

STATE OF NORTH CAROLINA

COUNTY OF DUPLIN

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
20 CVS 570

F. let per Rule 5  
with the Court  
A. G. Shultz 4:30  
pm  
10/22/20

ADRAIN ARNETT, in his individual capacity  
and in his official capacity as Chairman of the  
Duplin County Republican Party; NORTH  
CAROLINA REPUBLICAN PARTY,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF  
ELECTIONS; DAMON CIRCOSTA, in his  
official capacity as Chair of the State Board of  
Elections; STELLA ANDERSON, in her official  
capacity as Secretary of the State Board of  
Elections; JEFF CARMON III, in his official  
capacity as Member of the State Board of  
Elections; KAREN BRINSON BELL, in her  
official capacity as Executive Director of the  
State Board of Elections,

Defendants.

**ORDER DENYING TEMPORARY  
RESTRAINING ORDER**

THIS MATTER WAS HEARD before the Court on October 13, 2020. The undersigned was designated to preside over this matter by the Chief Justice of the North Carolina Supreme Court pursuant to Rule 2.1 of the North Carolina General Rules of Practice for Superior and District Courts. All adverse parties received notice and participated. The Court considered the pleadings, briefs of the parties, affidavits, and the record established thus far, as well as argument submitted by counsel in attendance.

THE COURT hereby makes the following:

### Findings of Fact

1. Plaintiff Adrain Arnett is a Duplin County voter who intends to vote during one-stop early voting. He is also the chairman of the Duplin County Republican Party. He brings this action in his individual capacity, and in his capacity as county party chairman.

2. Plaintiff North Carolina Republican Party is a statewide political party, as defined in N.C.G.S. § 163-96.

3. Plaintiffs filed this action in Superior Court of Duplin County on October 5, 2020. They named as Defendants the North Carolina State Board of Elections and three of its members, in their official capacities: Damon Circosta, Stella Anderson, and Jeff Carmon III. The Complaint also named Karen Brinson Bell, in her official capacity as executive director of the State Board.

4. The North Carolina Democratic Party moved to intervene as a Defendant in this matter, which this Court allowed in an order entered contemporaneously with this Order. The Democratic Party was permitted to participate provisionally in the hearing on this matter, as amicus curiae, pending the Court's subsequent decision on the motion to intervene.

5. The Complaint asserts a claim under the North Carolina Public Records Act, N.C.G.S. ch. 132. Plaintiffs allege that Defendants have violated the Public Records Act by failing to make available, as requested, the absentee ballot container-return envelope for every absentee-by-mail ballot that has been submitted to any county board of elections in the state.<sup>1</sup>

6. The request for these records was made on October 2, 2020. Absentee voting in North Carolina started on September 4, 2020. As of the date of the hearing in this matter, the

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<sup>1</sup> Technically, absentee voting in North Carolina encompasses both absentee-by-mail voting and one-stop early voting. See N.C.G.S. ch. 163, art. 20. To avoid confusion, when this Order refers to "absentee" voting or ballots, it is referring to absentee-by-mail voting or ballots.

requested records encompassed nearly 500,000 such container-return envelopes, which were in the possession of the 100 county boards of election across the state.

7. Plaintiffs have not initiated any mediation proceedings with the State Board concerning their requested records, pursuant to N.C.G.S. § 7A-38.3E.

8. The Complaint also asserts a claim under the Equal Protection Clause of the North Carolina Constitution, N.C. Const. art. I, § 19. Plaintiffs allege that voters who cast their ballots in person are treated differently than voters who cast absentee ballots by mail, as a result of procedures that vary between the two voting methods concerning the timing of voter challenges, the pre-processing of absentee ballots before the time allowed for challenges to absentee voters, and the lack of access to the requested container-return envelopes with which to allegedly make a challenge to an absentee voter.

9. The State Board, pursuant to N.C.G.S. § 163-22(a), issued guidance to the county boards of elections on September 22, 2020, regarding the procedures for reviewing and determining whether to approve absentee ballots that are submitted by voters to the county boards. That guidance document, Numbered Memo 2020-25, was updated on September 23, 2020, and was attached as an exhibit to the Complaint.

10. Plaintiffs moved for a Temporary Restraining Order “prohibiting Defendants from continuing the pre-election day processing of absentee by mail ballots without the public’s timely access to a pre-election day and election day challenge process and the container-return envelopes.”

11. That Motion was heard by the undersigned in Superior Court of Wake County on October 13, 2020, with the consent of all the parties.



### Conclusions of Law

12. With respect to the claim under the Public Records Act, Plaintiffs have not satisfied a jurisdictional prerequisite for obtaining relief under the Act.

13. “The Public Records Act provides that a litigant seeking to challenge the denial of access to public records ‘may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A-38.3E.’” *Tillett v. Town of Kill Devil Hills*, 257 N.C. App. 223, 224, 809 S.E.2d 145, 147 (2017) (quoting N.C.G.S. § 132-9(a)).

14. “Section 7A-38.3E of the General Statutes is titled ‘Mediation of public records disputes’ and requires a party who files a civil action under the Public Records Act to ‘initiate mediation . . . no later than 30 days from the filing of responsive pleadings with the clerk in the county where the action is filed.’” *Id.* at 225, 809 S.E.2d at 147 (quoting N.C.G.S. § 7A-38.3E(b)). This is a “jurisdictional requirement[],” meaning that if a plaintiff fails to initiate mediation, “the court lacks the power to adjudicate the dispute at all—rendering any action taken in the case a nullity.” *Id.*; *see id.* at 226, 809 S.E.2d at 148.

