

STATE OF NORTH CAROLINA
COUNTY OF WAKE

TELIA KIVETT, *et al.*,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD
OF ELECTIONS, *et al.*,

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 24CV031557-910

**MOTION FOR PRELIMINARY
INJUNCTION**

Emergency Relief Requested

NOW COMES Plaintiffs Telia Kivett, Wanda Nelson Fowler, the Republican National Committee, and the North Carolina Republican Party (“Plaintiffs”), by and through undersigned counsel and pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, move this Court to issue a preliminary injunction. Specifically, this Court should, under the North Carolina Constitution, prohibit Defendants the North Carolina State Board of Elections and its members and Executive Director Brinson Bell (“NCSBE” or “Defendants”) from relying on North Carolina General Statute § 163-258.2(1)(e) as a basis for allowing the acceptance or processing of any voter registration forms, absentee ballot applications, or ballots from individuals who have affirmed that they have never resided in North Carolina. In support of this Motion, Plaintiffs show the Court as follows:

INTRODUCTION

1. North Carolina’s elections are notoriously close, especially in recent election cycles. The November 5, 2024 general election will likely be one of the state’s closest yet.
2. Now more than ever, counting every legitimate vote from every eligible voter—and **only** legitimate votes from eligible voters—matters.

3. Across the nation, overseas voters make up a growing portion of the electorate.¹

4. Worryingly, this has led to an increasing trend of third party organizations such as Democrats Abroad spearheading efforts to register U.S. citizens who live overseas and who have never resided in a state (hereafter “Never Residents”) to nevertheless register to vote in certain targeted states’ elections. North Carolina is one such state where efforts to register Never Residents are underway.²

5. North Carolina’s elections are already close and the November 5, 2024 contest will be no different. However, the risk that such close results could be decided by the votes of Never Residents is unjustifiable, in direct contravention of North Carolina law, and a serious threat to public trust and confidence in this election.

6. To allow illegal votes to decide an election at any stage or race would be nothing short of a tragedy for democracy. Eligible voters, and only eligible voters, should be the ones deciding their state’s elections.

7. Considering Defendants’ open disregard of North Carolina law in allowing Never Residents to register to vote in the state’s elections, Plaintiffs are forced to turn to this Court for immediate relief.

8. Plaintiffs initiated this action by filing a Complaint for declaratory and injunctive relief on October 2, 2024. Individual Plaintiffs Telia Kivett and Wanda Nelson Fowler

¹ See, e.g., Shia Kapos, Could voters abroad hold all the cards?, POLITICO (Sept. 21, 2024), available at: <https://www.yahoo.com/news/could-overseas-voters-ticket-winning-202651757.html?Guccounter=1> (last accessed Oct. 10, 2024); see also Terri Schultz, Democratic voters overseas could help clinch the election in swing states, NPR (Sept. 10, 2024), available at: <https://www.npr.org/2024/09/10/nx-s1-5094907/democratic-voters-overseas-could-help-clinch-the-election-in-swing-states> (last accessed Oct. 10, 2024).

² See, e.g., Corey Clippinger, Key Dates and Information for voting in North Carolina elections from overseas, DEMOCRATS ABROAD (Oct. 01, 2024), available at: https://www.democratsabroad.org/coreyclip/how_to_vote_from_abroad_in_north_carolina (last accessed Oct. 11, 2024).

subsequently filed verifications of the Complaint soon thereafter. Plaintiffs attach the Complaint, all exhibits thereto, and Individual Plaintiffs' verifications, in support of this Motion.

