

FILED

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
2022 AUG 16 SUPERIOR COURT DIVISION

CASE NO: _____

WAKE COUNTY, N.C.

BY _____

IN RE APPEAL OF)
DECLARATORY RULING FROM)
THE STATE BOARD OF)
ELECTIONS)

PETITION FOR JUDICIAL REVIEW

Pursuant to N.C.G.S. § 150B-43, the North Carolina Republican Party, James H. Baker, and, Jerry “Alan” Branson (collectively, “Petitioners”), hereby file this Petition for Judicial Review of the July 22, 2022 Declaratory Ruling issued by the North Carolina State Board of Elections (“State Board”). In support of their Petition, Petitioners show the Court the following:

PARTIES

1. Petitioner, aggrieved party, is the North Carolina Republican Party (referred to throughout as the “NCGOP”). The NCGOP represents the interests of all Republican voters across the state, which as of August 13, 2022, includes more than 2.2 million individuals. The NCGOP seeks to ensure that individuals running as Republican candidates for office are afforded the opportunity to do so and that the Republican voters of the state have the right to select the candidates of their own choosing and for elections in North Carolina to be conducted on a free basis.
2. Petitioner, aggrieved party, is Cumberland County Board of Elections Member James H. Baker. As a county board member, Baker has a duty to

follow the law as passed by the North Carolina General Assembly.¹ Failing to follow the law could subject Baker (in his capacity as a county board member) or other county board members to criminal penalties. *See* N.C.G.S. § 163-104; N.C.G.S. § 163-274(a)(11).

3. Petitioner, aggrieved party, is Jerry “Alan” Branson. Branson is running as the Republican Party nominee for an at-large seat on the Guilford County Board of Commissioners. Branson is also aggrieved as an individual voter registered in Guilford County. In his capacity as a candidate, Branson is harmed by the inability of the Guilford County Board of Elections to use all available means to verify the proper execution of absentee request forms and container-return envelopes. In his capacity as a Guilford County voter, who is eligible and planning to vote in statewide general election, Branson is also aggrieved by the potential fraud that could result by the county board not verifying signatures.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action under North Carolina law, which provides that “any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision.” N.C.G.S. § 150B-43. To obtain judicial review, “the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision.” N.C.G.S. § 150B-45. The State Board ruling was released on July 22, 2022 and 30 days from that decision is August 21, 2022. *See* Exhibit 1.
5. This Court is the proper venue for this action. In order to obtain judicial review of a decision by the State Board, the petition must be filed in the Superior Court of Wake County. N.C.G.S. § 163-22(I).

¹ Before taking office, Board Member Baker took the following oath:

“I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States; and that I will well and truly execute the duties of the office of member of the _____ County Board of Elections to the best of my knowledge and ability, according to law; so help me God.” N.C.G.S. § 163-30(e).

FACTUAL BACKGROUND

6. On July 8, 2020, the State Board issued Numbered Memo 2020-15, which provided that “[c]ounty boards should accept the signature on the absentee request form *if* it appears to be made by the voter or their near relative or legal guardian,” and “the voter’s signature should not be compared with the voter’s signature on file because this is not required by North Carolina law.” See N.M. 2020-15, Exhibit 2. Despite this language, later on in the memo, the State Board continued to emphasize the importance that the, “signature must be unique” to the individual voter, creating confusion about how to determine and check this. *Id.*

7. On August 21, 2020,² The State Board issued a numbered memo, which provided that a “voter’s signature on [an absentee return] envelope shall not be compared with the voter’s signature on file because this is not required by North Carolina law.” See N.M. 2020-19; Exhibit 3. This memo instructed that county boards of elections accept the container-return envelope if “it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter.” See N.M. 2020-19; Exhibit 3. The memo continued that “even if the signature is illegible,” it should be counted because there is a presumption that the signature is that of the voter. *Id.* The purported purpose of this guidance was to provide “uniformity and consistency” in the process for reviewing the larger number of absentee ballots in the 2020 election due to the COVID-19 pandemic. *Id.*

8. On June 11, 2021, the State Board issued Numbered Memo 2021-03, which replaced Numbered Memo 2020-19, and provided that “[a] voter’s signature on the envelope shall not be compared with the voter’s signature in their registration record because this is not required by North Carolina law.” See Exhibit 4. This Numbered Memo also indicated that there is a presumption that “the voter’s signature is that of the voter, even if the signature is illegible.” See N.M. 2021-03; Exhibit 4. Despite this, the Numbered Memo

² Subsequent iterations of Numbered Memo 2020-19 were issued pursuant to numerous court orders. On September 22, 2020, Brinson-Bell issued a revised version of N.M. 2020-19. See N.M. 2020-19 revised V1, Exhibit 7. Finally, on October 17, 2020, Brinson-Bell issued another revised version of N.M. 2020-19. See N.M. 2020-19 revised V2, Exhibit 8.

continues to emphasize that county board staff “shall review each executed container-return envelope.” *Id.*

9. Prior to the issuance of N.M. 2020-19 and its successor N.M. 2021-03, it was common practice for county boards of elections to compare signatures on container-return envelopes to the voter’s signature on their registration file. *See Exhibit 3; Exhibit 4.*
10. On May 12, 2022, N.M. 2022-05 was issued to provide “procedures for county boards and/or chief judges to challenge ineligible absentee-by-mail” ballots. *See N.M. 2022-05, Exhibit 5* emphasized that county boards of elections, “should first review both the one-stop application and the absentee envelope, including comparing the voter’s signatures on the two voting documents, to determine if the same person voted twice.” *Id.* This document was sent to county boards to “formalize and revise” prior documents that were sent to county boards in 2020 and 2021.
11. On May 14, 2022, Petitioners collectively sent a *Request for Declaratory Ruling* to the State Board. *See Exhibit 6.* Petitioners asked the State Board to clarify the guidance sent to county boards, as seen in the Numbered Memos above. *Id.* Specifically, the request was that the State Board issue a ruling that clarified what county boards are supposed to do. *Id.* Petitioners believe county boards have the authority to verify a voter’s signature on their absentee ballot request and ballot return envelope, by comparing such signature with signatures contained in the voter registration records, before issuing an absentee ballot to the voter or approving their absentee ballot for counting. *Id.*
12. On June 9, 2022, the State Board granted the Request, thereby triggering a 45-day deadline to “issue a written ruling on the merits” of the request. N.C.G.S. § 150B-4(a1)(3). The State Board also authorized the submission of public comments between June 10th and July 5th, 2022, prior to making a ruling.
13. On June 30, 2022, the State Board voted in a 3-2 party line vote to rule against the Petitioners. *See Exhibit 1.*

14. On July 22, 2022, the State Board issued the written Declaratory Ruling being appealed. See Exhibit 1.
15. The State Board concluded that “[u]nder North Carolina law, absentee ballot requesters confirm their identity by providing two unique personal identifiers. Absentee voters confirm their identity when submitting their ballots by having two witnesses or a notary public attest to having watched them vote their ballot. These procedures are authorized in law; signature matching is not.” See Exhibit 1.
16. Petitioners have thus filed this Petition for Judicial Review.

ARGUMENT

Petitioners have standing

17. The North Carolina Constitution provides the following in regards to standing:

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18. A person who suffers harm has standing to sue in North Carolina courts. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642 (2008). Standing in North Carolina Courts is broader than the federal standing doctrine, as the power of our judiciary is plenary. See *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, ¶ 82, 376 N.C. 558, 608, 853 S.E.2d 698, 733 (“When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing.”)

18. Here, the State Board’s July 22, 2022 ruling has caused Petitioners harm because the decision contradicts the election safeguards put in place by the General Assembly. Petitioners have suffered harm because the State Board’s ruling stripped county board officials of a necessary tool to “review” ballots

cast and ensure that the ballot container return-envelope was personally signed by the voter, thereby resulting in less secure elections. *See* N.M. 2021-03; Exhibit 4. As stated below, there can be no way to accurately review signatures for authenticity without comparing them to a known exemplar—the voter registration application. In particular, this harms the NCGOP as it impacts its supported candidates in their quests for election to office, Petitioner Branson as a candidate who has an interest in a free election in his race and as a voter with an interest in the integrity of elections in which he votes, and Petitioner Baker as a member of a county board of elections who has taken an oath to uphold the law.

19. Additionally, the State Board’s ruling violated U.S. Const. Art. I § 4 by contradicting the General Assembly’s legislation on maintaining that county election board officials must “review” ballots. *See* N.M. 2021-03, Exhibit 4; N.C.G.S. § 163-230.1(d)-(e). The election board officials are required by the General Assembly to ensure that the absentee container-return envelopes have been “signed *personally* by the voter.” N.C.G.S. § 163-234(11) (emphasis added). However, the State Board’s ruling aggravates and causes harm to the Petitioners by circumventing the law. As a result of the ruling by the State Board, county boards of elections now have a choice: (1) follow the State Board’s Numbered Memos in defiance of their oath and violation of the statutory requirements, or (2) follow the statutory requirements and face the potential disciplinary actions from the State Board for failing to follow their guidance. There is no way to accurately review absentee ballots and ensure they are “signed personally by the voter” without looking at and reviewing the signatures. All three petitioners have a legal interest that serves to create “concrete adverseness” as required by the North Carolina Constitution. *See Comm. to Elect Dan Forest* 2021-NCSC-6, ¶ 45, 376 N.C. at 583, 853 S.E.2d at 717.

The State Board of Elections has usurped their statutory authority

20. The United States Constitution is clear that the “[t]he times, places and manner of holding elections . . . shall be prescribed in each state by the legislature thereof.” U.S. Const. Art. I, § 4, cl. 1. State legislatures have options for how to hold elections as the U.S. Constitution does not prescribe a specific way of holding elections. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969).

21. The State Board has the power to supervise elections in North Carolina and “make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable so long as they do not conflict with any provisions of [Chapter 163].” N.C.G.S. § 163-22. These rules and regulations are typically promulgated via either Numbered Memos or administrative rules. Despite the power possessed by the State Board, it cannot make law, rather it can only make, “recommendations to the Governor and legislature relative to the conduct and administration of the primaries and elections in the State[.]” N.C.G.S. § 163-22(i). The State Board even acknowledges this on their website by saying the Numbered Memos provide “guidance and updates about elections administration to the county board of elections.” North Carolina State Board of Elections, *Numbered Memos*, <https://www.ncsbe.gov/about-elections/legal-resources/numbered-memos> (last visited August 19, 2022). There is nothing on their website, or in the North Carolina General Statutes that instead allows them to make actual law.
22. The North Carolina Constitution provides that, “[a]ll elections shall be free.” N.C. Const. Art I, Sec. 10. In general, that includes, “the right to an honest vote count, free from fraud.” *Harper v. Hall*, 380 N.C. 317, 2020-NCSC-17, ¶285 (Newby, C.J., *dissenting*).³ One of the most basic rights to our democracy is ensuring our elections, and their vote counts, are free and accurate. Citizens exercise this right in a variety of ways such as running for office, voting, urging others to vote, volunteering, or contributing to a campaign. See *McCutcheon v. FEC*, 572 U.S. 185, 134 S.Ct. 1434 (2014).
23. Here, the State Board has issued multiple Numbered Memos instructing county boards that they are prohibited from comparing voter signatures or verifying voter signatures for an absentee ballot request or return. See N.M. 2020-15, Exhibit 2, N.M. 2021-03, Exhibit 4. However, by directing county boards to not compare voter signatures, the State Board is effectively creating a law that does not exist. This creates confusion for county board of elections members as it is unclear whether they have to follow the guidance to review the voter signatures for a personal signature or not. Many states⁴

³ “Based upon this Court’s precedent with respect to the free elections clause, a voter is deprived of a ‘free’ election if (1) the election is subject to a fraudulent vote count, or (2) a law prevents a voter from voting according to one’s judgment. Therefore, the free elections clause must be read in harmony with other constitutional provisions such as Article VI, that limits who can vote and run for office. Free elections must be absent of fraud in the vote tabulation.” *Harper*, 380 N.C. 317, 2020-NCSC-17, ¶289 (Newby, C.J., *dissenting*).

⁴ See Ala. Code 1975 § 17-11-7; AS §15.20.203; Ark. Code Ann. §7-5-409(b)(4); Conn. Gen. Stat. Ann. §9-137; Del. Code Tit. 15, §5505(b)(4); Ga. Code Ann. §21-2-384; K.S.A. §25-1136(b); LSA-R.S. §18:1306(E); MD Code, Election Law, § 9-310; M.S.A. § 203B.07; Miss. Code Ann. § 23-15-633; V.A.M.S. §115.283; Neb. Rev. Stat. § 32-947; N.M. Stat. Ann. § 1-6-8; 26 Okl.St. Ann §14-107; 25 P.S. § 3146.4; S.C. Code §7-15-220; 17 V.S.A. § 2542 § 2546; Virginia Stat. §24.2-706; Wis. Stat. Ann. §6.87; Wyo. Stat. § 22-9-111.

agree this is a process for the legislature and this has been shown by the passing of laws. Here, our North Carolina General Assembly was deprived of their lawmaking powers, by the State Board who is only authorized to make “recommendations.” N.C.G.S. § 163-22(i).

24. Furthermore, the Numbered Memos issued by the State Board directly contradict the statutory safeguards put into place by our General Assembly to ensure county boards properly evaluate the voter’s signature on (1) an absentee ballot request form or (2) an absentee container-return envelope.
25. Even though “there is no constitutional right to an absentee ballot,” *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020), every state offers some form of absentee voting or vote-by-mail. Each state picks their own process for this and does it in their own way. The Elections Clause of our US Constitution makes this clear, allowing each state to have the power to determine the “[t]he times, places and manner of holding elections[.]” U.S. Const. Art. I, § 4, cl. 1. For example, some states restrict mail-in absentee voting to citizens who will be absent on election day or who will otherwise have difficulties voting in person.⁵ Other states allow any voter to vote by mail.⁶ There is no set approach required by the Constitution, which is why each state legislature has chosen their own procedures. One common theme throughout the country, however, is that elected officials in the legislative branch (as seen below) have codified the laws for absentee ballots, and not unelected, partisan administrative agencies like the State Board. To allow the State Board to make the laws on absentee ballots would go against our country’s principles of democracy, violate the U.S. Constitution, and violate our State Constitution and statutes by depriving the legislature of their lawmaking powers.
26. For a qualified voter to request an absentee ballot, the voter “shall complete a request form” that is in “compliance with [N.C.G.S. §] 163-230.2.” N.C.G.S. § 163-230.1(a). “A completed written request form for absentee ballots as required by [N.C.G.S. §] 163-230.1 is valid only if it is on a form created by the State Board and signed by the voter requesting absentee ballots or that voter’s near relative or verifiable legal guardian.” N.C.G.S. § 163-230.2(a). Moreover, “[a] request for absentee ballots is not valid if . . . signed by anyone other than the voter, or the voter’s near relative or verifiable legal guardian [or] [t]he written request does not contain all of the information required by

⁵ See Ala. Code § 17-11-3; Ark. Code Ann. § 7-5-402; Conn. Gen. Stat. § 9-135; 15 Del. Code Ann. § 5502; Ind. Code § 3-11-10-24; Ky. Rev. Stat. Ann. §§ 117.085(1)(a), 117.077; La. Stat. Ann. § 18:1303; Mass. Gen. Laws ch. 54, § 86; Miss. Code Ann. § 23-15-715; Mo. Rev. Stat. § 115.277; N.H. Rev. Stat. Ann. § 657:1; S.C. Code Ann. § 7-15-320; Tenn. Code Ann. § 2-6-201; Tex. Election Code Ann. § 82.001; W. Va. Code § 3-3-1(b).

