

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV040620-910

WAKE COUNTY

JEFFERSON GRIFFIN,

Petitioner,

v.

NORTH CAROLINA STATE BOARD
OF ELECTIONS,

Respondent.

**BRIEF OF *AMICI CURIAE* SECURE FAMILIES INITIATIVE AND COUNT
EVERY HERO, AN UNINCORPORATED ASSOCIATION, IN SUPPORT OF
RESPONDENT¹**

¹ Pursuant to Rule 28.1(b)(3)(c) of the North Carolina Rules of Appellate Procedure, Protect Democracy assisted in drafting this brief. Otherwise, no other persons or entities, other than *amici curiae*, their members, and their counsel, helped to write or financially contributed to this brief.

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INTEREST OF AMICI CURIAE

Amicus 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 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. SFI has North Carolinian members who have been named in Petitioner’s election protests, and thus has a strong interest in ensuring its members are not wrongly disenfranchised.

Amicus 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: 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); Former Secretary of the Air Force Deborah Lee James; General Craig McKinley, United States Air Force (Retired); and Former Secretary of the Navy Sean O’Keefe. Together, they served under every President from John Kennedy to Donald Trump.

Amici have a strong interest in ensuring that all military and overseas Americans voting in North Carolina are not unduly burdened in exercising their right to vote. Drawing on their experiences, *Amici* aim to inform the Court how the relief

Petitioner seeks—throwing out the ballots of voters who dutifully followed the rules of every North Carolina government authority—would violate the U.S. Constitution and disenfranchise thousands of military and overseas voters.

INTRODUCTION

Months after an election has already occurred, Petitioner seeks to change the rules of that election and disqualify the ballots of those who faithfully followed operative state procedures to participate in North Carolina’s democratic process. He does so only because he believes changing the rules in certain ways will change the outcome of that election.

Many of the ballots Petitioner challenges come from North Carolinians living and working abroad, including family members of North Carolinians serving honorably in the United States Armed Forces, who followed the rules set by North Carolina’s Uniform Military Overseas Voters Act (“UMOVA”), N.C.G.S. § 163-258.2, *et seq.* Specifically, Petitioner challenges the ballots of more than 65,000 North Carolinians: 5,509 military and overseas voters whom he alleges did not provide voter identification with their absentee ballot (because they were not asked to); 267 whom he has deemed “Never Residents” because they are spouses or dependents of a military or overseas resident (but who are deemed residents by North Carolina law); and 60,273 whom he alleges provided “incomplete voter registration” because they may not have provided a driver’s license or social security number when registering to vote (because they were not asked to). Br. (Never Residents) at 4-5; Br. (Incomplete Registration) at 4-5; Brief of Petitioner at 66-67, *Griffin v. N. Carolina Bd. of*

Elections, No. 320P24, 2025 WL 263400 (N.C. Jan. 14, 2025). Perhaps sensing the frailties of his legal arguments, Petitioner further provides a “phasing proposal,” asking the Court to only discard the “outcome determinative” ballots of the 5,509 overseas voters whom he alleges did not provide voter identification. Br. (Photo ID) at 4. These limitations only further underscore Petitioner’s goal: not ensuring every eligible voter is heard but rather engineering his own electoral victory.

The Petition should be denied. Changing existing law after an election to nullify legally-cast ballots is not only manifestly unfair, it violates the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment demands that voters are given substantial notice of what the law is to comply with it and that they be treated on equal footing. Petitioner’s request to alter the rules after an election has been completed, and to do so only in certain disfavored counties, violates the bedrock principles of fairness and equality that form the basis of our Constitution.

Petitioner’s request also ignores the already substantial barriers faced by North Carolina military and overseas voters, risking the permanent disenfranchisement of the very voters that North Carolina and Congress have sought to specially protect through legislation. While putatively targeting a discrete number of ballots, Petitioner’s legal theories would make it almost impossible for certain overseas North Carolinians to vote.

ISSUES ADDRESSED

Amici address whether Petitioner’s requested relief will lead to the disenfranchisement of eligible military and overseas North Carolinians and violate their Fourteenth Amendment due process and equal protection rights.

ARGUMENT

I. PETITIONER SEEKS AN UNLAWFUL REMEDY.

Petitioner asks this Court to change the governing rules of the 2024 General Election and punish voters who undisputedly followed those rules when casting their ballots. This proposal to treat some military and overseas voters differently *after* the election has concluded disenfranchises eligible voters, violating their Fourteenth Amendment rights to due process and equal protection.

