

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 22-CVS-10520

WAKE COUNTY, C.S.C.

BY _____

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

**PROPOSED INTERVENOR NORTH CAROLINA ALLIANCE OF RETIRED
AMERICANS' MOTION TO DISMISS THE PETITION**

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INTRODUCTION

The North Carolina legislature has enacted a robust set of laws regarding how voters may request, receive, and cast an absentee ballot, as well as how county election officials review such ballots. Those comprehensive rules include numerous *express* requirements for ensuring that those who vote by absentee ballot are who they say they are. For example, requesting an absentee ballot requires the voter to supply their date of birth and a form of identification, and casting an absentee ballot requires the voter to sign their return envelope in front of a notary or two qualified witnesses. Critically, however, North Carolina’s absentee voting laws do *not* authorize or require election officials to compare a voter’s signature on their absentee ballot request form or their return envelope to a signature on file. And for good reason—asking county officials to match a voter’s registration signature with their absentee ballot request form or return envelope signature conflicts with other, express provisions of North Carolina law that permit voters to use electronic signatures or the signatures of close relatives and guardians. Just as importantly, signature matching—particularly when performed by a layperson using a single signature example—is simply not a reliable way to confirm a person’s identity. Courts across the country have recognized that signature matching disenfranchises voters who are older, disabled, and who take medication because their signatures are likely to unintentionally vary, resulting in election officials incorrectly tossing their ballots due to perceived signature mismatch. For that reason, the North Carolina Alliance for Retired Americans (“the Alliance”)—a non-profit organization representing 65,000 North Carolina retirees—has sought to intervene in this matter to protect the rights of its members.

The North Carolina State Board of Elections (“NCBSE” or “the Board”) has correctly recognized for years that signature matching is not authorized by law, and in fact would not comport with North Carolina’s absentee balloting rules. Undeterred by the total lack of statutory

authority for signature matching, the North Carolina Republican Party (“NCGOP”) and several of its members (collectively “Petitioners”), filed an administrative request with the Board asking it to graft a signature matching requirement into law. The Board agreed to hear their request, but correctly denied it in a July 22, 2022 declaratory ruling. Petitioners then brought this lawsuit under the North Carolina Administrative Procedure Act (“NCAPA”), hoping North Carolina courts will provide what the legislature has not—authority for county officials to engage in unreliable and arbitrary signature matching, which will disenfranchise numerous North Carolina voters who rely on absentee voting to participate in the franchise.

The Court should dismiss the Petition for several reasons. First, this Court lacks jurisdiction to hear Petitioners’ challenge because they lack standing under the NCAPA. That law only permits “persons aggrieved” to request a declaratory ruling from an agency, and in turn to obtain judicial review in Superior Court. But Petitioners have failed to explain how the Board’s long-held interpretation of North Carolina law harms them—merely disagreeing with an agency’s view of the law is not enough. The Board recognized Petitioners lacked standing but provided them their requested declaratory ruling anyway—on that procedural point, the Board erred. Petitioners were not entitled to a declaratory ruling to begin with and are not entitled to judicial review now.

Lack of standing aside, Petitioners also fail to state a claim under the NCAPA because, on the merits, the Board got it exactly right—North Carolina law does not authorize signature matching. Other North Carolina statutes show the legislature knows how to draft such signature matching requirements when it desires them, but it did not do so here. Left without statutory support for their claim, Petitioners simply make up statutory text that does not exist, repeatedly quoting favorable language that is found *nowhere* in North Carolina law. That desperate effort reveals this lawsuit for what it is—an attempt to impose a burden on voters found nowhere in the

law shortly before an upcoming election. Because the Board's declaratory ruling correctly interpreted North Carolina law as written by the legislature, Petitioners fail to state a claim under the NCAPA and the Petition should be dismissed.

BACKGROUND

I. North Carolina's statutory framework for voting absentee.

North Carolina's statutory framework spells out many minute details about how county boards are to distribute and process absentee ballots, yet *nowhere* do those detailed statutes require or permit county election officials to compare a voter's signature on absentee ballot request forms or return-carrier envelopes to the voter's signature provided when they registered to vote. Moreover, such signature matching would be nonsensical under the rules the legislature adopted, as many voters sign absentee ballot request forms electronically, or have close relatives or legal guardians sign on their behalf, as expressly permitted by North Carolina law. Understanding the complex set of rules established by the legislature is central to this case because it shows how the Board's declaratory ruling is altogether consistent with legislature's commands and, conversely, how the petitioners' demands run contrary to North Carolina law.