⁶ Ariz. Rev. Stat. Ann. §§ 15-541, -542(C).

[N.C.G.S. § 163-230.2(a)].” N.C.G.S. § 163-230.2. County boards of elections have a duty to ensure only voters who have lawfully submitted absentee ballot requests are sent absentee ballots. *See* N.C.G.S. § 163-236. Here, an accurate voter’s signature is clearly required to satisfy the statutory requirements. The State Board acknowledges this duty in their Numbered Memos when they write that county boards of elections “shall review” the ballots. *See* N.M. 2021-03, Exhibit 4. Further, pursuant to N.C.G.S. § 163-22(d), “[t]he State Board of Elections shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district”

27. By accepting an absentee ballot request without fully verifying the voter’s signature, a county board member is neglecting their duties, as set out by our General Assembly, for which they swore an oath to uphold. A county board member is thus left with two equally unsatisfactory results: (1) follow the State Board’s Numbered Memos in defiance of their oath and violation of the statutory requirements, or (2) follow the statutory requirements and face the potential disciplinary actions from the State Board for failing to follow their guidance. Therefore, legal clarification is needed.

28. Once a county board of Elections has approved a request for an absentee ballot, the board prepares and sends the voter an absentee ballot with a container-return envelope. N.C.G.S. § 163-230.2(d). The voter must then complete the absentee container-return envelope in the presence of two witnesses or a notary public. N.C.G.S. § 163-231(a). The voter must personally sign the container-return envelope and return it to the county board of elections either by mail or in-person. N.C.G.S. § 163-231. Moreover, N.C.G.S. § 163-229(b)(2) provides that the “container-return envelope” must provide for, among other things, “[a] space for identification of the envelope with the voter and the voter’s signature.” Pursuant to N.C.G.S. § 163-230.1(d)-(e), county board of elections members have a duty to determine whether absentee container-return envelopes have been properly executed, including that such envelopes have been “signed personally by the voter.” N.C.G.S. § 163-234(11). (“The county board of elections shall meet . . . to determine whether the container-return envelopes for absentee ballots received pursuant to G.S. 163-231(b)(2)(b) or (c) have been properly executed.”). Here, the State Board has directed county board members to do the exact opposite of their statutory duty. Instead of determining whether the envelopes have been properly executed and signed, the State Board has directed county board members to not take additional steps to determine whether an envelope had been properly executed. However, the State Board, in the same Numbered Memo has also stated that county boards “shall review” the container-return envelopes. *See* N.M. 2021-03, Exhibit 4. On one

hand, the State Board's guidance explicitly prohibits county boards from performing their statutory duty to determine that an absentee container-return envelope was in fact signed by the voter. On the other hand, the State Board seems to agree with the statutory requirements of our state legislature, and that there should be some review process. At the very least, this Court is needed to step in and clarify the confusing message sent by the State Board in their Numbered Memos.

29. Beyond the enumerated duties of the county board of elections to ensure voter signatures are those of the purported voters, county board members also must ensure "[t]he return and accurate accounting of all official ballots, regular, provisional, voted, unvoted, and spoiled, according to the provisions of Article 15A of [Chapter 163]." N.C.G.S. § 163-166.10. County board members further have the responsibility "to authenticate the count in every ballot item in the county by determining that the votes have been counted and tabulated correctly." N.C.G.S. § 163-182.5. If the county board approves absentee container-return envelopes that possibly contain a signature that is not that of the voter, the county board is not correctly counting the number of votes. Such inaction, even at the behest of the State Board, is in direct conflict with the applicable statutes established by the General Assembly and could create criminal liability for county board members. At the bare minimum, the guidance by the State Board causes confusion on the part of election officials and county board members as to the proper procedures to follow in order to follow North Carolina law.
30. Allowing potential illegal votes to count on the basis of the State Board stripping county boards of valuable tools to verify voters also decreases public confidence in our elections. Courts have been clear on this point and emphasize that the "state must protect against the diluting effect of illegal ballots." *Moore v. Circosta*, 494 F. Supp. 3d 289 (M.D.N.C. 2020) (quoting *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963)).

PETITIONER'S EXCEPTIONS TO THE STATE BOARD OF ELECTIONS'
DECISION

31. N.C.G.S. § 150B-43 allows for judicial review by all decisions of the State Board of Elections.
32. The decision of the State Board of Elections lacks a clear basis in fact on the record, is vague, arbitrary and capricious because it did little to clarify the responsibilities of county board of elections officials.

33. The decision of the State Board of Elections lacked a basis of legal authority.
34. The decision of the State Board of Elections failed to consider all necessary evidence to render a sound decision.
35. The conduct of the State Board of Elections was motivated by political partisanship and prejudice with regard to the validity of voter identity.
36. The procedure for adjudicating the issues in the Request for Declaratory Ruling before the State Board of Elections was extremely limited and did not provide the opportunity to properly represent Petitioners interests. Petitioners were not “afforded an opportunity to dispute noticed fact(s) through the submission of evidence and argument,” as required by N.C.G.S. § 150B-30.
37. The decision by the State Board of Elections with regard to lack of uniformity amongst signature verification, is per-se hypocritical given their conduct in *N.C. Green Party v. N.C. State Bd. of Elections*, No. 5:22-CV-276-D, 2022 U.S. Dist. LEXIS 139993 (E.D.N.C. Aug. 5, 2022).
38. The language in Numbered Memo 2020-15 directing that “[c]ounty boards should accept the signature on the absentee request form *if* it appears to be made by the voter or their near relative or legal guardian . . . ” and the language in Numbered Memo 2021-03 requiring county boards to “accept the voter’s signature on the container-return envelope if it appears to be made by the voter” is facially contradictory when considering the State Board’s additional guidance forbidding signature verification. The State Board’s guidance leaves the validity of the ballot to speculation and hope. *See* Exhibit 2.

RELIEF REQUESTED

Based upon the foregoing the Petitioners pray the Court to:

1. Modify and reverse the July 22, 2022 ruling by the State Board.
2. Conclude that the State Board erred, prejudiced the rights of Petitioners through violating United States and North Carolina constitutional


provisions⁷, N.C.G.S. § 150B-51(b)(1), and issued a ruling in excess of the statutory authority granted to the State Board, *Id.* at (b)(2). *Id.* at § 150B-51(b).

3. Grant a declaratory judgment that the July 22, 2022 ruling and the related Numbered Memos violates Art. I, § 4, cl. 1. to the U.S. Constitution and Art. I, § 10 to the N.C. Constitution.
4. Grant the Petitioners such other and further relief as is just and reasonable.

RESPECTFULLY SUBMITTED, this 19th day of August, 2022.

ATTORNEYS FOR PETITIONERS
NORTH CAROLINA REPUBLICAN PARTY
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JERRY ALAN BRANSON

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⁷ U.S. Const. art. 3 § 1; art. 3 § 2; NC Const. art. 3 § 1; NC Const. Art. 3 § 2.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF
JUSTICE
SUPERIOR COURT DIVISION
CASE NO: 22CVS10520

IN RE APPEAL OF DECLARATORY
RULING FROM THE STATE BOARD
OF ELECTIONS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the PETITION FOR JUDICIAL REVIEW in the above captioned matter (Filed August 19, 2022) on the North Carolina State Board of Elections by personal service at:

North Carolina State Board of Elections
Dobbs Building, Third Floor
430 N Salisbury St.
Raleigh NC 27603-7255

RESPECTFULLY SUBMITTED, this the 22nd day of August, 2022.



Philip R. Thomas
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STATE OF NORTH CAROLINA
WAKE COUNTY

2022 JUN 19 P 4 40

BEFORE THE STATE BOARD OF ELECTIONS

WAKE COUNTY, N.C.

BY _____

IN RE: REQUEST FOR DECLARATORY)
RULING ON SIGNATURE MATCHING)
FOR ABSENTEE BALLOT REQUESTS)
AND BALLOT ENVELOPES)
)

DECLARATORY RULING

The State Board of Elections was sent a Request for Declaratory Ruling (“Request”) from the North Carolina Republican Party and two individuals—a county board of elections member from Cumberland County, James Baker, and a candidate for county commissioner in Guilford County, Jerry Alan Branson (“Petitioners”). The Petitioners ask the State Board to declare that county boards of elections are authorized—perhaps even required—to compare a voter’s signatures on their absentee ballot request and ballot envelope, with their signature in the voter registration records, before issuing an absentee ballot to the voter or approving their absentee ballot for counting.¹

On June 9, 2022, the State Board granted the Request to issue a declaratory ruling, thereby triggering a 45-day deadline to “issue a written ruling on the merits” of the Request. N.C.G.S. § 150B-4(a1)(3). The State Board also authorized the submission of public comments between June 10 and July 5, 2022, prior to making a ruling on the merits of the Request. The agency received over 8,000 submissions from the public, representing viewpoints in favor and

¹ Technically, there are two methods of absentee voting in North Carolina: (1) one-stop absentee voting (*i.e.*, early voting which is done in person), *see* N.C.G.S. § 163-227.2; and (2) absentee-by-mail voting, *see id.* § 163-229. This Declaratory Ruling uses the shorthand “absentee” to refer to only absentee-by-mail voting, which is the only voting method at issue in the Request.

against the Request, and for myriad reasons. The State Board has been well served by these comments, which have helped illuminate the issues at stake within the record of this proceeding.

On June 30, 2022, the State Board determined by a 3–2 vote that North Carolina law does not authorize what the Petitioners are requesting. Under North Carolina law, absentee ballot requesters confirm their identity by providing two unique personal identifiers. Absentee voters confirm their identity when submitting their ballots by having two witnesses or a notary public attest to having watched them vote their ballot. These procedures are authorized in law; signature matching is not.

I. BACKGROUND

A. Request for Declaratory Ruling

The North Carolina Administrative Procedure Act permits any “person aggrieved” to ask a state administrative agency to “issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency.” N.C.G.S. § 150B-4(a). The Petitioners made such a request on May 14, 2022, seeking the State Board’s interpretation of how North Carolina’s laws governing absentee ballot procedures would apply to the Petitioners’ proposal that county board members compare signatures on absentee ballot requests and absentee ballot container-return envelopes to voter signatures among voter registration records, before approving such requests or ballots, respectively.

Prior to this Request, in 2020 and 2021, the executive director of the State Board issued official guidance on these issues. Regarding signatures on absentee ballot request forms, the executive director advised county board members and staff of the following, in a section of a Numbered Memo entitled “No Signature Verification”:

County boards should accept the signature on the absentee request form if it appears to be made by the voter or their near relative or legal guardian. The voter's signature should not be compared with the voter's signature on file because this is not required by North Carolina law. Additionally, attempting to verify a voter's signature would result in different treatment of absentee request forms, since it is not possible to verify the signature of the near relative or legal guardian. If the absentee request form appears to have been signed by the voter or near relative, you should accept the signature as valid.

Numbered Memo 2020-15 at 4.²

Regarding signatures on absentee ballot container-return envelopes, the executive director wrote, in a similarly entitled section of a different numbered memo:

Verification of the voter's identity is completed through the witness requirement. The voter's signature on the envelope shall not be compared with the voter's signature in their registration record because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

Numbered Memo 2021-03 at 1–2 (footnotes omitted).³

² Historically, the issuance of a numbered memorandum (or “numbered memo”) has been the method by which executive director of the State Board, who is the designated “chief State elections official,” N.C.G.S. § 163-27(d), communicates official policy or legal interpretation of the State Board, or prescribes specific administrative procedures for the uniform conduct of elections. *E.g.*, *In re Capitol Broad. Co., Inc.*, 19 F.4th 385, 387 (4th Cir. 2021); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2022 WL 715973, at *11 (M.D.N.C. Mar. 10, 2022).

³ This guidance was originally provided in Numbered Memo 2020-19, but that numbered memo was superseded by Numbered Memo 2021-03.

The Request claims that “[p]rior to issuance of [this guidance], it was common practice for county boards of elections to compare signatures on container-return envelopes to the voter’s signature on their registrationd [sic] file.” Request at 2. Petitioners did not submit evidence to support this statement. There is a dispute even among two current State Board members, who used to serve on the same county board, as to whether the practice was actually used in their county in prior years. In any event, although this practice may have occurred in certain counties, the State Board is unaware of official policy that would have authorized this practice in prior years. And, even among those counties that may have used this practice, there is no indication that there were any guidelines in place to ensure equal protection and due process for voters.

The Request does not specifically address whether it is seeking to have signature verification done on *all* absentee requests or ballot envelopes, or just those that generate some level of suspicion. However, the language used in the Request and the legal rationale provided for the declaratory ruling suggests that, in Petitioners’ view, signature verification would be required in *all* instances, because, according to the Request, signature verification is required by law. For example, Petitioners state the following, with emphasis added:

- “By accepting an absentee ballot request form *without fully verifying the voter’s signature*, a board member is *neglecting his or her duties*, as set out by the General Assembly, for which they swore an oath to uphold.” Request at 3.
- “It is *inadequate* for a county board of elections to not *exhaust all available resources* to confirm that the signature provided on an absentee container-return envelope is that of the purported voter.” *Id.* at 4.
- The Request argues authority for signature matching derives from the general duty to canvass “to ensure ‘[t]he return and accurate accounting of *all official ballots*.’” *Id.* at 5 (citing N.C.G.S. § 163-166.10).
- “If the county board is approving absentee container-return envelopes *that possibly contain a signature that is not that of the voter* and, in due course, is counting the

corresponding absentee ballots, they are not correctly counting the number of votes,” and “could create criminal liability.” *Id.* (citing N.C.G.S. § 163-182.5).

- “Allowing *potential illegal votes* to count on the basis of the NCSBE stripping the county boards of this valuable tool to verify voters decreases public confidence in our elections.” *Id.* (emphasis added).
- “[A] ruling by the NCSBE is required to ensure that the confirmation of *each voter’s vote* will count as one vote.” *Id.* at 8 (emphasis added).

There is no suggestion in the Request that verification should be limited to only specific circumstances (*e.g.*, where warranted based on some suspicion). Even if the Request could be read to alternatively suggest a more limited allowance for signature matching—contrary to the foregoing statements—the Request offers no suggestion as to what circumstances should trigger this additional level of scrutiny. Nor does it suggest how the State and county boards could implement a uniform and nondiscriminatory system for some-of-the-time signature matching, in a way that would avoid obvious equal protection and due process complaints. *See Bush v. Gore*, 531 U.S. 98, 106 (2000).