For more than a century, the U.S. Supreme Court has recognized that voting is a fundamental right protected by the Constitution. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). “[V]oting in local elections and referendums is subject to constitutional protection” too. *Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978). Of course, “included within the right to [vote] . . . is the right of qualified voters within a state to cast their ballots and have them counted.” *United States v. Classic*, 313 U.S. 299, 315 (1941). Likewise, under the Equal Protection clause, “[h]aving once granted the right to vote on equal terms, [a] State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

Granting Petitioner’s request to nullify thousands of votes would violate the Due Process Clause. A state court decision contravenes due process if it “will

constitute a retroactive change in the election laws that will effectively stuff the ballot box,” or “will constitute a post-election departure from previous practice.” *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-81 (11th Cir. 1995) (if “the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated”).

Numerous federal appellate courts have held that nullifying voters’ ballots after they have “voted in reliance on the . . . procedures announced by state officials” violates due process. *Griffin*, 570 F.2d at 1069; *see also League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (“The Due Process clause is implicated . . . where a state’s voting system is fundamentally unfair.”); *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (finding a violation of due process where board of elections changed voting rules without informing voters and then refused to count their votes); *Hendon v. N. Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983) (“Courts have imposed a duty on parties having grievances based on election laws to bring their complaints forward for pre-election adjudication when possible.”). That is because due process demands states “give[] people confidence about the legal consequences of their actions,” and voters must know the law at the time of election to comply with it. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266 (1994).

The Arizona Supreme Court recently applied this same principle to reject a last-minute attempt to invalidate the registrations of almost 100,000 voters. *See Maricopa Cnty. Recorder Stephen Richer v. Arizona Sec’y of State Adrian Fontes*, No.

CV-24-0221-SA, 2024 WL 4299099 (Ariz. Sept. 20, 2024). About two months before the 2024 General Election, Arizona officials discovered that, due to a database error, certain voters may not have provided the required proof of citizenship when registering to vote. Those voters were told that they were fully registered, were in fact registered, and many had voted without a problem for years. About six weeks before the election, the petitioner sought to prevent those voters from voting in state elections. Despite acknowledging that the database error raised questions regarding the affected voters' compliance with registration requirements, the Arizona Supreme Court was "unwilling . . . to disenfranchise voters en masse" and held that doing so "would violate the principles of due process." *Id.* at *3.²

Even though his Petition raises due process problems strikingly similar to those identified in *Richer*, *Griffin*, and other cases cited above—and even though the Board decision below identified those problems—Petitioner does not address them here.³ Decision and Order at 23-25, North Carolina State Board of Elections (Dec. 13,

² The relief Petitioner requests would create a more egregious due process violation than the one identified by the Arizona Supreme Court in *Richer*. There, the Court refused to de-register voters shortly *before* an election because it would be difficult for them to re-register before the upcoming election. *See* 2024 WL 4299099 at *3. Here, Petitioner acknowledges that the challenged voters have *already* cast their ballots consistent with existent law, meaning that they would have *no* opportunity to have their ballots counted.

³ Petitioner cursorily argues his challenges create no impermissible burden under the *Anderson-Burdick* test. *E.g.*, Br. (Incomplete Voter Registration) at 35-40. But the *Anderson-Burdick* test applies to pre-election challenges and measures the burden created by voting restrictions; it does not apply post-election challenges that would completely discount voters' ballots. *See, e.g., Roe*, 43 F.3d at 580-81 (discussing due process implications of retroactive change in election rules without applying *Anderson-Burdick*).

2024). Nor does Petitioner dispute that the challenged ballots were cast in accordance with all directions, instructions, and legal interpretations existing at the time of the 2024 General Election. Brief of Petitioner at 20, 25-27, 35-36, *Griffin v. N. Carolina Bd. of Elections*, No. 320P24, 2025 WL 263400; *see also Griffin v. N. Carolina Bd. of Elections*, 909 S.E.2d 867, 872 (N.C. 2025) (J. Dietz, dissenting) (“[The] election rules [were] already in effect when Judge Griffin’s election took place.”). Thus, his attempt to retroactively change the rules should be rejected. *See Roe*, 43 F.3d at 580-81; *Griffin*, 570 F.2d at 1069; *Richer*, 2024 WL 4299099 at *3.