A. Requesting absentee ballots under North Carolina law.

There are two ways for an eligible North Carolina voter to request an absentee ballot. *First*, a voter can submit a physical, absentee ballot request form that 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). To verify the voter's identity, the voter or their relative or verifiable legal guardian must provide certain personally identifying information, including the voter's date of birth and either the last four digits of their Social Security number, North Carolina driver's license number, or special identification card for nonoperators number. *Id.* at § 163-230.2(a)(4), (5); *see also* Pet., Ex. 2

(Numbered Memo 2020-15 (“N.M. 2020-15”)) at 1–2. If any required identifying information is not disclosed, the request will be denied. N.C.G.S. § 163-230.2(e); *see also* N.M. 2020-15 at 1–2.¹

Second, a voter “or that voter’s near relative or verifiable legal guardian” may also request an absentee ballot online via an NCSBE website. N.C.G.S. § 163-230.3(a). The request must include all the same voter identifying information discussed above, as well as an electronic signature. *Id.* Under North Carolina law, an electronic signature includes 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). In accordance with state law, NCSBE has created a web portal and allows “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.” Pet., Ex. 1 at 7 (“Decl. Ruling”). The County board must receive the completed absentee ballot request, whether through the physical form or web portal, “not later than 5:00 P.M. on the Tuesday before the election” in which the voter intends to participate. N.C.G.S. § 163-230.1(a).

As a result of the procedures available to voters to request an absentee ballot, the kinds of signatures affixed to an absentee ballot request will vary significantly. For example, “in the

¹ On top of this, North Carolina limits who may return such physical absentee ballot request forms to election officials. Only the voter, the voter’s near relative or verifiable legal guardian, or a member of a multi-partisan team designated by a county board of elections to assist voters who live in nursing homes and other similar facilities is authorized to return the ballot request form. N.C.G.S. § 163-230.2(c). If the form is delivered by anyone else, other than a post office employee or a delivery service, it will be rejected. *Id.* § 163-230.2(e); *see also* N.M. 2020-15 at 1–2. The only exception is for a voter who needs assistance due to a disability; they may enlist anyone to help them fill out and return the request form. *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); *see also* N.C.G.S. § 163-230.2(e1).

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.” Decl. Ruling at 8. In other words, many “signatures” on absentee ballot requests are not the ordinary handwritten signatures of the requestor. They may instead be digital signatures drawn with a mouse, stylus, or touchscreen; typed signatures; or the signature of a voter’s relative or guardian.

B. Receiving and casting absentee ballots under North Carolina law.

Once the county board receives a valid request for an absentee ballot, it confirms whether the voter is a registered voter of the county and, if so, mails the voter a single packet containing: (1) the official ballots for the races the voter is entitled to vote in; (2) a container-return envelope for the ballot which includes the voter’s absentee application form on the outside; (3) an instruction sheet; and (4) a clear statement that voters are required to return a photocopy of a valid photo identification with their ballot unless the voter qualifies for an exemption. N.C.G.S. § 163-230.1(a); *id.* § 163-230.2(d). The ballot itself must include a unique numerical or barcode identifier linking the ballot to the correct voter. N.C.G.S. § 163-230.1(c). The ballot is then placed in a container-return envelope which also contains a unique identifier.²

To cast their absentee ballot, the voter must, in the presence of either a notary or two witnesses who are at least 18 years old and not disqualified from being witnesses, mark and fold each completed ballot, place them in the container-return envelope, and seal the envelope.

² County boards of elections rely on the unique identifier for a number of reasons, including to discuss and “adjudicate ballots while preserving the confidentiality of the voter” as well as “to locate and retrieve a ballot from a tabulator (and thereby discount its votes) if a particular voter is determined to be ineligible.” Decl. Ruling at 8; N.C.G.S. § 163-89(e).

N.C.G.S. § 163-231(a). The voter must also ensure that the absentee application form located on the outside of the envelope is completed. *Id.*³

The voter and her witnesses then fill out and sign the relevant portions of the absentee application form—under a warning that fraudulently completing the form is a felony—and then either notarize the application or have the two witnesses certify that the voter is the registered voter submitting the marked ballots. *Id.* § 163-231(a). The voter’s identity is thus confirmed twice: once when the voter—under a warning that is a felony to complete the form fraudulent or falsely—certifies their identity, and again when the witnesses or notary certify the same. *Id.* § 163-22(o1). The warning also includes a “prominent display” listing the potentially unlawful acts associated with absentee voting. *Id.* § 163-229(7). No similar recitation is given to in-person voters. Once the absentee application form and certifications have been completed, the voter must send the sealed container-return envelope to the county board that issued the ballot. *Id.* § 163-231(b).

Once returned, the county board of elections reviews the absentee application form and, if the form was properly executed, approves the ballot for counting. *Id.* § 163-230.1(e). A “properly executed” application is one that complies with the requirements imposed by the North Carolina legislature, as set out above; county boards are not instructed to conduct any other review of the

³ The application form printed on the contain-return envelope must, by law, include: (1) the voter’s certification of their eligibility to vote for the ballot they are returning; (2) a space for the voter to provide their name and signature; (3) a space for the identification, address, and signature of the two individuals who witness the casting of the absentee ballot; (4) a space for the name, address, and signature of an individual authorized to assist the voter in filling out and certifying their application, if applicable; (5) a space for county board approval; (6) a space to allow reporting of a change of name; (7) a “prominent display” of all unlawful acts related to absentee voting; (8) an area to attach additional documentation as necessary to comply with the state’s identification requirements; and (9) the unique identifier discussed above. N.C.G.S. § 163-229(b).

voter's application, including signature matching. *See supra* I.B (setting out statutory requirements).⁴

C. North Carolina's voter registration records.

As explained above, nothing in North Carolina law permits or requires county election officials to compare a voter's request or container-return envelope signature with their registration signature. Nor would such a requirement make sense given that many signatures at issue are electronic or provided by a voter's relative or guardian. But even setting those points aside, such signature matching would be stymied by the way North Carolina stores a voter's record signature—those signatures are simply not suitable comparators for signature matching.