Whether the Request seeks universal or part-time signature matching by county boards, it is important to consider the Request against the various mechanisms that are in place—by law—to protect the integrity of absentee-by-mail voting. It is also important to understand why, under existing North Carolina law, signature matching cannot be applied uniformly.

B. Absentee Ballot Request Procedures

To receive an absentee ballot in North Carolina, a voter must submit a valid request through a form provided by the State Board which is “signed by the voter requesting absentee ballots or that voter’s near relative or verifiable legal guardian.” N.C.G.S. § 163-230.2(a). The form requires confirmation of the voter’s identity through a combination of personally

identifying information: (1) date of birth, plus (2) last four digits of a Social Security Number or driver's license number. *Id.* § 163-230.2(a)(4).

The relevant portions of the current absentee ballot request form and instructions which accompany that form appear below:

Voter identification Required	3	Date of birth (mm/dd/yyyy)	AND	NC Driver's License/DMV ID number _____ OR Last 4 digits of your Social Security number _____
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3: Voter identification
You must provide your date of birth
and one of the following:

- A NC Driver's License or DMV ID card number
- The last 4 digits of your social security number

The request form may be returned only by the voter, the voter's near relative or legal guardian, or a member of a bipartisan team designated by the county board to assist voters who live in nursing homes and other similar facilities. *Id.* § 163-230.2(c). If the form is delivered by someone else (besides the post office or a delivery service), it cannot be fulfilled. *Id.* § 163-230.2(e). There is an exception required by a recent court decision, which permits any voter who needs assistance due to a disability to call on the assistance of any person of their choosing to assist with completing or returning their ballot request. *See Disability Rights N.C. v. N.C. State Bd. of Elections*, No. 5:21-CV-361-BO, 2022 WL 2678884, at *6 (E.D.N.C. July 11, 2022).

As noted above, many requests are not made by the voter, but are made, lawfully, by near relatives, legal guardians, and persons assisting disabled voters. In these circumstances, it would be impossible to match the voter's signature with that in their registration records, since their signature would not appear on the request form.

Additionally, the law permits North Carolinians to make absentee ballot requests online via a web portal provided by the State Board, and to allow an “electronic signature” to be provided, as that term is defined in the Uniform Electronic Transaction Act. *Id.* § 163-230.2(b)(2). That law provides that an electronic signature can be “an electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record.” *Id.* § 66-312(9). The State Board has implemented this provision in the portal by allowing voters (or their authorized requesters) to trace their signature with a finger on a touchscreen or by using a computer mouse. Visually impaired voters are permitted to type their signature.

Below is how the signature page on the request portal appears to the voter:

The screenshot shows the signature page of the North Carolina State Board of Elections. At the top, there is a logo with a ballot box and the text "VOTE" and "NORTH CAROLINA STATE BOARD OF ELECTIONS". To the right of the logo is a "Font Size: A A" link. Below the logo is a navigation bar with "Home" and "Contact" links. The main heading is "Signature". Below the heading, there is a paragraph: "A signature is required to return your absentee ballot request." This is followed by two instructions: "If you are using a touchscreen device, please sign your name in the space provided below using your finger or a stylus." and "If you are not using a touchscreen device please sign your name in the space provided below using your mouse." A third instruction states: "If you are a visually impaired voter who is requesting an accessible ballot you will be able to type your signature." Below these instructions is a bold warning: "Fraudulently or falsely completing this form is a Class 1 felony under Chapter 163 of the NC General Statutes." The signature area is a large white box with a dashed border. Inside the box, on the left, is a large "X" and on the right is the text "CLICK TO SIGN". Below the signature area are two buttons: "GO BACK" on the left and "CONTINUE" on the right. At the bottom of the page, there is a footer: "Powered by Democracy Live | Privacy Policy | Technical Support".

Accordingly, some voters who make requests for absentee ballots will have pen-to-paper signatures, others will transmit electronic signatures that are captured in ways that could make it difficult to compare with voter registration signatures, and some voters will not submit their signatures at all.

For context, in the November 2020 election, 1,364,761 voters submitted requests for absentee ballots, 362,818 of which (or 27%) were submitted through the web portal, and 33,100 of which (or 2%) were submitted by a near relative or guardian.

C. Absentee Ballot Completion

Under North Carolina law, after a valid ballot request is made, a county board must send a voter their absentee ballot, along with an envelope into which the voter can insert their completed ballot. *Id.* § 163-230.1(c). Each ballot includes a “bar code or other unique identifier to allow both the county board of elections and the voter to track the ballot following return of the voted ballot to the county board of elections by the voter.” *Id.* § 163-229(b)(9). The ballot itself contains a unique numerical identifier. *Id.* § 163-230.1(c)(1). This serves multiple purposes. It permits the county board to refer to a particular ballot in an open meeting to adjudicate ballots while preserving the confidentiality of the voter. It also permits a county board to locate and retrieve a ballot from a tabulator (and thereby discount its votes) if a particular voter is determined to be ineligible—for example, after a voter challenge. *See id.* § 163-89. This ability to retrieve a particular voter’s absentee ballot is a security feature that is not available for in-person Election Day voting, unless a particular voter is challenged in the act of voting, which is comparatively rare.

When voting, the voter must mark their ballot in the presence of two witnesses or a notary who must certify to having witnessed the voter complete their ballot. N.C.G.S. § 163-

231(a). On the outside of the ballot envelope is the absentee application form, where the voter and witnesses execute their certification with their signatures and personal contact information.

Id. §§ 163-231(a), -229(b).

The contents of the application are prescribed by law and include:

- (1) The voter's certification of eligibility to vote the enclosed ballot and of having voted the enclosed ballot in accordance with [the absentee voting statutes].
- (2) A space for identification of the envelope with the voter and the voter's signature.
- (3) A space for the identification of the two persons witnessing the casting of the absentee ballot in accordance with G.S. 163-231, those persons' signatures, and those persons' addresses.
- (4) A space for the name and address of any person who, as permitted under G.S. 163-226.3(a), assisted the voter if the voter is unable to complete and sign the certification and that individual's signature.
- (5) A space for approval by the county board of elections.
- (6) A space to allow reporting of a change of name as provided by G.S. 163-82.16.
- (7) A prominent display of the unlawful acts under G.S. 163-226.3 and G.S. 163-275, except if there is not room on the envelope, the State Board may provide for that disclosure to be made on a separate piece of paper to be included along with the container-return envelope.
- (8) An area to attach additional documentation necessary to comply with the identification requirements in accordance with State Board rules, as provided in G.S. 163-230.1.
- (9) A bar code or other unique identifier to allow both the county board of elections and the voter to track the ballot following return of the voted ballot to the county board of elections by the voter.

Id. § 163-229(b).

For voters familiar with in-person voting, the absentee ballot application is equivalent to the one-stop application or the authorization-to-vote form voters complete when they check in to vote at one-stop early voting or at their precinct on Election Day, respectively. Each of these

forms serves essentially the same purpose through very similar means: they confirm the identity of the person seeking to vote through the voter's attestation, executed in front of a person witnessing the act. At the polling place, a county elections worker witnesses the attestation. For the voter submitting their ballot by mail, the attestation is witnessed by two individuals or a notary public who provide their contact information.

General Statute § 163-231(a) sets forth the specific rules for how a voter properly completes their absentee ballot. It requires the voter to:

- (4) Make the application printed on the container-return envelope according to the provisions of G.S. 163-229(b) and make the certificate printed on the container-return envelope according to the provisions of G.S. 163-229(b).
- (5) Require those two persons in whose presence the voter marked that voter's ballots to sign the application and certificate as witnesses and to indicate those persons' addresses. Failure to list a ZIP code does not invalidate the application and certificate.
- (6) Do one of the following:
 - a. Have the application notarized. The notary public may be the person in whose presence the voter marked that voter's ballot.
 - b. Have the two persons in whose presence the voter marked that voter's ballots to certify that the voter is the registered voter submitting the marked ballots.

Alternatively to the prior paragraph of this subsection, any requirement for two witnesses shall be satisfied if witnessed by one notary public, who shall comply with all the other requirements of that paragraph. The notary shall affix a valid notarial seal to the envelope, and include the word "Notary Public" below his or her signature.

The identity of the voter is confirmed first by the voter's own certification that the voter "marked the enclosed ballot or it was marked according to my instructions." The relevant portion of the current absentee envelope application appears below:

Step 2: Voter, sign and complete below.

I certify that:

- I am a US citizen.
- I am at least 18, or will be by the date of the general election.
- I am registered to vote in this county.
- I will have lived at my address printed above for at least 30 days before this election.
- I have not been convicted of a felony **or** if I have been convicted of a felony I have (a) completed my sentence (including probation, post-release supervision, or parole); **or** (b) I am serving an extended term of probation, post-release supervision, or parole, I have outstanding monetary obligations, and I am not aware of other reasons for the extension of my period of supervision.
- I understand it is a felony to vote more than once in an election.
- I marked the enclosed ballot or it was marked for me according to my instructions.

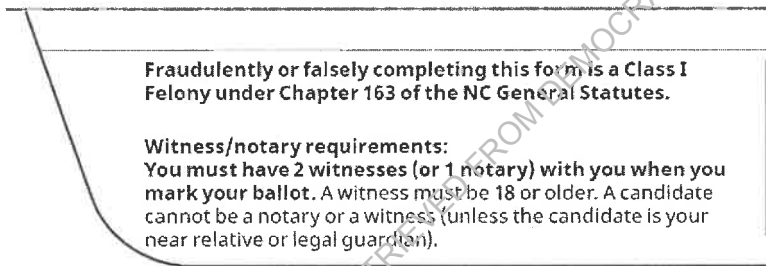
Voter, sign here:

X

- If a second primary or runoff is called, please mail me an absentee ballot for that election.

Name correction (if applicable) _____

This attestation is made under an express warning, required by statute, that fraudulently or falsely completing the form is a felony. *Id.* § 163-22(o1). Here is how the felony warning appears on the flap that the voter uses to seal their ballot:



Moreover, a list of all unlawful acts associated with absentee voting is required to accompany each absentee ballot envelope, *id.* § 163-229(b)(7), a level of anti-fraud warning that has no equivalent for in-person voting.

Aside from the voter’s attestation, the identity of the voter is further confirmed by the attestation and signature by two witnesses or a notary that “[t]he voter marked the ballot in my presence, or caused it to be marked in the voter’s presence according to their instruction,” and that “[t]he voter signed this envelope, or caused it to be signed.” These attestations, again, are provided under warning of felony punishment for falsity.

Below is how the witness certification appears on the current absentee ballot envelope:

Step 3: Witnesses or notary, certify below.

Each witness or notary certifies that:

- I meet the eligibility requirements as outlined on the envelope flap.
- I respected the secrecy of the ballot unless I assisted at the voter's request.
- The voter marked the ballot in my presence, or caused it to be marked in the voter's presence according to their instruction.
- The voter signed this envelope, or caused it to be signed.

Witness 1 print name: _____

Street Address / PO Box: _____

City / State / Zip: _____

Witness 1, sign here: _____

Witness 2 print name: _____

Street Address / PO Box: _____

City / State / Zip: _____

Witness 2, sign here: _____

If using a notary instead of 2 witnesses, the notary also certifies that:

State of _____

County of _____

The voter, _____

Voter name

appeared in person and was positively identified on _____

Date

Notary Public

Commission Expiration Date

seal

Although the above process is completed in handwriting on paper by the majority of absentee voters, not all absentee ballots will have a voter's pen-to-paper signature. First, due to a federal court order, visually impaired voters may use the State Board's absentee web portal to submit their absentee ballots and electronically sign, either by touchscreen, mouse, or typing (if the voter's assistive device does not permit marking a signature). See *Taliaferro v. N.C. State Bd. of Elections*, No. 5:20-CV-411-BO, Doc. 62 at 2, 4 (E.D.N.C. June 15, 2021). Similarly, uniformed and overseas voters may also use the portal to submit their ballots and may electronically sign using touchscreen or mouse to make their signature (but may not type their signature). See N.C.G.S. §§ 163-258.7(c) & (d), -258.9(b), -258.10. Finally, if an absentee voter

is unable to sign due to a disability, the law provides for their assistant to sign on their behalf. *See id.* §§ 163-229(b)(4), -231(a)(1).

Accordingly, for some voters, signature matching would be less precise than for other voters due to the use of electronically captured signatures, and, in some cases, it would be completely unavailable.

D. Absentee Ballot Review and Approval

The county boards of elections review absentee ballot container envelopes (*i.e.*, applications) before approving the applications and removing the ballot to be counted, similar to how one-stop voting or precinct officials approve a one-stop application or authorization-to-vote completed by a voter at check-in before allowing the voter to submit a ballot. But since the county boards are not physically in the presence of the person signing the form and voting, as they are with in-person voting, they must rely on two witnesses' or a notary's attestation that the voter completed the form and voted the ballot.

The statute that directs how the county board is to review the application on an absentee ballot is N.C.G.S. § 163-230.1(e). It states, in full:

(e) Approval of Applications. - At its next official meeting after return of the completed container-return envelope with the voter's ballots, the county board of elections *shall determine whether the container-return envelope has been properly executed*. If the board determines that the container-return envelope has been properly executed, it shall approve the application and deposit the container-return envelope with other container-return envelopes for the envelope to be opened and the ballots counted at the same time as all other container-return envelopes and absentee ballots.

(Emphasis added.) The requirement for the county board to determine that a ballot envelope has been "properly executed" is reiterated in section 163-234(11), a provision that governs the procedures for meetings after Election Day to review absentee ballot envelopes.

The county board's decision to approve or disapprove a ballot application must be made by a quorum of the board; not a single member. N.C.G.S. § 163-230.1(f).

The decision is not appealable, except when it is part of an election protest. As N.C.G.S. § 163-230.1(e) states:

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.

(Emphasis added.)

In the November 2020 election, voters submitted 1,001,401 absentee ballots (including civilian, military, and overseas ballots). Each five-member county board in the state participated in approving and disapproving these applications over numerous, often lengthy meetings before and after Election Day. No matter the population size of a county or the number of ballots submitted, the statutes permit only the five appointed board members in the county to approve ballot applications. So, for example, the five-member board in Mecklenburg County may review tens of thousands of envelopes, while a different five-member board in Hyde County may review a few hundred envelopes.

E. Signatures Available for Matching in Registration Records

Although the Request does not specify exactly what signature record should be consulted for comparing signatures on absentee request forms and ballot envelopes, presumably the Request envisions consulting a voter's signature record in the VoterView module of the State Elections Information Management System (SEIMS), the statewide system managed by the State Board which contains such registration records. That is where an electronic image of a registered

voter's signature is retained. Currently, that module displays on a voter's record an image of their signature from a scanned voter registration form or update, or an absentee ballot request form—whichever was submitted most recently. This presents some difficulty for the administration of signature matching.