Further, Petitioner’s attempt to negate an entire class of legitimately cast ballots by challenging the interpretation and constitutionality of North Carolina statutes and Election Board rules through an *election protest*, a mechanism meant to catch technical irregularities or misconduct, is unauthorized. *See* N.C.G.S. § 163-182.12 (election protests govern “fraud or corruption and . . . irregularities”). While voting by ineligible voters can constitute misconduct, *Bouvier v. Porter*, 386 N.C. 1, 4 (2024), a voter is only considered ineligible if they have violated existing state law. *Id.* at n.2.⁴ The proper vehicle to raise such issues was through a challenge to the statutes and rules themselves long *before* Election Day.⁵

⁴ As in *Richer*, where there was no statutory authority for county officials to “years after a voter applied to vote and became registered to vote, remove that voter’s ability to vote a full ballot,” 2024 WL 4299099 at *2, North Carolina’s election protest statute provides no mechanism by which the North Carolina Board of Elections could change longstanding interpretation of a state statute. *See* N.C.G.S. § 163-182.10.

⁵ When Petitioner sought to challenge UMOVA before Election Day, his arguments were rejected. Order Denying Preliminary Injunction, *Kivett v. North Carolina State Board of Elections*, No. 24CV031557-910 (N.C. Sup. Court Oct. 21, 2024).

Moreover, Petitioner’s reliance on *James v. Bartlett* is misplaced. In *James*, “the State Board of Elections *violated* the election rules by counting [certain] votes. Here, by contrast, the State Board of Elections *complied* with the election rules existing at the time of the election.” *Griffin v. N. Carolina Bd. of Elections*, No. 320P24, 2025 WL 263400, at *6-7 (N.C. Jan. 22, 2025) (Dietz, J. concurring); *E.g.*, Br. (Incomplete Voter Registration) at 9-13. Therefore, due process requires that Petitioner’s selected ballots be counted. *Classic*, 313 U.S. at 315.

Aside from cases invoking the Due Process Clause, federal courts and the North Carolina Supreme Court have recognized that even last-minute changes to election practices and procedures *before* an election are harmful and confusing to voters; “[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.”); *Hendon*, 710 F.2d at 182. This principle applies much more force months *after* an election, when voters are unable to even attempt to comply with a new interpretation of state election law and thus will be disenfranchised. *Griffin v. N. Carolina Bd. of Elections*, 909 S.E.2d 867, 872 (N.C. 2025) (J. Dietz, dissenting) (“Permitting post-election litigation that seeks to rewrite our state's election rules—and, as a result,

remove the right to vote in an election from people who already lawfully voted under the existing rules—invites incredible mischief.”).

Furthermore, Petitioner’s attempt to re-write the rules only for *some* voters would violate the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause demands equal treatment of voters and prohibits treating voters differently based on the county in which they reside. *See Bush*, 531 U.S. at 104. But Petitioner seeks to discard the ballots of certain voters only in counties he has handpicked to be “outcome-determinative.” Brief of Petitioner at 65-67, *Griffin v. N. Carolina Bd. of Elections*, No. 320P24. His challenges single out certain classes of ballots for disfavored treatment: his protests included military and overseas voters who cast absentee ballots pursuant to UMOVA; military and overseas voters who did not provide a photo identification in specific counties that he chose; and military and overseas voters he termed “Never Residents” in 53 of North Carolina’s 100 counties. Brief of Respondent at 7-8, *Griffin v. N. Carolina Bd. of Elections*, No. 320P24, 2025 WL 263400 (N.C. Jan. 21, 2025). Petitioner does not explain why those counties and categories should be singled out for differential treatment, but one analysis found that the majority of voters in the counties that Petitioner chose support the party of Petitioner’s opponent.⁶ This Court should reject Petitioner’s request that this Court

⁶ Doug Bock Clark, *North Carolina Supreme Court Candidate Wants Military Absentee Votes Tossed. Years Earlier, That’s How He Voted.*, PROPUBLICA (Jan 18, 2025), <https://www.propublica.org/article/jefferson-griffin-military-absentee-votes-north-carolina-supreme-court>.

“ratif[y] th[e] uneven treatment” Petitioner seeks to impose on the counties he singled out to secure victory. *Bush*, 531 U.S. at 107.

Over a century ago the North Carolina Supreme Court recognized, “[t]he object of the law—a fair and full expression of the will of the qualified voters—must be kept in mind; and if this has been obtained, and no fraud appears, we will not look for mere irregularities to defeat his will.” *Woodall v. W. Wake Highway Comm'n*, 97 S.E. 226, 233 (1918). This Court should uphold the will of the electorate.