9. Through the Complaint Plaintiffs seek, among other forms of relief:

a. A declaration that Defendants' use of N.C. Gen. Stat. § 163-258.2(1)(e) is unconstitutional as applied to Plaintiffs to the extent it violates Article VI, § 2 of the North Carolina Constitution. Compl. ¶ 84(a);

b. A declaration that any participation by a Never Resident in the state's elections is a violation of Article VI, § 2 of the North Carolina Constitution as applied to Plaintiffs. Compl. ¶ 84(b);

c. An order that Defendants must immediately instruct county boards of election to segregate and not process any ballots returned to them by individuals who have never resided in the state, including but not limited to those persons who registered to vote via submitting a Federal Post Card Application ("FPCA") or Federal Write-In Absentee Ballot ("FWAB") and selected the option stating "I am a U.S. citizen living outside the country, and I have never lived in the United States," and that those ballots may not be processed unless and until such persons can confirm residency in the state of North Carolina pursuant to § 163-166.12 *et seq.* Compl. ¶¶ 48, 84(c), 85(a);

d. An order that Defendants must remove the aforementioned option from the state's FPCA registration forms. Compl. ¶¶ 84(d), 85(b);

e. An order that Defendants must reject voter applications in any form from Never Residents. Compl. ¶ 85(c);

- f. An order directing Defendants to update their website to specify North Carolina's constitutional residency requirement and the prohibition on Never Residents voting in the state's elections. Compl. ¶ 85(e);
- g. An order requiring Defendants to notify the U.S. Department of Defense's Federal Voting Assistance Program ("FVAP") that Never Residents are ineligible to vote in the state's elections and to provide FVAP with North Carolina-specific instructions to include with FVAP materials made available to UOCAVA voters on its website and through other means. Compl. ¶ 85(f); and
- h. A declaration that Defendants' policy and guidance sent to county elections officials regarding voter registration and identification requirements for Never Residents (as attached to the Complaint) are null and void as they directly conflict with N.C. Gen. Stat. § 163-166.12 *et seq.* Compl. ¶ 92(a).

FACTUAL BACKGROUND

10. Article VI § 2 of 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." Compl. ¶ 2.

11. Both North Carolina law, N.C. Gen. Stat. § 163-258.1, *et seq.* ("UMOVA"), and federal law, 52 U.S.C. § 20301, *et seq.* ("UOCAVA"), provide certain criteria upon which persons who are not currently residing in the United States may nevertheless register for and vote in elections in the state. Compl. ¶¶ 4, 5.

12. While the two statutes overlap, their coverage is not identical. In this regard, UMOVA purports to extend voting eligibility to Never Residents in North Carolina, whereas UOCAVA does not. *See* N.C. Gen. Stat. § 163-258.2(1)(e); *see also* Compl. ¶¶ 5, 31-36, 38-42.

13. As such, federal law confers no rights on Never Residents, and UMOVA's effort to confer voting rights on these individuals under state law directly conflicts with N.C. Const. art. VI § 2. Compl. ¶¶ 42-43.

14. Defendants have instructed county elections officials to accept and process applications from persons who apply to register to vote or request an absentee ballot via either a Federal Post Card Application ("FPCA") or a Federal Write-In Absentee Ballot ("FWAB"), including for Never Residents. Compl. ¶¶ 45-51. They have also marketed to the public the exact process by which Never Residents could register to vote and apply for absentee ballots in North Carolina. *Id.* at ¶ 50.

15. Additionally, Defendants recently provided written guidance to county boards of elections and elections officials instructing them to consider Never Residents who register under, *inter alia* N.C. Gen. Stat. § 163-258.2(1)(e), as "exempt" from certain voter identification requirements as set forth in § 163-166.12 *et. seq.* Compl. ¶¶ 53-72.

16. Defendants' guidance fails to account for the fact that the statutory provisions cited in support of this exemption apply only to UOCAVA voters, **not** to UMOVA voters and thus not to the Never Residents to whom UMOVA purports to extend the right to vote. Compl. ¶¶ 64-72. In other words, UOCAVA voters are exempt from state laws that would otherwise require them to produce identification to vote. Never Residents do not enjoy the same exemption because, even if UMOVA could have conferred upon them a right to vote—which it could not do—such persons are not covered by UOCAVA. Accordingly, they are not entitled to its exemptions.