First, the largest source of voter registration forms and updates is the North Carolina Division of Motor Vehicles (DMV), either through registration activity at DMV offices or through the DMV's online voter registration service. *See* N.C. State Bd. of Elections, NVRA Registration Statistics, <https://www.ncsbe.gov/registering/national-voter-registration-act-nvra/nvra-registration-statistics>. By and large, voter signatures provided through the DMV are captured using a stylus on an electronic signature pad, not pen to paper. And as experienced elections administrators in North Carolina are aware, the image quality of these scanned digital signatures varies widely, with many such images being highly pixelated. Additionally (and relatedly), whenever a registration update through the DMV is made, the signature applied to that *new* registration record is often the *original* DMV signature provided by a driver, which, in many cases, could be decades old.

Second, if the most recent signature in VoterView is from an absentee ballot request, this presents the problem that the signature was most likely provided electronically using a mouse or a finger on a touchscreen, as explained above, *supra* Section I.B.

Accordingly, the signatures the Request is proposing county boards compare absentee voter signatures to may be of low quality and often were captured using a means of signing *other than* pen to paper.

II. ANALYSIS

A. Aggrieved Party Status

For a party to have standing to request a declaratory ruling, they must be “aggrieved” within the meaning of the law. N.C.G.S. § 150B-4(a). Under the Administrative Procedure Act, the applicable law under which the Request has been filed, a “Person aggrieved” is “[a]ny person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.” *Id.* § 150B-2(6). The standing of each of the three Petitioners is discussed in turn below. Importantly, the standing inquiry here is limited to determining whether a person or entity is entitled to use a *particular* legal process to challenge an agency determination—the request for a declaratory ruling through the Administrative Procedure Act. This standing inquiry does not necessarily address a person or entity’s ability to seek relief through some other legal means.

The Republican Party asserts its interest in supporting Republican candidates, and ensuring Republican voters are able to have their votes counted accurately and under fair rules. These interests do not suggest any substantial effect of the signature verification rules to the “person, property, or employment” of the Republican Party. It is therefore doubtful the party fits the definition of an aggrieved party under the statute.

James Baker, a member of the Cumberland County Board of Elections, asserts that he is being prevented from fulfilling his oath-bound duty to follow the law as a board member, and that failure to follow the law can subject him to criminal liability. One question is whether this legal disagreement substantially effects his “employment,” which requires assuming that appointed board membership is “employment.” County board members are not paid a salary or wage, and are provided only \$25 per meeting, along with reimbursement for expenses. N.C.G.S.

§ 163-32. Whether this arrangement could be considered “employment” seems unlikely. On the other hand, Baker’s assertion that he is injured by allegedly violating his oath and thereby subjecting himself to possible criminal sanction could theoretically constitute aggrieved status as an injury to his “person,” but his cited authority doesn’t fully add up. He argues that N.C.G.S. § 163-274(a)(11) makes it a misdemeanor for any board member to “to fail or neglect, *willfully or of malice*, to perform any duty, act, matter or thing required or directed in the time, manner and form in which said duty, matter or thing is required to be performed in relation to any primary, general or special election and the returns thereof.” (Emphasis added.) His Request for a Declaratory Ruling, however, proves that his failure to conduct signature matching is not “willful” at all, since he claims that he is being ordered to refrain from doing so by the State Board under penalty of removal. Request at 2 & n.1. Accordingly, to conclude that Baker is actually injured in the way he has alleged would be inconsistent with the underlying allegations he has put forward.

Jerry Alan Branson, the Guilford County voter and county commissioner candidate does not elaborate on how he fits the statutory definition of aggrieved. He contends that he has a constitutional right to run for office, but whether signature verification is done on absentee requests or ballots does not prevent him from running for office or otherwise burden that right. He claims that as a candidate and voter he is aggrieved by the county boards not using “all means available” to verify absentee voters, but he doesn’t connect this complaint to his “person, property, or employment” at all. Accordingly, his standing under the statute is also questionable.

In sum, the standing allegations offered by the Petitioners appear insufficient to meet the statutory requirements for a person to obtain a declaratory ruling under the Administrative Procedures Act. Nonetheless, this question of the interpretation of the Administrative Procedure

Act may be better suited for a court of law to address than the State Board. We therefore assume without deciding that the Petitioners have standing to make their Request and proceed to interpret the election laws that the State Board is authorized to implement.

B. Legal Authority for Signature Matching

The Request presents the State Board with a basic question of statutory interpretation: do North Carolina's absentee voting laws permit county boards of elections to consult signatures in voter registration records to compare and scrutinize the signatures on absentee ballot requests and applications, and to deny such requests or applications in the event of a mismatch? The simple answer is that the laws do not permit this.

The North Carolina Supreme Court has explained the basic ground rules of statutory interpretation as follows:

“Statutory interpretation properly begins with an examination of the plain words of the statute.” *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232 (1992). “If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274 (2005). “[H]owever, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent.” *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151 (2009). Canons of statutory interpretation are only employed “[i]f the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings[.]” *Abernethy v. Bd. of Comm'rs*, 169 N.C. 631, 636, 86 S.E. 577 (1915).

JVC Enterprises, LLC v. City of Concord, 2021-NCSC-14, ¶ 10, 376 N.C. 782, 785–86, 855 S.E.2d 158, 161.

Here, there is no North Carolina statute that explicitly conditions either providing an absentee ballot or counting a returned absentee ballot on the county board's determination that the signatures on a request form or absentee application matches a different signature for that voter retained in the registration records. This fact is important, because the states that require

signature matching for the counting of absentee ballots have generally done so using explicit statutory language.

The bipartisan National Conference of State Legislatures (NCSL) has catalogued all states' laws on voter verification for absentee ballots. *See* Nat'l Conf. of State Legis., Table 14: How States Verify Voted Absentee/Mail Ballots (March 15, 2022).⁴ Below, for example, are the first five states' laws listed by NCSL, per alphabetical listing:

- Arizona: “On receipt of the envelope containing the early ballot and the ballot affidavit, the county recorder or other officer in charge of elections shall compare the signatures thereon with the signature of the elector on the elector's registration record.” Ariz. Rev. Stat. § 16-550.
- California: “Upon receiving a vote by mail ballot, the elections official shall compare the signature on the identification envelope with either of the following to determine if the signatures compare: (A) The signature appearing on the voter's affidavit of registration or any previous affidavit of registration of the voter. (B) The signature appearing on a form issued by an elections official that contains the voter's signature and that is part of the voter's registration record.” Cal. Elec. Code § 3019(a)(1).
- Colorado: “Except as provided in subsection (5) of this section, in every mail ballot election that is coordinated with or conducted by the county clerk and recorder, an election judge shall compare the signature on the self-affirmation on each return envelope with the signature of the eligible elector stored in the statewide voter registration system” Colo. Rev. Stat. § 1-7.5-107.3(1)(a).
- Florida: “The supervisor of the county where the absent elector resides shall receive the voted ballot, at which time the supervisor shall compare the signature of the elector on the voter's certificate with the signature of the elector in the registration books or the precinct register to determine whether the elector is duly registered in the county and must record on the elector's registration record that the elector has voted.” Fla. Stat. § 101.68(1).
- Hawaii: “If: . . . (2) The affirmation signature does not match a reference signature image . . . the clerk shall make an attempt to notify the voter by first class mail, telephone, or

⁴ Available at <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx>.

electronic mail to inform the voter of the procedure to correct the deficiency.” Haw. Rev. Stat. § 11-106.

There is no equivalent to the examples above in the North Carolina statutes governing absentee voting. What this shows is that when a lawmaking body decides to impose a specific hurdle to the approval of someone’s ballot, it does so explicitly and with unambiguous language. The lack of such language in our General Statutes shows that this hurdle has not been erected under North Carolina law.

Moreover, when considered against the entire context of the absentee voting laws in Article 20 of Chapter 163, it seems particularly improbable that the legislature would authorize a very specific action—for county boards to consult evidence extrinsic to the absentee forms they are reviewing, to attempt to verify whether a signature on a document is authentic—without providing any reference to signature matching, signature verification, or consulting the registration records in connection with reviewing the request form or application. Article 20 provides numerous specific instructions for the county boards on the processing of absentee ballots. These include specifications that:

- The board meet at specific times and places to review ballot envelopes, and provide the public notice of any change in the meeting schedule, *id.* §§ 163-230.1(f), -234(2);
- The board record its decisions on the approval of each ballot envelope in a specific manner, *id.* §§ 163-230.1(f); -234(6);
- A quorum of the board participate in approving ballot envelopes, *id.* § 163-230.1(f), and that a member from each political party participate in the counting of the ballots, *id.* § 163-234(4) & (9);
- The board separate approved and disapproved ballots in a specific manner before counting may commence, *id.* § 163-234(6);
- The counting of absentee ballots at such meetings be done in a “continuous” manner until completed, except to break for “unavoidable necessity,” *id.* § 163-234(2);

- The board may separate ballots from approved containers and insert them into tabulators, but without running the tally of results until polls have closed, *id.* § 163-234(3);
- The board create lists of returned absentee ballots for distribution to the State Board and voting precincts on Election Day, and carry out procedures to ensure no voter attempts to vote on Election Day after having voted absentee, *id.* § 163-232; and
- The board create separate lists of returned ballots that arrive on or after Election Day, and those that have been challenged, and post those lists publicly, *id.* § 163-232.1.

In contrast to these statutes specifying how to conduct ballot approval, nowhere in the absentee voting statutes is there any discussion of (or even a suggestion of) comparing a voter's signature on a ballot request or ballot envelope with any signature for the voter that the county board retains elsewhere. *See generally* N.C. Gen. Stat. ch. 163, art. 20. If the General Assembly had intended county boards to implement such procedures, the above provisions suggest that there would be specific statutory language authorizing it. *See AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs.*, 240 N.C. App. 92, 111, 771 S.E.2d 537, 548 (2015) (“It is well established that in order to determine the legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each.”).

Although there is no explicit authority in Article 20 of Chapter 163 for signature matching, there is another election-related statute that does speak directly to signature verification, in Article 9. Under N.C.G.S. § 163-96(c), when a political party collects signatures for a petition to gain official recognition to participate in general elections in this state, the county boards are required to “examine the signatures on the petition” to determine whether a signer is “qualified and registered to vote,” and the county board must further certify “that *the signatures* on the petition have been *checked against the registration records.*” (Emphasis added.) This statute shows that where the General Assembly intends to require signature verification in the elections context, it makes that intention plain through explicit statutory language. *See N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711

(2009) (“When a legislative body ‘includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.’”) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)).

Perhaps recognizing the lack of explicit authority to condition ballot approval on signature matching, the Request relies on other statutes that purportedly *imply* such authorization.

First, the Request relies on the requirement that county boards determine that the absentee ballot container envelope has been “properly executed.” N.C.G.S. §§ 163-230.1(e); - 234(11). Considered against the context of the otherwise very specific requirements imposed on county boards for absentee ballot approval as described above, and the new party petition statute that explicitly requires signature matching, it is unreasonable to interpret the general requirement to determine that the envelope has been “properly executed” as anything other than ensuring that the envelope facially complies with all of its required elements. This includes ensuring that the voter signed the attestation that they voted the ballot, and ensuring that two witnesses or a notary identified themselves and *attested to having seen the voter complete the ballot*.

To imply that the general requirement to ensure proper execution of the envelope somehow authorizes county boards to consult extrinsic materials to attempt to scrutinize the authenticity of the voter’s signature would aggrandize a significant amount of discretionary authority to county boards of elections. The fundamental right to vote is at stake. The power to fashion new hurdles to the effective exercise of this fundamental right should not be inferred

from vague statutory provisions that do not expressly authorize those hurdles.⁵ See, e.g., *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008) (“[I]t is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ‘ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.’”) (quoting *Deese v. Se. Lawn & Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982)).

Next, the Request relies on the “general duty” of county boards to ensure accurate accounting of ballots. Request at 5. For this proposition, the Request cites N.C.G.S. § 163-166.10(1), entitled “Procedures after the close of voting,” which directs *the State Board* to “promulgate rules for closing the voting place and delivering voting information to the county board of elections for counting, canvassing, and record maintenance,” which “shall include procedures to ensure . . . [t]he return and accurate accounting of all official ballots” As the plain text of this provision makes clear, it has nothing to do with procedures for approving absentee ballots. It is instead a general rulemaking authorization for *the State Board*. Even if an affirmative duty *for the county boards* could be implied from this provision, moreover, it would be a nonspecific duty to accurately count ballots which does not speak to any particular procedure which may be used in service of this duty.

⁵ By referring to signature matching as a “hurdle,” we are not necessarily implying that the practice, if authorized, would violate any constitutional provision, state or federal. We are simply acknowledging the fact that having one’s signature scrutinized by a layperson against a different sample of one’s signature on a different document, from a different time, and perhaps using a different medium, can constitute an impediment to the effective exercise of voting which could result in one’s lawful ballot being rejected. The public comments received by the State Board regarding the Request for Declaratory Ruling, especially those from elderly and disabled voters (and their advocates), make this fact plainly clear. Studies were also provided showing that certain demographic groups of voters are more likely to have their signatures rejected and that rejection rates can fluctuate dramatically from election to election and jurisdiction to jurisdiction, suggesting that the matching process can be somewhat arbitrary.

The Request also cites the county boards' canvassing duties. Request at 5. Under N.C.G.S. § 163-182.5, entitled "Canvassing votes," county boards are directed to "meet at 11:00 A.M. on the tenth day after every election to complete the canvass of votes cast and to authenticate the count in every ballot item in the county by determining that the votes have been counted and tabulated correctly." By its own terms, this provision addresses procedures that take place at post-election canvass, not at an absentee meeting, so it is inapplicable to the issue at hand. And as with the rulemaking provision discussed above, it is a general, nonspecific duty to ensure votes were counted accurately. It is not a grant of authority to conduct checks on voters or their ballots that are not specifically authorized in law otherwise.

Although no North Carolina court has addressed this issue, other states' court have reviewed this question where similar claims of implied authority have been made. They have all determined that signature matching may not occur in the absence of a specific statutory authorization.

The Pennsylvania Supreme Court reviewed a similar claim and determined that "the [Pennsylvania] Election Code does not impose a duty on county boards to compare signatures," *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 609 (Pa. 2020), and that in the absence of such a duty, "county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons," *id.* at 611. There, the court rejected a similar argument that a general statutory duty to ensure a ballot application was "sufficient" provided authority to conduct signature matching. *Id.* at 608.

Similarly, before the above case was decided, a federal district court in Pennsylvania also rejected claims that signature matching was required to ensure a free and fair elections in that

state. It concluded that “the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications,” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 398 (W.D. Pa. 2020), noting that the “Plaintiffs’ competing interpretation is not plausible,” *id.* at 398 n.13.

And a federal district court in South Carolina preliminarily enjoined the state’s elections boards from conducting signature matching on absentee ballots, where the court determined, “South Carolina election laws do not authorize county boards to engage in signature matching processes as a basis to disqualify an absentee ballot otherwise properly completed and timely submitted.” *League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59, 67 (D.S.C. 2020). South Carolina’s law, like ours, imposes a general duty to ensure that the absentee ballots is “properly signed and witnessed,” but does not specifically address signature matching. *Id.* One issue before the court was the fact that, despite the state elections board’s position that the law did not authorize matching, a handful of counties were doing it anyway, using different standards among them. The court concluded that this practice likely imposed an unjustifiable burden on the right to vote and denied voters due process. *Id.* at 76–77.