II. PETITIONER IGNORES SIGNIFICANT BARRIERS FOR MILITARY AND OVERSEAS VOTERS THAT UMOVA AND UOCAVA WERE ENACTED TO PROTECT.

North Carolinians abroad, including members of *amicus* SFI and other military service members and their families, face extraordinary logistical and procedural challenges when attempting to register and vote. Recognizing this problem, the North Carolina General Assembly unanimously passed UMOVA to make voting more accessible for military voters abroad. *See* Uniform Military and Overseas Voters Act, H.B. 514 (N.C. 2011). UMOVA was intended to build on the foundation of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), a law passed by Congress to help ensure that service members and other Americans living abroad can participate in our democracy. Yet even after those legislative efforts, military and overseas voters face formidable obstacles when trying to vote. Petitioner’s effort to nullify their votes thwarts lawmakers’ intent to protect the franchise for those who serve our country.

With over 138,000 military personnel calling North Carolina home, and housing the fifth-largest population of military personnel in the country,⁷ North Carolina enacted UMOVA to “simplif[y] the process of absentee voting for United States military and overseas civilians by making the process more uniform, convenient, secure and efficient.”⁸ In passing UMOVA, lawmakers sought to make “North Carolina law *more* beneficial to those voters.” *Id.* (emphasis added). This included ensuring that the spouses and dependents of military and overseas North Carolina voters could exercise their right to vote and reducing the barriers to casting absentee ballots. *Id.* UMOVA passed with unanimous, bipartisan support about 14 years ago, and had not been challenged until just before the 2024 General Election. Order Denying Motion for Preliminary Injunction ¶ 3, *Kivett et al. v. North Carolina State Board of Elections*, No. 24-cv-031557-910 (N.C. Sup. Court Oct. 21, 2024). Thus, the North Carolina General Assembly expressed a clear desire to make voting more accessible to North Carolina military and overseas voters consistent with the North Carolina Constitution.

⁷ *Military and Civilian Personnel by Service/Agency by State/Country*, DEFENSE MANPOWER DATA CENTER (June 2024), <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports>.

⁸ *Military and Overseas Voters Act*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=6acb3a89-34a9-4df0-a4bc-42f1b35581d8> (last visited Jan. 30, 2025).

UMOVA was intended to build on protections already found in UOCAVA⁹. In UOCAVA, a bipartisan act, Congress sought “to facilitate absentee voting by United States citizens, both military and civilian, who are overseas.” H.R. REP. NO. 99-765, at 5 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 2009, 2012. When deliberating over the merits of enacting UOCAVA, Congress found that one reason why military and overseas citizens faced difficulties voting was because States had enacted legal and administrative obstacles that “discourage[d] or confuse[d] overseas citizens.” *Id.* at 9. This included voting by “absent uniformed services voter[s],” which are specifically defined to include “a spouse or dependent” of a uniformed service member, “who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote.” 52 U.S.C. § 20310(1) (emphasis added).

While the protections of UMOVA and UOCAVA are vital for military and other overseas voters, those living abroad still face major barriers to participating in our democracy: they find it difficult to register to vote and to request and return absentee ballots, and they often do not know about key absentee ballot deadlines.¹⁰ Indeed, only 35%, 41%, and 32% of active-duty military members in 2018, 2020 and 2022, respectively, knew how to “[r]equest [an] absentee ballot.”¹¹ And in 2020, 14% of

⁹ THE PEW CENTER ON THE STATES, DEMOCRACY FROM AFAR 6 (Jan. 2012), <https://web.mit.edu/supportthevoter/www/files/2013/08/Pew-2012-Progress-on-Military-and-Overseas-Voting.pdf>.

¹⁰ FED. VOTING ASSISTANCE PROGRAM, 2023 POST-ELECTION VOTING SURVEY: ACTIVE DUTY MILITARY (ADM) 50 (2023), <https://www.fvap.gov/uploads/FVAP/Reports/2022-PEVS-ADM-Tech-Report-Final-20230823.pdf>.