15. Plaintiffs have not satisfied the condition precedent for obtaining relief under the Public Records Act, because they have not initiated mediation pursuant to N.C.G.S. § 7A-38.3E.

16. Even if Plaintiffs had initiated mediation, the proper entities to request the documents are the county boards of elections, not the State Board or its members or executive director.

17. The Public Records Act “limits a custodian’s duty to ‘public records . . . in the custodian’s custody.’” *State Employees Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 364 N.C. 205, 213, 695 S.E.2d 91, 97 (2010) (alterations in original) (quoting N.C.G.S. § 132-6); *see*

also *Cline v. Hoke*, 238 N.C. App. 16, 19, 766 S.E.2d 861, 863 (2014) (“If Defendant was not the custodian, however, he could not be compelled by law to provide access to public records as the custodian.”). The Act defines “custodian” as “[t]he public official in charge of an office having public records.” N.C.G.S. § 132-2.

18. The county boards of election are the custodians of the container-return envelopes requested by Plaintiffs, as that term is defined in the Public Records Act. While the State Board does have powers to order documents from the county boards, that does not make it the custodian of county board records, and the State Board does not have custody of these particular records.

19. With respect to Plaintiffs’ equal protection claim, the procedures set forth in Numbered Memo 2020-25 do not violate the equal protection rights of voters.<sup>2</sup>

20. Under N.C.G.S. § 163-85(c), every voter may be challenged on the same bases, whether they vote in-person or absentee.

21. Plaintiffs contend that N.C.G.S. § 163-89(c) permits absentee voters to be challenged for an alleged deficiency on the absentee ballot container-return envelope, which includes the voter’s absentee ballot application, *see* N.C.G.S. §§ 163-229, 163-230.1(d)–(f), as amended by N.C. Sess. Law 2020-17, sec. 4. The Court disagrees. Section 163-89(c) permits challenges to absentee voters based on the grounds listed in N.C.G.S. § 163-85(c). And a separate provision of Chapter 163 states that the county boards are to decide whether an absentee

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<sup>2</sup> As noted in the Order Granting the Motion to Transfer, filed contemporaneously with this Order, Plaintiffs clarified during the hearing on the Motion for Temporary Restraining Order that, in the equal protection claim, they are not challenging the constitutionality of the statutes requiring pre-Election Day processing of absentee ballots, deferring challenges to absentee ballots until Election Day, and limiting access to voted ballots. *See* N.C.G.S. §§ 163-89(a), -165.1(e), -230.1(f). They are instead challenging the State Board’s guidance to county boards in Numbered Memo 2020-25.

ballot container-return envelope meets the requirements of the law. The county board's decision is not subject to a voter challenge. *See* N.C.G.S. § 163-230.1(f) ("The decision of the board on the validity of an application for absentee ballots shall be final subject only to such review as may be necessary in the event of an election contest. The county board of elections shall constitute the proper official body to pass upon the validity of all applications for absentee ballots received in the county; this function shall not be performed by the chair or any other member of the board individually.").

22. The State Board's Numbered Memo does not change this, nor could it. The statutes do not allow a challenge process for absentee ballot container-return envelopes and therefore the memo is consistent with the statutes as promulgated by the General Assembly.

23. N.C.G.S. § 163-230.1(f) requires county boards to "pass upon" absentee ballot applications at public meetings. In other words, the county boards are required to decide to approve or disapprove the application. Once that decision is made, the decision is recorded. *Id.* It is clear from the statute that the decision must be that of the entire board, not the chair or an individual member of the board. The statute does not mandate the process requested by Plaintiffs, whereby members of the public would review and object to absentee ballot applications during these meetings. Accordingly, nothing in Numbered Memo 2020-25 is inconsistent with the statutory requirements.

24. Moreover, the fact that members of both major political parties comprise the county boards provides sufficient safeguards to protect against approval of non-compliant container-return envelopes. Even though there have been close to 500,000 absentee ballots passed upon, there is no evidence in the record to suggest that non-compliant applications are




being approved. In addition, there is no evidence that any county board member has been denied the opportunity to inspect or view a container return envelope.

25. While the Court agrees with Plaintiffs that transparency is important, the extent of the transparency is a legislative function and it is not the role of the judiciary to expand the limits beyond any statutory requirements absent constitutional requirements. As Memo 2020-25 is consistent with the statutory mandates and the statutes are not being challenged as unconstitutional, the Court cannot expand the limits of transparency even if it believes it is good policy.

26. As such, based upon the record before the Court and after a careful balancing of the equities, the Court concludes that Plaintiffs are unlikely to succeed on the merits.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for Temporary Restraining Order is hereby DENIED.

SO ORDERED, this 22 day of October, 2020.

  
A. GRAHAM SHIRLEY II  
Superior Court Judge Presiding

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on the persons indicated below by depositing a copy thereof in the United States Mail addressed as follows, with a courtesy copy sent via electronic mail:

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This the 27<sup>th</sup> day of October 2020.



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Kellie Z. Myers  
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