Accordingly, among the cases that have directly addressed this question, the law does not favor the Request.⁶

⁶ The Request cites two cases that merit brief discussion. First, it cites a federal court case concluding that changes to the rules governing the acceptance of absentee ballots after absentee voting has begun in an election may violate equal protection by imposing “arbitrary and disparate” treatment on voters. *Moore v. Circosta*, 494 F. Supp. 3d 289, 315 (M.D.N.C. 2020). The Request neither suggests that there is arbitrary or disparate treatment occurring in the absence of signature matching, nor that the imposition of signature matching is somehow *required* by the federal constitution. This case is therefore irrelevant. Second, it cites a North Carolina Supreme Court case determining that extreme partisan gerrymandering violates the Free Elections Clause of the North Carolina Constitution, because it “denies to certain voters . . . substantially equal voting power, including when the denial is on the basis of voters’ partisan affiliation.” *Harper v. Hall*, 2022-NCSC-17, ¶ 140, 380 N.C. 317, 376, 868 S.E.2d 499, 542. By

In sum, neither the General Statutes, applying the rules of statutory interpretation, nor the relevant case law supports the position argued in the Request.

III. CONCLUSION

Applying the rules of statutory interpretation and reviewing the case law, there is no authority in North Carolina election law to condition the provision of an absentee ballot or the counting of an absentee ballot on the county board of elections' satisfaction that a voter's signature on an absentee request or envelope matches other example signatures for that voter in the registration records. The statutes authorize other mechanisms to confirm the identity of a voter requesting or completing a ballot. Accordingly, the State Board affirms its prior guidance that the county boards are not authorized to engage in signature matching for absentee ballot requests and absentee ballot return envelopes.

This the 22nd day of July, 2022.



Damon Circosta, Chair
STATE BOARD OF ELECTIONS

this citation, the Request appears to be suggesting that there is an affirmative obligation under the state constitution to carry out specific voting procedures that are not discussed in statute, to avoid the *potential* for fraud, because such potential fraud, if it came to be, *could* dilute the power of lawful voters' votes. Neither *Harper*, nor any other North Carolina case addressing the Free Elections Clause, supports that tenuous proposition.



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Numbered Memo 2020-15

TO: County Boards of Elections
FROM: Karen Brinson Bell, Executive Director
RE: Absentee Requests Forms
DATE: July 28, 2020

This numbered memo addresses certain issues related to absentee request forms. It sets out uniform standards to be applied statewide. It includes changes to the law based on Session Law 2020-17 and Session Law 2019-239.

Determining Validity of Form

An absentee request is valid if it contains all of the following information:¹

- The request is on the State Board's Absentee Request Form.
- The request form indicates it is for the 2020 general election. If the form has a checkbox for the election date, the box must be checked for the request to be valid. Voters may use any 2020 State-issued form, including the soon-to-be released redesigned version.
- The form is signed by the voter, near relative, or legal guardian.
- The request is returned by the voter or the voter's near relative or legal guardian, or a bipartisan assistance team (MAT).
- All required fields on the form are completed:
 - Voter's name and residence address
 - Name and address of voter's near relative or legal guardian if that individual is making the request
 - Address the voter wants their ballot mailed to, if different from the voter's residence address
 - One of the following:
 - The voter's DMV-issued drivers license number or nonoperator ID number; or
 - The last four digits of the voter's Social Security number; and

¹ G.S. § 163-230.2(a), as amended by Section 1.3.(a) of Session Law 2019-239.

- The voter's date of birth

A form that does not contain all of the above information is invalid.

If a county board receives an invalid request, it shall immediately contact the voter, or the voter's near relative or legal guardian, ideally within one business day. The county board shall use any available method to contact the voter. If the contact is by phone, the county board shall also contact the voter in writing (by email, fax, or mail). The county board shall include a copy of a blank absentee request form and explain to the voter why their absentee request was invalid. A county board may not pre-fill an absentee request form for any reason.²

Absentee Request Submission

How to Submit the Request Form

In 2020, a request may be delivered using any of the following methods:

- In person;
- Email;
- Fax;
- U.S. Mail or designated delivery service; or
- Online request form portal, which will be available on or before September 1, 2020.

There is no requirement for the particular type of file a voter may use to submit a request form by email. A voter may attach a picture of the form taken with their phone camera, for example, provided it is readable by the county board of elections. We recommend that voters do not send a link to the form using a service such as Google Docs because performing a cyber scan of such documents may not be possible and thus could pose a security risk to the board of elections.

Who May Submit the Request Form

Only the following individuals may return an absentee request form:

- The voter;
- The voter's near relative or verifiable legal guardian; or
- A MAT.

An absentee request returned by any other person is invalid.³ A third party may not submit the request.

In some cases, it may not be clear whether the absentee request form was submitted by the voter, the voter's near relative or legal guardian, or MAT. **In the absence of evidence to the contrary,**

² G.S. § 163-230.2(e)(2), as amended by Section 1.3.(a) of Session Law 2019-239.

³ G.S. § 163-230.2(e)(4), as amended by Section 1.3.(a) of Session Law 2019-239.

a county board of elections should presume that the request was submitted by an authorized person.

Submission by Mail

If you receive an absentee ballot request by mail, you may consider the return address of the envelope in determining whether the request was returned by the voter or the voter's near relative or legal guardian. If there is no return address and no other information indicating the request was submitted by someone other than the voter or the voter's near relative or legal guardian, the request is valid. It is permissible for multiple requests to be submitted in the same envelope provided the sender is the voter or the voter's near relative or legal guardian for each request.

A third party may provide a postage stamp to the voter or the voter's near relative or legal guardian to return the request form.⁴

Submission by Email

The following are a non-exhaustive list of scenarios where an emailed absentee request would be treated as being submitted by an authorized person:

1. A request form is sent from a theme, fanciful, or other email address that is not associated with a person's name. For example, the request is sent from animallover10@gmail.com and there is no other information included in the body of the email to identify the sender.
2. A request form is sent from an email address that appears to be associated with the voter. For example, the absentee request form of voter John Smith is received from John-Smith@yahoo.com, and there is no other information included in the body of the email to identify the sender.
3. A request form is sent from an email address that appears to be associated with the voter's near relative or legal guardian. For example, Jane Smith signed the request form for her husband, voter John Smith, and the request is sent from JaneSmith@hotmail.com. There is no other information included in the body of the email to identify the sender.
4. A request form is sent from an email address that appears to be associated with a person other than the voter or the voter's near relative or legal guardian. For example, the request form of voter John Smith is received from CrystalJones@hotmail.com. However, the body of the email includes a note indicating that the voter used that email address to submit their

⁴ The U.S. Department of Justice, in its Federal Prosecution of Election Offenses manual, states that giving a stamp is not a federal crime, because "'facilitation benefits,' e.g., things of value given to voters to make it easier for them to cast a ballot that are not intended to stimulate or reward the voting act itself, such as a ride to the polls or a stamp to mail an absentee ballot, do not ordinarily involve federal crimes."

absentee request form and that the form was sent by the voter. This form is acceptable because there is evidence indicating the voter actually returned the form, as required by G.S. § 163-230.2(e)(4). An example of language that would be acceptable in the body of the email is “*I certify that I am the voter and that I personally transmitted this request by email. Sincerely, [INSERT VOTER’S NAME].*” It is not required that this language be used, but an email with this language will be acceptable.

A request form returned using an email address associated with a website is invalid because it was not “returned” by the voter. We are aware that leo@voteamerica.com, for example, has submitted request forms to county boards of elections by email. In this situation, transmission was made by a third party, not the voter, and therefore the form is invalid. You should contact the voter and let them know they must submit the request. If the voter has a copy of the form they completed online, the voter may forward this form to the county board of elections.

It is Class G felony for a third party to retain copies of an absentee request form or the personally identifying information contained therein.⁵

Signatures

No Signature Verification

County boards should accept the signature on the absentee request form if it appears to be made by the voter or their near relative or legal guardian. The voter’s signature should not be compared with the voter’s signature on file because this is not required by North Carolina law. Additionally, attempting to verify a voter’s signature would result in different treatment of absentee request forms, since it is not possible to verify the signature of the near relative or legal guardian. If the absentee request form appears to have been signed by the voter or near relative, you should accept the signature as valid.

Signature Requirement

The absentee request form must be signed by the voter or the voter’s near relative or legal guardian. A wet ink signature is not required, but the signature must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

⁵ G.S. § 163-237(d3), as amended by Section 1.5.(a) of Session Law 2019-239: “Any person, other than the voter or near relative or verifiable legal guardian of that voter, who copies or otherwise retains the request for absentee ballots, a completed application for absentee ballots, or any identifying information, as defined in G.S. 14-113.20, disclosed in a request or application, shall be guilty of a Class G felony.”

The following is a nonexclusive list of examples of acceptable signatures:

- The voter signs the form by hand with a pen, pencil, etc.;
- The signature is made by the voter's hand with their finger or stylus on a touchscreen or using a mouse to draw their signature;
- The voter copies and pastes a photo their unique signature onto the request form; and
- The voter makes their mark on the form.

Assistance with Absentee Requests

Who May Assist

A voter may receive assistance with their request form from only the following people:

- The voter's near relative or legal guardian; or
- A MAT.

Assistance means helping the voter physically fill out the form. Any person may provide a voter with a copy of a blank absentee request form or explain what the voter needs to do to complete the request form because this is not considered assistance.

Exception for Blind, Disabled, and Illiterate voters

A voter who is blind, disabled, or unable to read or write, including unable to read or write English, and whose near relative or legal guardian is unavailable to assist the voter, may receive assistance from another person. "Unavailable" means that the near relative or legal guardian is not available at the time the voter is filling out the form.

The assistant is not required to be a registered voter, U.S. citizen, or over the age of 18. The assistant must complete the appropriate section of the request form.

A voter who is a patient or resident in a nursing home is prohibited from receiving assistance from a person identified in G.S. § 163-226.3(a)(4).

Pre-Filled Request Forms

A form that is pre-filled, in part or in whole, by a third party or the county board of elections is invalid.⁶ A county board may not complete missing elements of the form even if the voter provides that information when contacted about an incomplete form.

⁶ G.S. § 163-230.2(e)(2), as amended by Section 1.3.(a) of Session Law 2019-239: "The completed written request is completed, partially or in whole, or signed by anyone other than the voter, or the voter's near relative or verifiable legal guardian. A member of a multipartisan team

A request form that is typed is acceptable provided it was not completed by someone other than the voter or the voter's near relative or legal guardian. A voter may use a portal to enter information onto the form provided the voter or the voter's near relative entered the information and signed the form. A form that has "NC" pre-filled as the state in the "Current NC Residential Street Address" box of Section 1 of the form is acceptable because there is no other acceptable response in that box.

Logging Requests

County boards are required to maintain a log of absentee request forms dropped off at the office. The log may be a single sheet per form to avoid having multiple people touch the same form. If a county board's office is closed to the public due to COVID-19, the logging requirement is waived, but the county board shall provide a secure, immovable drop box for the return of absentee request forms and other documents.

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trained and authorized by the county board of elections pursuant to G.S. 163-226.3 may assist in completion of the request.”



NORTH CAROLINA

STATE BOARD OF ELECTIONS

Numbered Memo 2020-19

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Absentee Container-Return Envelope Deficiencies

DATE: August 21, 2020 (revised on September 22, 2020; further revised on October 17, 2020 in light of orders in *Democracy NC v. North Carolina State Bd. of Elections*, No. 20-cv-457 (M.D.N.C.) and *NC Alliance for Retired Americans v. North Carolina State Bd. of Elections*, No. 20-CVS-8881 (Wake Cty. Sup. Ct.))

County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.¹

1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent

¹ This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name²
- Witness or assistant did not print address³

² If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

³ Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter

- Witness or assistant signed on the wrong line

This cure certification process applies to both civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Witness or assistant did not sign
- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the

the cure certification in accordance with Section 3. See [Numbered Memo 2020-29](#) for additional information regarding address issues.

county board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by the deadline for receipt of absentee ballots. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline by (1) 5 p.m. on Election Day or (2), if postmarked on or before Election Day and received by mail by the deadline for receipt of postmarked ballots. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.



NORTH CAROLINA
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Numbered Memo 2021-03

TO: County Boards of Elections
FROM: Karen Brinson Bell, Executive Director
RE: Absentee Container-Return Envelope Deficiencies
DATE: June 11, 2021

This numbered memo replaces Numbered Memo 2020-19, which was first issued on August 21, 2020 and subsequently revised and reissued on September 22, 2020, and October 17, 2020. The State Board is required to provide a cure process for voters whose absentee container-return envelopes contain certain deficiencies. There were two separate court orders requiring a cure process. The Consent Judgment in *NC Alliance v. State Board of Elections*, No. 20-CVS-8881 (Wake Co. Sup. Ct. Oct. 2, 2020), which formed part of the basis for the revised 2020 memo, was limited to the 2020 general election. The preliminary injunction in *Democracy NC v. State Board of Elections*, 476 F.Supp.3d 158 (M.D.N.C. Aug. 4, 2020), was not limited to a particular election. This numbered memo revises the cure process that was first established for the 2020 general election and applies to all elections going forward.

County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.¹

1. No Signature Verification

Verification of the voter's identity is completed through the witness requirement. The voter's signature on the envelope shall not be compared with the voter's signature in their registration

¹ This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26.

record because this is not required by North Carolina law.² County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to timely correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the new ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with Cure Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a cure certification:

- Voter did not sign the Voter Certification.
- Voter signed in the wrong place.

The cure certification process applies to civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification, because the missing information comes from someone other than the voter:

- A witness or assistant did not print name.³ However, if the witness forgot to print their name but the witness's or assistant's signature is legible such that the name can be determined, the container-return envelope is not deficient and the ballot shall not be spoiled, absent any other deficiency.

² See also [Numbered Memo 2020-15](#), which explains that signature comparison is not permissible for absentee request forms.

³ If the printed name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

- A witness or assistant did not print address.⁴
- A witness or assistant did not sign.
- A witness or assistant signed on the wrong line. Where the witness or assistant signed in place of the voter's signature, that deficiency cannot be cured and requires the ballot to be spoiled. Otherwise, if all required information from the witness or assistant is present but not on the designated line for each (for example, the witness or assistant printed their name on the address line, printed their address on the name line, and signed), the container-return envelope is not deficient and the ballot shall not be spoiled, absent any other deficiency.
- Upon arrival at the county board office, the envelope is unsealed or appears to have been opened and re-sealed.
- The envelope indicates the voter is requesting a replacement ballot.

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with this numbered memo.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot is in the container-return envelope, more than one ballot is in the container-return envelope, or two voters' ballots and container-return envelopes were switched. If the county board disapproves a container-return envelope by majority vote in a board meeting, it shall proceed according to the notification process outlined in Section 3.