¹¹ *Id.*

overseas citizens reported difficulties requesting a ballot.¹² If a military or overseas voter knows how to request a ballot, doing so may still require internet access, but as of 2020, 11% of active-duty military members did not have reliable access to the internet,¹³ and 14% of overseas voters more generally characterized their internet connection as “very unreliable” or “unreliable.”¹⁴

Military and overseas voters also may not have access to the identification Petitioner claims is required. Many of those voters have lived overseas for years and move often, meaning they are more likely to have expired driver’s licenses, to have lost their driver’s licenses or social security cards, or to have identification buried in storage, possibly even back in the United States. They also may not have driver’s licenses from the correct state, despite being legal residents, especially if they were born abroad. Military and overseas voters are less likely to have such documents in the first place: children born abroad are not automatically enrolled with the Social Security Administration. Instead, following certification of a child’s citizenship, parents may separately apply for a social security number.¹⁵ If the parents do not

¹² FED. VOTING ASSISTANCE PROGRAM, 2020 OVERSEAS CITIZEN POPULATION ANALYSIS REPORT 35 (2021), https://www.fvap.gov/uploads/FVAP/Reports/OCPA-2020-Final-Report_20220805.pdf.

¹³ FED. VOTING ASSISTANCE PROGRAM, 2020 POST-ELECTION VOTING SURVEY: ACTIVE DUTY MILITARY 21, 28 (2021), https://www.fvap.gov/uploads/FVAP/Reports/FVAP_ADM-Technical-Report-2020_FINAL_20210831.pdf.

¹⁴ 2020 OVERSEAS CITIZEN POPULATION ANALYSIS REPORT, *supra* note 12, at 101.

¹⁵ *See, e.g., Birth Abroad – Register Your Child as a U.S. Citizen*, U.S. EMBASSY AND CONSULATE GENERAL OF THE NETHERLANDS, https://nl.usembassy.gov/birth-abroad-register-your-child-as-a-u-s-citizen/?_ga=2.74723738.909771702.1738248273-1478516282.1738248273 (last visited Jan. 30, 2025)(noting that social security numbers are separate and must be applied to after a child’s citizenship has been

apply, the child is without a social security number, yet will still be eligible to vote at the age of eighteen. The same is true for state-issued identification and driver's licenses; a voter born or living abroad long-term will rarely have a reason or an opportunity to obtain a state-issued identification.

These and other procedural hurdles already deprive eligible, overseas North Carolinians of the opportunity to vote. According to one survey, 67% of active-duty service members were interested in voting in the 2020 presidential election,¹⁶ but only 47% of active duty service members voted, compared to 74% of the civilian, non-military population.¹⁷ In fact, over 20% of active-duty military members in 2020 reported that they wanted to vote but were unable.¹⁸ About four in ten of those service members who tried or wanted to vote but did not do so cited “difficulty registering to vote” and voting process complications as reasons they were deterred from voting.¹⁹ Regarding overseas voters more generally, 82% who did not return a ballot in 2020 did not vote because they “couldn’t complete [the] process.”²⁰ And when the youngest military and overseas eligible citizens were asked why they did not vote, they were

registered); *Birth Abroad and Eligibility for U.S. Citizenship*, U.S. EMBASSY & CONSULATES IN MEXICO, <https://mx.usembassy.gov/passports/births/> (last visited Jan. 30, 2025) (same).

¹⁶ *State of the Military Voter*, FED. VOTING ASSISTANCE PROGRAM, <https://www.fvap.gov/info/reports-surveys/StateoftheMilitaryVoter> (last visited Jan. 30, 2025).

¹⁷ 2020 POST-ELECTION VOTING SURVEY, *supra* note 13, at 12.

¹⁸ *Id.* at 38.

¹⁹ *Id.* at 39.

²⁰ FED. VOTING ASSISTANCE PROGRAM, 2020 REPORT TO CONGRESS 17 (2021), https://www.fvap.gov/uploads/FVAP/Reports/FVAP-2020-Report-to-Congress_20210916_FINAL.pdf.

19 times more likely to cite trouble completing the voting process than to say that they did not want to vote.²¹

At bottom, Petitioner fails to acknowledge the myriad barriers faced by military and overseas voters or how his requested relief would threaten to disenfranchise the very voters that the North Carolina General Assembly and Congress intended to protect by enacting UMOVA and UOCAVA.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's petition.

Respectfully submitted this the 3rd day of February, 2025.

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N.C.R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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²¹ FED. VOTING ASSISTANCE PROGRAM, 2022 REPORT TO CONGRESS 15 (2023), https://www.fvap.gov/uploads/FVAP/Reports/rtc_20231113_V10_FINAL.pdf.

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**Pro Hac Vice Applications Forthcoming*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, the undersigned counsel for Amici Curiae certifies that the foregoing brief, which is prepared using a proportional font, contains fewer than 3,750 words (excluding cover, index, table of authorities, caption, signature blocks, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 3rd day of February, 2025.

/s/ Lucy Inman
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was e-filed and served upon the parties listed below via e-mail, addressed as follows:

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