17. Thus, upon information and belief, Defendants have allowed and will continue to allow Never Residents to register and participate in North Carolina elections despite a constitutional prohibition against such participation or, at a minimum, without requiring such persons to produce identification documents otherwise required by state law. Compl. ¶¶ 51, 53.

18. Upon information and belief, Defendants can easily identify any Never Residents who have registered to vote in the state by segregating those individuals who selected the aforementioned FVAP or FWAB boxes. Compl. ¶¶ 47-49.

ARGUMENT

19. Plaintiffs seek injunctive relief because they will be seriously and irreparably harmed by Defendants' actions in permitting Never Residents to register and vote in North Carolina elections, including the upcoming November 5, 2024 contest.

20. Unless the court grants injunctive relief, Defendants will continue to facilitate ongoing violations of the North Carolina Constitution, which, as applied to organizational Plaintiffs, will diminish their respective missions, election-related efforts, and their electoral prospects. As applied to individual Plaintiffs, these violations will impermissibly dilute their votes and violate their clearly established constitutional rights.

I. Standard

21. This court has the inherent authority to issue injunctive relief upon application from a party. *State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913, *on reh'g*, 299 N.C. 731, 265 S.E.2d 387 (1980) (stating that injunctive relief is “a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.”).

22. Issuance of a preliminary injunction is appropriate when necessary to avoid immediate and irreparable injury to a party. *See* N.C. R. Civ. P. 65; *see also A.E.P. Indus., Inc. v. McClure*, 309 N.C. 393, 401, 302 S.E.2d 754, 759 (1983).

23. To demonstrate entitlement to a preliminary injunction, Plaintiffs must establish: (1) likelihood of success on the merits; and (2) that they are likely to sustain irreparable loss unless the injunction is issued, or if, in the Court's opinion, issuance is necessary for the protection of Plaintiffs' rights during the course of the litigation. *See Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977).

24. Notably, Plaintiffs' likelihood of success on the merits means a "reasonable likelihood." *See A.E.P. Indus., Inc.*, 308 N.C. at 402, 302 S.E.2d at 760.

II. Plaintiffs Are Likely to Succeed on the Merits of their Claims

25. Plaintiffs have established a reasonable likelihood of success on the merits of their claims through, *inter alia*, pointing to Defendants' own guidance to both county elections officials and the public in general, all of which clearly allow Never Residents to register and vote in North Carolina's elections. Compl. ¶¶ 50 n. 4, 64-72.

26. Further, the plain language of N.C. Const. art. VI § 2 makes clear that North Carolina residents, and only North Carolina residents, may vote in the state's elections. *See* N.C. Const. art. VI § 2; *see also* Compl. ¶2; *Hall v. Wake Cnty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972).

27. Yet, as Plaintiffs have described in detail, Defendants are utilizing N.C. Gen. Stat. § 163-258.2(1)(e) to circumvent this constitutional requirement, allowing Never Residents to register and vote in North Carolina. *See* Compl. ¶¶ 32, 48-51.

28. At the same time Defendants are violating the North Carolina Constitution's residency requirement, they are unlawfully exempting those same ineligible voters from the state's law that requires individuals who have failed to supply adequate identifying information at the time of registration to produce acceptable identification documentation at the time of voting. *See* Compl. ¶¶ 53-72.

29. As applied to Organizational Plaintiffs, these constitutional and statutory violations significantly harm their missions, organizational efforts, and electoral prospects. They do this by authorizing ineligible persons to participate in elections and by disregarding protections that help ensure that such persons are who they say they are. That is, protections that help ensure that Never Residents are not, for example, underage persons or foreign citizens. The magnitude of these harms is substantially increased in light of the impending November 5, 2024 election. *See* Compl. ¶ 7, 52, 80.

30. As applied to Individual Plaintiffs, these constitutional and statutory violations impermissibly dilute their votes, resulting in immediate and irreparable harm, the magnitude of which is likewise substantially enhanced by the impending November 5, 2024 election. *See* Compl. ¶¶ 52, 79.

31. Considering the foregoing, Plaintiffs have established more than a reasonable likelihood of success on the merits of their claims.