⁴ Failure to list a witness's ZIP code does not invalidate the container-return envelope. G.S. § 163-231(a)(5). A witness's or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603," you can determine the state is NC, or if a witness lists "333 North Main Street, 27701," you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the ballot spoiled in accordance with Section 3. See Numbered Memo 2020-29 for additional information regarding address issues.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot, enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent. The outside of the envelope containing the new ballot or cure certification shall indicate that it contains official election mail, unless it is not possible due to the use of a specialized USPS or commercial carrier service envelope.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued by mail to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by 5 p.m. the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification. There is not a postmark requirement for cure certifications returned by mail – the cure certification must be *received* by the deadline, not postmarked by the deadline.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. Voters who require assistance in mailing their ballot pursuant to 08 NCAC 18 .0101(a) may also direct that the cure certification be taken directly to the closest U.S. mail depository or mailbox by a person selected by the voter in accordance with the Rule. It is not permissible for a

cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification, but the cure certification must be signed by the voter. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification was timely received and contains the voter's name and signature and was returned by an authorized person, the county board of elections shall approve the absentee ballot.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason their ballot was not counted. Late absentee ballots are not curable.

If a ballot is received after county canvass, the county board is not required to notify the voter.

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Petitioners' Exhibit 5

NORTH CAROLINA
STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

Fax: (919) 715-0135

Numbered Memo 2022-05

TO: County Boards of Elections
FROM: Karen Brinson Bell, Executive Director
RE: County Board Challenges to Ineligible Absentee Ballots
DATE: May 12, 2022

This numbered memo provides procedures for county boards and/or chief judges to challenge ineligible absentee-by-mail and one-stop ballots (both of which are considered “absentee” ballots). It formalizes and revises the “Reminders for Absentee Challenges” document that was sent to county boards in 2020 and 2021. The guidance in this memo is intended only for county board challenges. It does not include guidance for members of the public seeking to file voter challenges.

Included in this numbered memo are the basic steps that county boards must follow, along with answers to frequently asked questions about specific situations that often arise. A sample challenge form and hearing notice are appended to this memo.

The only method to retrieve and discount the ballot of an absentee voter is through a timely and successful absentee ballot challenge.¹ This memo overrules the “Disputed Ballots” section of Numbered Memo 2012-28, to the extent it suggests otherwise.

As outlined below, generally the first step will be the disapproval of the one-stop or absentee-by-mail application by the county board at an absentee meeting, followed by a challenge. However, if your board has already approved a one-stop or by-mail application and you determine that the ballot was ineligible, you will still need to follow the ballot challenge procedures below. If, after

¹ G.S. § 163-89; *see* N.C. State Bd. of Elections, Order In the Matter of: Consideration of Certain Legal Questions Affecting the Authentication of the 2016 General Election, ¶ 7 (Nov. 28, 2016) (“No county board may retrieve and discount a ballot cast by an unqualified voter unless a challenge was timely brought . . . or the State Board or a county board has found [pursuant to an election protest] that ineligible voters participated in numbers sufficient to change the outcome of the election.”).

a challenge proceeding, the board determines that the ballot was properly cast, it shall reconsider and approve the application (if it was not already approved) and permit the ballot to be opened and counted.

As a reminder, the qualifications for all voters, including absentee voters, are judged as of Election Day.²

Who May File a Challenge

There are two options for who may file a challenge when it becomes apparent to the county board that an ineligible absentee ballot has been cast:

1. The county board of elections may file challenges to one-stop or absentee-by-mail ballots;³ or
2. The chief judge of the voter's precinct may file the challenge to one-stop or absentee-by-mail ballots at the close of the polls on Election Day. The chief judge is not required to be a resident of the voter's precinct.⁴

Challenge Deadlines

One-Stop: A challenge to a voter's ballot cast at a one-stop site must be filed:

1. By the county board between noon on Election Day and 5 p.m. on the next business day following the deadline for receipt of civilian absentee ballots (*i.e.*, the Monday after Election Day, typically);⁵

² G.S. § 163-226.

³ G.S. § 163-227.2(d); *see* G.S. § 163-182.5(a) (permitting county boards to "pass upon the legality of disputed ballots," which it may do on its own motion pursuant to a proper challenge).

⁴ G.S. § 163-89(a).

⁵ The 5 p.m. Election Day deadline in G.S. § 163-89(a) applies to challenges brought by voters only, not county boards. The authority for county board challenges of absentee ballots comes from G.S. § 163-182.5(a) and § 163-227.2(d), neither of which sets an Election Day deadline. The county board must, however, challenge a ballot in sufficient time for notice of a challenge hearing to be effectively delivered to a challenged voter, to comply with the requirements of due process. Accordingly, one-stop and civilian absentee challenges may not be filed after the business day following the last day for the receipt of civilian absentee ballots, which affords enough time for notice to be received by the voter before the hearing at the county canvass meeting.

2. By the chief judge of the voter's precinct at the close of the polls on Election Day;⁶ or
3. During the one-stop voting period.⁷

By-Mail: A challenge to an absentee-by-mail ballot must be filed either:

1. By the county board between noon on Election Day and 5 p.m. on the next business day following the deadline for receipt of civilian absentee ballots (*i.e.*, the Monday after Election Day, typically);⁸ or
2. By the chief judge of the voter's precinct at the close of the polls on Election Day.⁹

Disapproving the Absentee Application and Challenging the Absentee Ballot

1. Disapproving the One-Stop or Absentee-By-Mail Application

If a county board finds that a voter was not qualified to cast an absentee ballot or finds that the voter was not qualified to cast the ballot issued, at its absentee board meeting the county board must disapprove the absentee application and then file a ballot challenge.¹⁰

Upon disapproving the application, the board must notify the voter stating the reason for disapproval by first-class mail addressed to the voter at that voter's residence address and at the address shown in the application for the voter's absentee ballot.¹¹

In some instances, the voter should be notified of the opportunity to vote a provisional ballot during early voting or on Election Day. This may occur if, for example, the voter was given an incorrect ballot style or was erroneously allowed to change party affiliation during One-Stop and there remains time to re-vote. In such cases, the county board should contact the voter via phone, if possible, immediately to notify them of this option.

⁶ G.S. § 163-89(a).

⁷ G.S. § 163-227.2(i).

⁸ For any challenges to UOCAVA ballots received after the civilian absentee ballot receipt deadline, the county board must file the challenge as far in advance of county canvass as possible and notify the voter by any means that are available to ensure the quickest notification.

⁹ G.S. § 163-89(a).

¹⁰ G.S. §§ 163-227.2(d), 163-230.1(f).

¹¹ G.S. § 163-227.2(d).

2. Challenging the Absentee Ballot

- a. Enter the Challenge. Use one of the following options:
- i. At the absentee board meeting on Election Day or at a subsequent board meeting, the board must enter an official challenge to the absentee ballot, using the challenge form and attaching any relevant evidence;
- Or,
- ii. The chief judge of the precinct in which the voter is registered enters the challenge at the polling place at the time of close of the polls; the chief judge should use the challenge form to enter the challenge and attach any relevant evidence. NOTE: If the chief judge is to challenge the ballot at the close of the polls on Election Day, the CBE should prepare the Notice of Challenge and other materials (*e.g.*, Incident Report, witness statements, etc.), and provide the materials to the chief judge to ensure the chief judge is prepared to make the challenge.
- b. Send Notice. The board shall hold a hearing on the challenge on the day set for the county canvass. The voter whose ballot is being challenged must be sent a notice in advance of the hearing (preferably via first-class mail), addressed to the voter's residence address, mailing address (if different), and the address shown in the application for absentee ballots. The notice shall include the reason for the challenge and the date and time of the county canvass where the challenge will be heard.
- c. Conduct the Hearing. Follow the procedures in G.S. §§ 163-88 and 163-89(e) for examining the challenged voter (if they appear), administering oaths, and adjudicating the challenge. Recall that "[n]o challenge shall be sustained unless the challenge is substantiated by affirmative proof," and "[i]n the absence of such proof, the presumption shall be that the voter is properly registered or affiliated."¹²

¹² G.S. § 163-90.1(b).

- d. If Challenge Sustained. If the challenge to the absentee ballot is sustained, the board shall direct county board staff to retrieve the challenged absentee ballot, and carry out the following steps:
- i. The board shall complete a tally sheet to deduct the votes cast on the full ballot or shall deduct the votes cast for any ineligible contest. If the voter returned to vote a provisional ballot with an eligible ballot (because they are eligible but voted the wrong ballot at first), the original ballot should be deducted in full and the provisional should be counted. The board shall direct staff to add a manual edit to the proper precinct results in the proper reporting group to deduct any ineligible votes that were recorded on the results tally sheet.
 - ii. The staff shall then print two copies of the manual edit report and attach one report to the tally sheet and one report to the official canvass report.
 - iii. The challenged ballots and the accompanying tally sheet and a copy of the manual edit report shall then be sealed by the board and separated from the other absentee ballots.
 - iv. The official canvass reports shall be provided to the State Board of Elections pursuant to G.S. § 163-182.6.
 - v. The county board shall prepare a supplemental absentee abstract in accordance with G.S. § 163-234(6) and provide it to the State Board of Elections.
- e. Challenge Overruled/Dismissed. If the challenge is overruled or dismissed, the board must reconsider and approve the absentee application (if it was not already approved), and proceed to count the ballot.

Frequently Asked Questions

1. **A person who is serving a felony sentence registered to vote using same-day registration and cast a ballot during one-stop voting. What should the CBE do?**¹³
 - Create an incident report
 - Follow the process for Disapproving the Application and Challenging the Absentee Ballot above.
 - Report to Investigations at the State Board via a Help Desk ticket. Include the application number, incident report, and any other documentation.
 - Deny the voter registration application.¹⁴ Once the county board resolves that the applicant is not qualified to vote due to felony conviction, the board shall send, by certified mail, a notice of denial of registration. The notice of denial shall contain the date on which registration was denied, and shall be mailed within two business days after denial. Any applicant who receives notice of denial of registration may appeal the denial within five days after receipt of the notice of denial. Keep a physical copy of the denial letter and certified mail notice. Attach a copy of the denial letter to the voter record.

2. **An existing registrant has been flagged for removal due to active felony status and has cast a ballot during one-stop voting.**
 - Create an incident report.
 - Follow the process for Disapproving the Application and Challenging the Absentee Ballot above.
 - Report to Investigations at the State Board via a Help Desk ticket. Include the application number, incident report, and any other documentation.
 - Follow the 30-Day Removal Notice procedure, pursuant to G.S. § 163-82.14(c)(3). The felony conviction list-maintenance process can be found in the SEIMS Help Files.

¹³ Note that any felons serving *extended* felony sentences for financial obligations—and therefore eligible to vote under the court ruling in *Community Success Initiative v. Moore*, see Numbered Memo 2020-26—would not be identified through the felon matching in SEIMS or on the lists provided to CBEs on the State Board’s Intranet.

¹⁴ G.S. § 163-82.7.

- 3. A voter has submitted an absentee-by-mail ballot and votes at a one-stop site in the same county.**
- The county board should first review both the one-stop application and the absentee envelope, including comparing the voter's signatures on the two voting documents, to determine if the same person voted twice. The board must determine by majority vote that there is sufficient evidence to challenge the voter for voting twice.
 - If the board determines by majority vote that the same voter voted twice, it shall determine which ballot should be counted and shall challenge the ballot that should not be counted. If only one ballot is retrievable, that ballot shall be retrieved. Again, it is up to the board, not staff, to make the determination of which vote should be counted. For the challenge, follow the Process for Disapproving the Application and Challenging the Absentee Ballot above.
 - Create an incident report.
 - Notify the Legal and Investigations teams at the State Board. Include the ballot application, absentee envelope, incident report, and any other documentation.
 - **Is the process different if the absentee ballot was considered deficient pending cure and then was Approved-Cured?**
 - The process is ultimately the same. The county board will count the legal vote and administratively retrieve the other absentee ballot.
- 4. A voter submitted a ballot in two different counties.**
- Create an incident report.
 - Work with the other county to determine where the voter is eligible to vote and which ballot must be retrieved. Work with the State Board as needed.
 - If the ballot cast in your county was ineligible, follow the Process for Disapproving the Application and Challenging the Absentee Ballot above.
 - Report to Investigations at the State Board via a Help Desk ticket. Include the application number, incident report, and any other documentation.
- 5. A one-stop employee accidentally provided a ballot style to the voter that the voter was not eligible to vote. The voter voted that ballot.**
- Create an incident report.
 - Follow the Process for Disapproving the Application and Challenging the Absentee Ballot above.
 - If there is time, contact the voter and allow the voter to come in person to vote a provisional ballot with the correct ballot style. The board should count the provisional ballot if the voter is otherwise eligible to vote that ballot. If the voter does not return, count any contests on the regular ballot that the voter was eligible to vote in.

6. **A voter dies after voting absentee (one-stop or by mail) but before Election Day.**
 - Before disapproving the absentee application based on belief that the voter is now deceased, obtain official confirmation of the death. Permissible sources include the DHHS List Maintenance Reports, death certificate from the local register of deeds, or a written, signed notification from a near relative.
 - Follow the Process for Disapproving the Application and Challenging the Absentee Ballot above.
 - Remove the voter pursuant to G.S. 163-82.14(b).

7. **A voter registers to vote at a one-stop site and the two voter cards sent pursuant to G.S. § 163-82.7 are returned as undeliverable prior to Election Day.**
 - Previously, a voter who same-day registered and had both mail verifications returned as undeliverable prior to Election Day would have their ballot challenged. *See* G.S. § 163-82.7(g)(1).
 - However, a 2018 federal court order prohibits any voter challenges from being brought without individualized knowledge within 90 days of a federal election. The order specifically states that the mere fact that mail was sent to a voter and returned as undeliverable did not constitute individualized evidence and therefore is prohibited as the basis for a challenge. As a result, the voter's ballot must be counted if otherwise eligible and cannot be challenged on the basis of returned voter cards without individualized evidence that the voter is not a resident of the county. *See* Numbered Memo 2018-07 for more information.

8. **Voter inserted their absentee-by-mail ballot into the tabulator at a One-Stop Site.**
 - Create an incident report.
 - Retrieve and secure the ballot.
 - Mark the absentee as SPOILED as it was returned without an application/ certificate and will need to be reissued.
 - Notify the voter and let them know they may complete the reissued ballot or vote one-stop or on Election Day.
 - Challenge the ballot on Election Day.
 - Conduct a hearing and, if sustained, remove the vote totals of the challenged ballot at canvass.

