots, a task it never seriously contended was impossible. Unfortunately for the voting populace of North Carolina, the NCSBE refused to act. The appropriate redress for this intentional inaction is currently pending in front of this Court. *See Kivett, et al. v. NCSBE, et al.*, 218P24 (NC 2024). Both the record in that case and Petitioner’s make clear that the threat of Never Resident voting was something the NCSBE was acutely aware of before and after the November 5, 2024 state general

³ *See* <https://s3.amazonaws.com/dl.ncsbe.gov/Forms/2021-09-13-FPCA.pdf> (last accessed: Jan. 15, 2025).

election. Petitioner's contest is paradigmatic of the very real harm that the NCSBE's unlawful actions have caused throughout the state's election contests. But by ignoring the simple fix they were offered before the election, the NCSBE has allowed a far-reaching Constitutional violation to fester and infect the integrity of North Carolina's elections.

III. The NCSBE's Practice of Allowing Never Resident Voting is Akin to Forum-Shopping One's Vote

The NCSBE's application of UMOVA to Never Residents is akin to forum-shopping a vote. Under the NCSBE's theory, an overseas person could survey a selection of battleground states or close election contests and attempt to register in each one until a state accepts their registration. Then the person could have a potentially decisive say in the election contests of their choosing despite having no personal connection to or interest in the state whatsoever. There could not be a clearer example of why Never Residents are prohibited from voting in North Carolina. The idea that an individual could test the waters in various states until one accepts their registration proves why residency is a vital element of North Carolina's voter eligibility. Even more troubling, the FWAB is akin to a fill-in-the-blank, allowing the Never Resident the ability to selectively vote for a certain party in close contests across the state.⁴

⁴ The FWAB does not require the voter to know or list the name of the candidate they are voting for, rather, they can simply select a party and the NCSBE will mark that person as having voted for the candidate of that party. *See* N.C.G.S. § 163-258.11.; *see also* <https://s3.amazonaws.com/dl.ncsbe.gov/Forms/2021-09-13-FWAB.pdf>, at p. 3 (last accessed: Jan. 15, 2025).

Based upon the NCSBE's do-nothing approach to receiving Never Resident applications, they would presumably allow an FWAB which voted for the Democratic candidate in House District 79, Senate District 50, the mayor of Raleigh, and the next Associate Justice of the North Carolina Supreme Court, all in one ballot. The NCSBE would undoubtedly prohibit a person who is otherwise qualified to vote in North Carolina from voting in state election contests in a district where they do not reside. But the NCSBE is allowing that very thing to happen with persons who are constitutionally prohibited from voting in any of the state's elections. The General Assembly could not have intended for UMOVA to be applied in this manner

IV. Federal Law Does Not Preempt North Carolina's Prohibition on Never Resident Voting

The NCSBE attempts to conflate federal law's coverage for certain distinct categories of overseas voters with the UMOVA provision they used to allow Never Resident voting. The federal statute—52 U.S.C. § 20301, *et seq.*, the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”)—has no impact or effect here. As a threshold matter, Petitioner's contest is for a state office and as such, state law applies. *See* 52 U.S.C. § 20302(a). Not only are UOCAVA's provisions irrelevant to the outcome of the matter in front of the Court, but UOCAVA itself makes clear that Never Resident voting is purely an issue of state law.

By its own terms UOCAVA does not extend to Never Residents; there is no parallel language to that which the NCSBE is using to allow Never Resident voting. *Compare generally* 52 U.S.C. § 20310 *with* N.C.G.S. § 163-258.2(1)(e). Thus, even if UOCAVA had any bearing on Petitioner's contest, which it does not, it would not

permit Never Resident voting in any manner, let alone the way in which the NCSBE is allowing it to occur.

RITE does not understand Petitioner’s requested relief to impact or challenge the eligibility of overseas uniform services members and their spouses or qualified dependents, all of whom are covered by separate provisions of UMOVA which Petitioner does not challenge. *See* N.C.G.S. § 163-258.2(1)(a)-(d).

CONCLUSION

The North Carolina Constitution has never permitted individuals who are not residents of the state to vote in its elections. The manner in which the NCSBE has applied state law is manifestly unconstitutional. Petitioner’s contest embodies the very concern those who ratified the state’s residency requirement in 1868 were concerned about—preserving the rights of North Carolinians, and only North Carolinians, to decide their elected representatives. The NCSBE violated this principle when it allowed Never Residents to cast votes in Petitioner’s contest. Accordingly, *Amicus Curiae* Restoring Integrity and Trust in Elections respectfully requests that this Court grant Petitioner’s Petition for Writ of Prohibition as it relates to Never Resident voting in the November 5, 2024 election contest for Seat 6 as an Associate Justice of the North Carolina Supreme Court.

* * * *

Respectfully submitted this, the 21st day of January, 2025.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

By: /s/ Phillip J. Strach
Phillip J. Strach
North Carolina Bar No. 29456
Jordan A. Koonts
North Carolina State Bar No. 59363
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
T: (919) 329-3800
F: (919) 329-3799
phil.strach@nelsonmullins.com
jordan.koonts@nelsonmullins.com

*Counsel for Amicus Curiae Restoring
Integrity and Trust in Elections*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was electronically filed and served this day by email, addressed as follows:

Troy Shelton
Craig Schauer
Michael Dowling
tshelton@dowlingfirm.com
cschauer@dowlingfirm.com
mike@dowlingfirm.com
Counsel for the Hon. Jefferson Griffin

Mary-Carla Babb
Terence Steed
mcbabb@ncdoj.gov
tsteed@ncdoj.gov
Counsel for the North Carolina State Board of Elections

Raymond Bennett
Samuel Hartzell
ray.bennett@wbd-us.com
sam.hartzell@wbd-us.com
Counsel for the Hon. Allison Riggs

Shana Fulton
Will Robertson
James Whalen
sfulton@brookspierce.com
wrobertson@brookspierce.com
jwhalen@brookspierce.com
Counsel for the North Carolina Democratic Party

Respectfully submitted this, the 21st day of January, 2025.

/s/ Phillip J. Strach
Phillip J. Strach