III. Plaintiffs Are Likely to Suffer Irreparable Harm Unless Relief Is Granted and A Preliminary Injunction is Necessary to Protect Plaintiffs' Rights During the Course of Litigation

32. Plaintiffs' undeniable constitutional and statutory rights to vote in free and fair elections, where only qualified voters participate, are at immediate risk, absent an injunction. *See* N.C. Const. art. VI § 2; *see also* N.C. Const. art. I § 10.

33. Absent an injunction, organizational Plaintiffs' will be substantially and irreparably harmed in their respective missions, election-related efforts, and their electoral prospects. Further, individual Plaintiffs' constitutional rights will be substantially harmed and their votes will be impermissibly diluted. As to both sets of Plaintiffs, this harm will be exacerbated, should relief not be available before the November 5, 2024 election. Simply put, the bulk of the damage will already be done.

34. In contrast, Defendants will suffer little if any harm, should the injunction issue.

35. Registration forms submitted by Never Residents are readily and easily identifiable and Defendants can, upon information and belief, readily identify Never Residents by ordering county officials to segregate those FVAP or FWAB registration forms where the registrant selected one of the aforementioned boxes attesting that they are a U.S. citizen who lives outside the country and has never lived in the United States or by querying information in the State Elections Information Management System (SEIMS) or other systems accessible to Defendants.

36. Upon information and belief, Defendants should be able to identify, locate, and segregate ballots that Never Residents return to election officials or order county officials to do so.

37. Accordingly, the applications, registrations, and any ballots cast by Never Residents are both readily identifiable and segregated until such point that residency can be confirmed.

38. Considering that Never Residents would have resided outside of the United States for at least eighteen (18) years, there is no justifiable reliance interest at issue as Never Residents, by their very nature, have taken no actions to establish residency in North Carolina.³

³ For this consideration in balancing the equities, it is also worth noting that there are other instances of U.S. citizens who cannot vote in a state's elections such as U.S. citizens residing in U.S. territories.

39. Defendants are already constitutionally prohibited from allowing Never Residents to vote in North Carolina's elections. Thus, to the extent Defendants claim a burden in having to ensure residency requirements of a subset of registrants, the same is already required by North Carolina law.

40. In sum, the equities favor Plaintiffs especially insofar as they are seeking to vindicate pre-established rights and protect the validity of their votes.

WHEREFORE, Plaintiffs respectfully request this Court enter an Order:

- a. Declaring that Defendants' use of N.C. Gen. Stat. § 163-258.2(1)(e) is unconstitutional as applied to Plaintiffs to the extent it violates Article VI, § 2 of the North Carolina Constitution and enjoining Defendants from using the same to allow any Never Resident to vote in North Carolina's elections;
- b. Declaring that any participation by a Never Resident in the state's elections is a violation of Article VI, § 2 of the North Carolina Constitution as applied to Plaintiffs and enjoining Defendants from taking any actions which would allow Never Residents to participate in North Carolina's elections;
- c. Directing Defendants to immediately instruct county boards of election to segregate and not process any ballots returned to them by Never Residents, including but not limited to those persons who registered to vote via submitting an FPCA or FWAB and selected the option stating "I am a U.S. citizen living outside the country, and I have never lived in the United States," and that those ballots may not be processed unless and until such persons can confirm residency in the state of North Carolina pursuant to § 163-166.12 *et seq.* or eligibility to vote under UOCAVA; and

d. For any other relief deemed just and proper.

Respectfully submitted, this, the 11th day of October, 2024.

**NELSON MULLINS RILEY &
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CERTIFICATE OF SERVICE

I hereby certify that on this, the 11th day of October, 2024, I served a true and accurate copy of the foregoing **MOTION FOR PRELIMINARY INJUNCTION** upon all counsel of record by using the Odyssey e-file and serve feature, sending a copy of the same to all counsel of record via e-mail, and sending a copy via U.S. Mail, postage prepaid and addressed as follows:

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