9. **A voter submitted an absentee-by-mail and subsequently moved to a new county. The voter has contacted your county to find out what they need to do.**
- If the voter moved less than 30 days prior to election day, they don't need to do anything. They are still eligible to vote in your county and the ballot they submitted stands.
 - If they moved 30 or more days prior to Election Day, they are no longer eligible to vote in your county. However, a 2018 federal court order prohibits any voter challenges based on residence from being brought without individualized knowledge within 90 days of a federal election. The voter will need to submit a cancellation in your county, or the voter will need to register in the new county. Then you can challenge the ballot, notify the voter, and hear the challenge at canvass in order to deduct the vote totals.
 - If the voter submits a cancellation in your county, you should direct them to register and vote in their new county.
10. **A voter mails their ballot and votes on Election Day. The mailed ballot is received by the county board timely but on or after Election Day.**
- Follow the Process for Disapproving the Application and Challenging the Absentee Ballot above.
 - It is critical to complete voter history as soon as possible in order to identify this issue and challenge the absentee-by-mail ballot.
11. **FOR PRIMARY ELECTIONS: A registered voter affiliated with a political party can't be found during check-in and uses same-day registration to re-register with a different party.**
- Process the voter registration application. If you have already "linked" the registrations, you will need to "unlink" the registration in order to be able to deny the new registration without removing the prior voter registration. Please put in a Help Desk ticket if you need assistance.
 - Follow the Process for Disapproving the Application and Challenging the Absentee Ballot above.
 - Contact the voter and let the voter know that they can vote the correct ballot provisionally, which the board would consider during canvass.
 - If the challenge is sustained at canvass, the ineligible ballot should be retrieved and the vote counts deducted. This could result in a partial count if there is an eligible contest on the ineligible ballot (bond, nonpartisan board of education, etc.) and the voter has not returned to vote a provisional ballot.

12. FOR PRIMARY ELECTIONS: A voter is registered as Unaffiliated. The voter's record can't be found during check-in so the voter re-registers with a political party.

- Process the voter registration application. If you have already “linked” the registrations, you will need to “unlink” the registration to be able to deny the new registration without removing the prior voter registration. Please put in a Help Desk ticket if you need assistance.
- The voter has received an eligible ballot based on their unaffiliated registration status so there is no need to disapprove the application or challenge the ballot.
- Check with the voter after the election to confirm whether they did want to change party affiliation, at which point you may process that change.

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VOTER CHALLENGE FORM – For Board Use
NORTH CAROLINA
COUNTY OF _____

[] COUNTY BOARD OF ELECTIONS
 [ADDRESS]
 [CITY/STATE/ZIP]

PHONE: _____ FAX: _____
 EMAIL: _____

I, _____, Chair of the _____ County Board of Elections, hereby challenge the ballot cast by _____, who is registered to vote at (address) _____, pursuant to a vote of the board.

I challenge the above-named voter for the reason(s) checked below:

- The person is not a resident of the State of North Carolina.
- The person is not a resident of the county in which the person is registered.
- The person is not a resident of the precinct in which the person is registered.
- The person is not a resident of the municipality in which the person is registered.
- The person is not eighteen years of age, or if this challenge is made within 60 days before a primary, the person will not be eighteen years of age by the next general election.
- The person has been adjudged guilty of a felony and the person's rights of citizenship have not been restored.
- The person is dead.
- The person is not a citizen of the United States.
- The person is not who he or she represents himself or herself to be.
- With respect to a primary or election on ____/____/____, the person has already voted in the primary or election.
- With respect to voting in a partisan primary on ____/____/____, the person is a registered voter of another political party.
- The person was issued the wrong ballot style.

Chair's Signature _____

[ATTACH EVIDENCE SUPPORTING THE CHALLENGE]

COUNTY BOARD LETTERHEAD

DATE

NAME

STREET ADDRESS

CITY, STATE, ZIP CODE

RE: Notice of Absentee Ballot Challenge

The ballot submitted by the above-referenced voter has been challenged pursuant to North Carolina General Statute 163-89, a copy of which is attached. The ballot has been challenged because:

- The person is not a resident of the State of North Carolina.
- The person is not a resident of the county in which the person is registered.
- The person is not a resident of the precinct in which the person is registered.
- The person is not a resident of the municipality in which the person is registered.
- The person is not eighteen years of age, or if this challenge is made within 60 days before a primary, the person will not be eighteen years of age by the next general election.
- The person has been adjudged guilty of a felony and the person's rights of citizenship have not been restored.
- The person is dead.
- The person is not a citizen of the United States.
- The person is not who he or she represents himself or herself to be.
- With respect to a primary or election on ____/____/____, the person has already voted in the primary or election.
- With respect to voting in a partisan primary on ____/____/____, the person is a registered voter of another political party.
- The person was issued the wrong ballot with contests for which the voter is ineligible.

If this challenge is successful, the challenged ballot will not count, or any ineligible contests will not count.

The county board will conduct a hearing on this challenge at the county canvass meeting, which is held in person at **11:00 a.m. on Friday, [DATE]**, at the county board of elections office. If you believe the information is in error, please contact our office immediately.

You have a right to be heard by the board at the challenge proceeding or you may authorize a representative to appear on your behalf. You may present evidence in support of your position, including your own testimony.

§ 163-89. Procedures for challenging absentee ballots.

(a) Time for Challenge. - The absentee ballot of any voter may be challenged on the day of any statewide primary or general election or county bond election beginning no earlier than noon and ending no later than 5:00 P.M., or by the chief judge at the time of closing of the polls as provided in G.S. 163-232 and G.S. 163-258.26(b). The absentee ballot of any voter received by the county board of elections pursuant to G.S. 163-231(b)(ii) or (iii) may be challenged no earlier than noon on the day following the election and no later than 5:00 p.m. on the next business day following the deadline for receipt of such absentee ballots.

(b) Who May Challenge. - Any registered voter of the same precinct as the absentee voter may challenge that voter's absentee ballot.

(c) Form and Nature of Challenge. - Each challenged absentee ballot shall be challenged separately. The burden of proof shall be on the challenger. Each challenge shall be made in writing and, if they are available, shall be made on forms prescribed by the State Board of Elections. Each challenge shall specify the reasons why the ballot does not comply with the provisions of this Article or why the absentee voter is not legally entitled to vote in the particular primary or election. The challenge shall be signed by the challenger.

(d) To Whom Challenge Addressed; to Whom Challenge Delivered. - Each challenge shall be addressed to the county board of elections. It may be filed with the board at its offices or with the chief judge of the precinct in which the challenger and absentee voter are registered. If it is delivered to the chief judge, the chief judge shall personally deliver the challenge to the chairman of the county board of elections on the day of the county canvass.

(e) Hearing Procedure. - All challenges filed under this section shall be heard by the county board of elections on the day set for the canvass of the returns. All members of the board shall attend the canvass and all members shall be present for the hearing of challenges to absentee ballots.

Before the board hears a challenge to an absentee ballot, the chairman shall mark the word "challenged" after the voter's name in the register of absentee ballot applications and ballots issued and in the pollbook of absentee voters.

The board then shall hear the challenger's reasons for the challenge, and it shall make its decision without opening the container-return envelope or removing the ballots from it.

The board shall have authority to administer the necessary oaths or affirmations to all witnesses brought before it to testify to the qualifications of the voter challenged or to the validity or invalidity of the ballot.

If the challenge is sustained, the chairman shall mark the word "sustained" after the word "challenged" following the voter's name in the register of absentee ballot applications and ballots issued and in the pollbook of absentee voters; the voter's ballots shall not be counted; and the container-return envelope shall not be opened but shall be marked "Challenge Sustained." All envelopes so marked shall be preserved intact by the chairman for a period of six months from canvass day or longer if any contest then is pending concerning the validity of any absentee ballot.

If the challenge is overruled, the absentee ballots shall be removed from the container-return envelopes and counted by the board of elections, and the board shall adjust the appropriate abstracts of returns to show that the ballots have been counted and tallied in the manner provided for unchallenged absentee ballots.

If the challenge was delivered to the board by the chief judge of the precinct and was sustained, the board shall reopen the appropriate ballot boxes, remove such ballots, determine how those ballots were voted, deduct such ballots from the returns, and adjust the appropriate abstracts of returns.

Any voter whose ballots have been challenged may, either personally or through an authorized representative, appear before the board at the hearing on the challenge and present evidence as to the validity of the ballot. (1939, c. 159, ss. 8, 9; 1945, c. 758, s. 8; 1953, c. 1114; 1963, c. 547, s. 8; 1965, c. 871; 1967, c. 775, s. 1; 1973, c. 536, s. 4; 1993 (Reg. Sess., 1994), c. 762, s. 29; 2009-537, s. 8(c); 2014-111, s. 15(d); 2017-6, s. 3; 2018-146, s. 3.1(a), (b).)



May 14, 2022

Via Electronic Mail

To: Ms. Karen Brinson-Bell
Executive Director
North Carolina State Board of Elections
430 N. Salisbury St.
Raleigh, NC 27603

State Board Members
Damon Circosta, Chair
Stella Anderson, Secretary
Jeff Carmon
Four Eggers
Tommy Tucker

Katelyn Love
General Counsel
North Carolina State Board of Elections

From: North Carolina Republican Party—*represented by Philip R. Thomas*
1506 Hillsborough St.
Raleigh, NC 27605

James H. Baker, as a member of the Cumberland County Board of Elections—*represented by Kevin J. Cline*
2834 Wade Stedman Rd.
Fayetteville, NC 28391

Jerry Alan Branson, as a candidate and voter—*represented by Kevin J. Cline*
3731 Old Julian Rd.
Julian, NC 27283

On behalf of our clients—the aggrieved parties described below—we hereby submit this request for a declaratory ruling pursuant to N.C.G.S. § 150B-4 by the North Carolina State Board of Elections (“NCSBE”) as to the application of (1) N.C.G.S. § 230.1 and N.C.G.S. § 230.2 (and other statutes cited throughout this letter) as to the approval or disapproval of a request for an absentee by-mail ballot and (2) N.C.G.S. § 230.1 (and other statutes cited throughout this letter) to the review and approval or disapproval of absentee container-return envelopes. Our

research has indicated that no fee is required to file this request for a declaratory ruling; however, if there is a fee associated with such a request, please provide the amount and legal basis for that fee.

NCSBE Numbered Memo (“N.M.”) 2020-15, issued by NCSBE Executive Director Karen Brinson-Bell, provides that “County boards should accept the signature on the absentee request form if it appears to be made by the voter or their near relative or legal guardian. The voter’s signature should not be compared with the voter’s signature on file because this is not required by North Carolina law.”

NCSBE N.M. 2021-03, issued by NCSBE Executive Director Karen Brinson-Bell, provides that a “voter’s signature on the envelope shall not be compared with the voter’s signature in their registration record because this is not required by North Carolina law.”

Moreover, N.M. 2021-03 purports to replace N.M. 2020-19, originally issued on August 21, 2020, which likewise provided that “voter’s signature on the envelope shall not be compared with the voter’s signature on file because this is not required by North Carolina law.” The NCSBE in 2020, and presumably in 2022, has issued this guidance under the threat of removing any county board who does not follow their illegal edicts. See N.M. 2020-19 (providing that “[a]s part of its supervisory authority, the State Board is empowered to ‘compel observance’ by county boards of election laws and procedures. *Id.*, § 163-22(c)).”¹

Prior to issuance of N.M. 2020-19 in 2020, it was common practice for county boards of elections to compare signatures on container-return envelopes to the voter’s signature on their registrationd file.

The guidance from the NCSBE diminishes the statutory safeguards put into place by the North Carolina General Assembly to ensure the county boards of elections properly evaluate the voter’s signature on (1) an absentee request form for an absentee ballot and (2) an absentee container-return envelope.

¹ N.C.G.S. § 163-22(c) provides that “. . . The State Board of Elections shall have power to remove from office any member of a county board of election”

Absentee Ballot Request Form

First, for a “qualified voter” to request an absentee ballot, the voter “shall complete a request form” in “compliance with [N.C.G.S. §] 163-230.2.” N.C.G.S. § 163-230.1(a). “A completed written request form for absentee ballots as required by [N.C.G.S. §] 163-230.1 is *valid only if* it is on a form created by the State Board and *signed by the voter* requesting absentee ballots or that voter's near relative or verifiable legal guardian.” N.C.G.S. § 163-230.2(a) (emphasis added). Moreover, “[a] request for absentee ballots is not valid if . . . signed by anyone other than the voter, or the voter's near relative or verifiable legal guardian [or] [t]he written request does not contain all of the information required by [N.C.G.S. § 163-230.2(a)].” N.C.G.S. § 163-230.2.

County board of elections members have a duty to ensure only voters who have lawfully submitted absentee ballot requests are sent absentee ballots. There are several statutes on point, including the following:

...

The [county] board shall issue and deliver blank applications for absentee ballots in strict accordance with the provisions of G.S. 163-230.1. The issuance of ballots to persons whose requests for absentee ballots have been received by the county board of elections under the provisions of G.S. 163-230.1 is the responsibility and duty of the county board of elections. It shall be the duty of the county board of elections to keep current all records required by this Article and to make promptly all reports required by this Article. If that duty has been assigned to the chair, member, officer, or employee of the board of elections, that person shall carry out the duty. The willful violation of this section shall constitute a Class 2 misdemeanor.

N.C.G.S § 163-236.

By accepting an absentee ballot request form without fully verifying the voter's signature, a board member is neglecting his or her duties, as set out by the General Assembly, for which they swore an oath to uphold.

Absentee Container-Return Envelopes

Once the county board of elections has approved a request for an absentee ballot, they prepare and send the voter an absentee ballot with the container-return envelope. N.C.G.S. § 163-230.2(d). The voter must complete the absentee container-return envelope in the presence of two witnesses or a notary public. N.C.G.S. § 163-231(a). The voter must personally sign the container-return envelope and return it to the county board of elections either by mail or in-person. N.C.G.S. § 163-82.6(c).

Pursuant to N.C.G.S. § 163-230.1(d)–(e), county board of elections members have a duty to determine whether absentee container-return envelopes have been properly executed, including that such envelopes have been “signed personally by the voter.” See N.C.G.S. § 163-234(11) (“The county board of elections shall meet . . . to determine whether the container-return envelopes for absentee ballots received pursuant to G.S. 163-231(b)(2)(b) or (c) have been properly executed.”).

It is inadequate for a county board of elections to not exhaust all available resources to confirm that the signature provided on an absentee container-return envelope is that of the purported voter. By instructing the county boards that they should not compare the signature of a voter’s registration record to the signature on an absentee container-return envelope, the NCSBE is prohibiting county boards (and their members) from using all available resources at their disposal to ensure they are fulfilling their statutory duties.

The envelope must be “signed by the voter personally.” N.C.G.S. § 230.1(d); See N.C.G.S. § 163-229(b)(2), providing that the “container-return envelope” must provide for, among other things, “[a] space for identification of the envelope with the voter and the voter’s signature.”

North Carolina law clearly requires that the signature on absentee request form and the absentee container-return envelope be that of the specific voter who is seeking to vote. See N.M. 2020-15 and N.M. 2021-03, and potentially other guidance from the NCSBE and their Executive Director, all of which appear to prohibit county boards of elections from enforcing the statutory requirements that the request form and absentee container-return envelope be signed by the voter.

Canvassing of Returns

Beyond the enumerated duties to ensure signatures of voters are those of the purported voters, county board of elections members have the general duty to ensure “[t]he return and *accurate* accounting of all official ballots, regular, provisional, voted, unvoted, and spoiled, according to the provisions of Article 15A of [Chapter 163].” N.C.G.S. § 163-166.10 (emphasis added).

Pursuant to Article 15A of Chapter 163, the county board members further have a duty to “to authenticate the count in every ballot item in the county by determining that the votes have been counted and tabulated *correctly*.” N.C.G.S. § 163-182.5. (emphasis added). If the county board is approving absentee container-return envelopes that possibly contain a signature that is not that of the voter and, in due course, is counting the corresponding absentee ballots, they are not correctly counting the number of votes. This would be in direct conflict with the applicable statutes, which could create criminal liability.

At a minimum, the NCSBE’s guidance causes confusion on the part of the election workers and county board of elections members as to the proper procedures needed to follow North Carolina law. County election officials have a duty to protect their constituents against vote dilution caused by potential illegal votes. Allowing potential illegal votes to count on the basis of the NCSBE stripping the county boards of this valuable tool to verify voters decreases public confidence in our elections. North Carolina federal courts have been clear on this point: “The state must protect against the diluting effect of illegal ballots.” *Moore v. Circosta*, 494 F. Supp. 3d 289 (M.D.N.C. 2020) (quoting *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963)).

Aggrieved Parties²

The aggrieved parties in this case are the North Carolina Republican Party (“NCGOP”), James H. Baker (“Board Member Baker”) in his capacity as a member of the Cumberland County Board of Elections, and Jerry Alan Branson (“Mr. Branson”) in his capacity as a candidate in the Republican Primary election to be the party’s nominee for an at-large seat of Guilford County Board of Commissioners and in his capacity as an individual duly registered to vote in Guilford County in North Carolina.

² See 08 NCAC 15 .0102.

The North Carolina Republican Party

The NCGOP is aggrieved as an organization in that the NCGOP and its subsidiary organizations assist in recruiting and providing support for candidates. Moreover, the NCGOP represents the interest of its members—all registered Republican voters across the state, which as of May 7, 2022 included nearly 2.2 million individuals. The NCGOP seeks to ensure that individuals running as Republican candidates are afforded the opportunity to do so and that the Republican voters of the state have the right to select the candidate of their own choosing and for elections in North Carolina to be conducted on a “free” and “fair” basis. As recently proclaimed by the Supreme Court of North Carolina, “[a] system of fair elections is foundational to self-government.” *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022).

Board Member James H. Baker

Cumberland Board of Elections Member James H. Baker is aggrieved because he has a duty to follow the law as passed by the General Assembly and the NCSBE has effectively prevented him from doing that.

Before taking office, Board Member Baker took the following oath:

"I, ____, do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States; and that I *will well and truly execute the duties* of the office of member of the ____ County Board of Elections to the best of my knowledge and ability, according to law; so help me God."

N.C.G.S. § 163-30(e) (emphasis added).

Pursuant to statute, the failure of a county board of elections member to follow the law can result in criminal penalties. See N.C.G.S. § 163-104; N.C.G.S. § 163-274(a)(11) (“All acts made criminal if committed in connection with a general election shall likewise be criminal, with the same punishment, when committed in a primary election held under the provisions of this Chapter.”)

By taking this oath, Board Member Baker swore to uphold the law of the United States and the State of North Carolina. In addition to the oath taken by him and every other county board of elections member in North Carolina, the county board of elections members have a duty to make sure that the votes counted are those of legal voters. A violation of this duty is specifically made a crime:

Any person who shall, in connection with any primary or election in this State, do any of the acts and things declared in this subsection to be unlawful, shall be guilty of a Class 2 misdemeanor. It shall be unlawful to do any of the following: For any chair of a county board of elections or other returning officer to fail or neglect, willfully or of malice, to perform any duty, act, matter or thing required or directed in the time, manner and form in which said duty, matter or thing is required to be performed in relation to any primary, general or special election and the returns thereof.

N.C.G.S. § 163-274(a)(11).

Jerry Alan Branson

Mr. Branson is aggrieved in his capacity as a candidate in that he has a constitutional right to run in the Republican primary as a candidate for an at-large seat of Guilford County Board of Commissioners. N.C. Const. Art. VI, § 6. Moreover, Mr. Branson is also aggrieved as an individual voter registered to vote in Guilford County.

In his capacity as a candidate, Mr. Branson is harmed by the inability (due to the NCSBE's guidance) of the Guilford County Board of Elections to use all available means to verify that absentee request forms and absentee container-return envelopes are properly executed, including that the signature on such is that of the purported voter.

Mr. Branson is also harmed in his capacity as a Guilford County voter for the same reason (the Guilford County Board of Elections inability to follow the law). Additionally, as a voter, who is eligible and plans to vote in the statewide primaries, due to the same inability of all other county boards of elections in North Carolina.

Conclusion

Ultimately, the NCSBE's unlawful guidance could cause vote dilution due to the potential for illegal absentee ballots to be sent out and illegal absentee votes to be counted. As it stands under current NCSBE guidance, every legal vote that is cast could be diluted by the illegal votes accepted pursuant to the guidance and direction of the NCSBE. While we believe, and will continue to hold the belief, that the North Carolina Constitution demands free elections, North Carolina elections must also be "fair" elections.³ The North Carolina Supreme Court has stated that ". . . elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government." *Harper*, at 542.

Consequently, a ruling by the NCSBE is required to ensure that the confirmation of each voter's vote will count as one vote and not a fraction of a vote due to the illegal casting of ballots by fraudulent intervenors. There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise this right in a variety of ways: they can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, [or] contribute to a candidate's campaign. *McCutcheon v. FEC*, 572 U.S. 185, 134 S. Ct. 1434 (2014).

Upon receipt of this request for a declaratory ruling, the NCSBE has 30 days to make a written decision granting or denying this request by June 13, 2022. N.C.G.S. § 150B-4(a1)(1). If the NCSBE fails to respond within 30 days of receipt of this request, such failure will be deemed a decision to deny the request. *Id.*

If the NCSBE denies the request, the decision is deemed immediately subject to judicial review in accordance with Article 4 of N.C.G.S 150B. N.C.G.S. § 150B-4(a1)(2).

If the NCSBE grants the request, the Board shall issue a written ruling on the merits within 45 days of the decision to grant the request. N.C.G.S. §

³ "Based upon this Court's precedent with respect to the free elections clause, a voter is deprived of a 'free' election if (1) the election is subject to a fraudulent vote count, or (2) a law prevents a voter from voting according to one's judgment. Therefore, the free elections clause must be read in harmony with other constitutional provisions such as Article VI, that limits who can vote and run for office. Free elections must be absent of fraud in the vote tabulation." *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (C.J. Newby, *dissenting*) (internal citations omitted).

150B-4(a1)(3). Of course, a declaratory ruling is subject to judicial review in accordance with Article 4 of N.C.G.S 150B.

We look forward to the NCBSE's prompt response to this request.

Sincerely,



Philip R. Thomas
on behalf of of the North Carolina Republican Party
Chief Counsel & Strategy Director
North Carolina Republican Party



Kevin J. Cline
on behalf of James H. Baker and Jerry Alan Branson
Kevin Cline Law, PLLC



NORTH CAROLINA
STATE BOARD OF ELECTIONS

Numbered Memo 2020-19

TO: County Boards of Elections
FROM: Karen Brinson Bell, Executive Director
RE: Absentee Processes
DATE: August 21, 2020

As you know—and are preparing for—we are expecting an unprecedented number of voters who will vote absentee-by-mail during the 2020 general election. In light of this, statewide uniformity and consistency in reviewing and processing these ballots will be more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.¹

1. No Signature Verification

County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. Verification of the voter's identity is completed through the witness requirement. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

¹ This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with an affidavit and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot issued if there is time to mail the voter a new ballot that the voter would receive by Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with an Affidavit (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter an affidavit:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place

The cure affidavit process applies to civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by affidavit, because the missing information comes from someone other than the voter:

- Witness or assistant did not print name²
- Witness or assistant did not print address³
- Witness or assistant did not sign
- Witness or assistant signed on the wrong line
- Upon arrival at the county board office, the envelope is unsealed or appears to have been opened and re-sealed

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with this numbered memo.

² If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

³ Failure to list a witness's ZIP code does not invalidate the container-return envelope. G.S. § 163-231(a)(5).

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

If a county board office receives a container-return envelope with a deficiency, it shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure affidavit or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day. The written notice shall be sent to the address to which the voter requested their ballot be sent; however, if the deficiency can be cured and the voter has an email address on file, the county board shall send the cure affidavit to the voter by email. The notice shall also state that, if the voter prefers, they may appear at the county canvass to contest the status of their absentee ballot.

There is not time to reissue a ballot if it would be mailed the Friday before the election, October 30, 2020, or later. Within one business day of the determination that the container-return envelope is deficient, the county board shall:

1. Notify the voter by phone or email, if available, to provide information about how to vote in-person at early voting or on Election Day, if the determination is made between the Friday before the election and Election Day (between October 30 and November 3, 2020), and inform the voter about the ability to contest the status of their absentee ballot at county canvass; and
2. Notify the voter by mail. This notification shall inform the voter about the ability to contest the status of their absentee ballot at county canvass.

Receipt of the Cure Affidavit

The cure affidavit must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure affidavit may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given and fill out a new cure affidavit. The cure affidavit may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT).

A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency and they may appear at the county canvass to contest the status of their absentee ballot.

4.1. Civilian Ballots

Civilian absentee ballots must be received by the county board office by 5 p.m. on Election Day, November 3, 2020, or, if postmarked by Election Day, by 5:00 p.m. three days after the election, November 6, 2020.⁴ Civilian absentee ballots received after this time are invalid.

4.2. UOCAVA Ballots

Ballots from UOCAVA voters must be received by the county board office by 7:30 p.m. on Election Day, November 3, 2020, or submitted for mailing, electronic transmission, or fax by 12:01 a.m. on Election Day, at the place where the voter completes the ballot.⁵ If mailed, UOCAVA ballots must be received by the close of the business on the day before county canvass. County canvass is scheduled for November 13, 2020, and therefore the deadline would be November 12, 2020. UOCAVA ballots received after the statutorily required time are invalid.

5. Hearing at Canvass

If the voter appears in person at the county canvass to contest the disapproval of their deficient ballot, the county board shall provide the voter with an opportunity to be heard. The county board shall determine by majority vote whether the decision to disapprove the absentee container-return envelope should be reconsidered. The burden shall be on the voter to prove by a preponderance of the evidence that their container-return envelope was properly executed and timely received. The voter cannot “cure” a deficient absentee container-return envelope at the hearing.

6. Return of the Ballot

6.1. Method of Return

Civilian absentee ballots may be returned:

- In person at the county board office;
- In person at a one-stop early voting site in the voter’s county;
- By mail or commercial carrier.

⁴ G.S. § 163-231(b).

⁵ G.S. §§ 163-231(b); 163- 258.10.

An absentee ballot returned to a polling place on Election Day shall not be counted. Precinct officials shall be trained to instruct a voter who brings their ballot to the polling place to instead return it to the county board office or mail it the same day ensuring a postmark is affixed.

6.2. Who May Return a Ballot

Only the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot.⁶ A bipartisan assistance team (MAT) or a third party may not take possession of an absentee ballot. For this reason, county boards are required by rule to log absentee ballots that are delivered in person to their county board office. The log, which is completed by the person dropping off the ballot, shall include the name of the voter, name of person delivering the ballot, relationship to the voter, phone number and current address of person delivering the ballot, date and time of delivery of the ballot, and signature or mark of the person delivering the ballot certifying that the information is true that that they are the voter or the voter's near relative or legal guardian.⁷

Because of the requirements about who can deliver a ballot, and because of the logging requirement, an absentee ballot may not be left in an unmanned drop box. The county board shall ensure that, if they have a drop box, slot, or similar container at their office, the container has a sign indicating that absentee ballots may not be deposited in it.

Failure to comply with the logging requirement, or delivery of an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot.⁸ A county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot. The county board may, however, consider the delivery of a ballot in accordance with the rule, 08 NCAC 18 .0102, in conjunction with other evidence in determining whether the container-return envelope has been properly executed.

⁶ It is a class I felony for any person other than the voter's near relative or legal guardian to take possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter. G.S. § 163-223.6(a)(5).

⁷ 08 NCAC 18 .0102.

⁸ *Id.* Compare G.S. § 163-230.2(3), as amended by Section 1.3.(a) of Session Law 2019-239, which states that an absentee request form returned to the county board by someone other than an unauthorized person is invalid.

Absentee Board Meetings

Pursuant to Session Law 2020-17, county boards will begin holding their absentee board meetings the fifth Tuesday before the election, rather than the third Tuesday before the election. Because the meetings must be noticed at least 30 days prior to the election, county boards should consider noticing additional meetings in order to plan for the increased volume of absentee ballots that are expected for this election.⁹ The meetings may later be cancelled if the county board does not have absentee container-return envelopes to consider at that meeting. Additional guidance will be forthcoming regarding processing the increased volume of absentee ballots at these board meetings.

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⁹ G.S. § 163-230.1(f).

Absentee Cure Affidavit

Instructions

You are receiving this affidavit because you did not sign the absentee ballot container-return envelope, or because you signed in the wrong place. For your absentee ballot to be counted, complete and return this affidavit as soon as possible. **It must be received by your county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before the county canvass.** You, your near relative or legal guardian, or a multipartisan assistance team (MAT), can return the affidavit by:

- Email
- Fax
- Delivering it in person to the county board of elections office
- Mail or commercial carrier

If this affidavit is not returned to the county board of elections by the deadline, your absentee ballot will not count. You may still vote in person during the early voting period (October 15-October 31) or on Election Day, November 3, 2020.

READ AND COMPLETE THE FOLLOWING:

I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I requested, voted, and returned an absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

Voter's Name

Voter's Signature

Voter's Address



NORTH CAROLINA

STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

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Numbered Memo 2020-19

TO: County Boards of Elections
FROM: Karen Brinson Bell, Executive Director
RE: Absentee Container-Return Envelope Deficiencies
DATE: August 21, 2020 (revised on September 22, 2020)

County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.¹

1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

¹ This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name²
- Witness or assistant did not print address³
- Witness or assistant did not sign
- Witness or assistant signed on the wrong line

² If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

³ Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter the cure certification in accordance with Section 3.

This cure certification process applies to both civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

If, prior to September 22, 2020, a county board reissued a ballot to a voter, and the updated memo now allows the deficiency to be cured by certification, the county board shall contact the voter in writing and by phone or email, if available, to explain that the procedure has changed and that the voter now has the option to submit a cure certification instead of a new ballot. A county board is not required to send a cure certification to a voter who already returned their second ballot if the second ballot is not deficient.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline, defined in Numbered Memo 2020-22 as (1) 5 p.m. on Election Day or (2) if postmarked on or before Election Day, 5 p.m. on Thursday, November 12, 2020. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.