North Carolina's statewide voter records system, the State Elections Information Management System ("SEIMS"), houses electronic images of registered voters' signatures. Decl. Ruling at 14–15. As NCSBE noted in its declaratory ruling, the system's capabilities are limited and only display an image of a voter's signature that was scanned from a voter registration or update, or from an absentee ballot request form—whichever is most recent. *Id.* This restricts the county boards' ability to match signatures for a number of reasons. *Id.*

For one thing, many updated absentee ballots uploaded to SEIMS were captured electronically using a mouse or a finger or stylus on a touchscreen, in compliance with state law. These kinds of signatures may not reflect a voter's pen-and-paper signature, leading to errors if election officials attempt to match them. Moreover, most voter registration forms and updates in

⁴ A quorum of the county board must approve or disapprove a ballot application; the decision is not left up to any individual member. N.C.G.S. § 163-230.1(f). Only the five appointed members of a county board can approve or disapprove absentee application forms notwithstanding the county's population size or how many absentee ballots were cast. *Id.*; *see also* N.C.G.S. § 163-30(a). As a result, one county's five-member board may review a few hundred applications while another may review tens of thousands of applications. Moreover, the county board's decision is not appealable, unless there is an election contest. N.C.G.S. § 163-230.1(f).

North Carolina come from the North Carolina Division of Motor Vehicles (“DMV”), both through in-person and online DMV voter registration services. See N.C. NCSBE, *NVRA Registration Statistics*, <https://www.ncsbe.gov/registering/national-voter-registration-act-nvra/nvra-registration-statistics> (last visited Aug. 26, 2022). Online DMV registrations yield electronic signatures while in-person DMV registration signatures are typically captured using styluses on electronic signature pads, the image quality of which is often poor and highly varied from ordinary pen-and-paper signatures. Decl. Ruling at 15. In both cases, the image captured often does not adequately reflect a voter’s pen-and-paper signature. Relatedly, when a voter updates their voter registration through the DMV, the DMV’s system often pulls the voter’s signature from when they first secured their driver’s license, which in many instances is years or decades old, and uses it as the signature in the voter’s new, updated registration. *Id.*

II. The Board’s guidance that North Carolina absentee voting laws do not permit signature matching.

The North Carolina legislature has tasked the Board with “general supervision over the primaries and elections in the State,” granting it the “authority to make such reasonable rules and regulations with respect to the conduct of primaries and election as it may deem advisable so long as they do not conflict with any provisions” of North Carolina election law. N.C.G.S. § 163-22(a). To that end, NCSBE sometimes issues guidance to North Carolina’s county boards of election to ensure compliance with, and uniform application of, the state’s election laws. Since 2020, NCSBE has issued six “Numbered Memos” and corresponding revisions providing official guidance to county boards on the standards and procedures related to absentee ballots in the state.

On July 28, 2020, the Board issued Numbered Memo 2020-15, which advised county boards to “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 further that the “signature should not be compared

with the voter's signature on file because this is not required by North Carolina law." N.M. 2020-15 at 4. The Board warned that "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." *Id.* The Board also provided a nonexclusive list of acceptable signatures which included the voter: (1) signing the form by hand; (2) signing with their finger or stylus on a touchscreen or using a mouse to draw their signature; (3) copying and pasting a photo of their unique signature onto the request form; and (4) making their mark on the form. *Id.* at 5.

On August 21, 2020, via Numbered Memo 2020-19, the Board: (1) reiterated that a voter's container-return envelope signature should not be compared with their voter registration signature because it "is not required by North Carolina law;" (2) clarified that county boards should accept a "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; (3) advised counties that "[a]bsent clear evidence to the contrary" they should presume "the voter's signature is that of the voter, even if . . . illegible;" and (4) advised counties that voters are able to both "sign their signature or make their mark." Pet., Ex. 3 ("N.M. 2020-19") at 1-2.⁵

On June 11, 2021, the Board issued Numbered Memo 2021-03, replacing N.M. 2020-19, and providing that "[v]erification of the voter's identity is completed through the witness requirement." Pet., Ex. 4 ("N.M. 2021-03") at 1. The Board reincorporated the same instructions with regard to signature matching listed in Numbered Memo 2020-19 and enumerated in the preceding paragraph. *Id.* at 1-2.

⁵ This Numbered Memo was revised on September 22 and October 17, 2020 however, no substantive changes were made to the relevant "Signature Matching" portions of the memo.

On May 12, 2022, NCSBE issued its latest Numbered Memo, Numbered Memo 2022-05, addressing absentee ballots. Pet., Ex. 5 (“N.M. 2022-05”). The Numbered Memo did not expressly discuss signature matching but describes mechanisms by which county boards may further ensure that absentee ballots are validly cast according to state law. *Id.* at 3-4

III. The Board’s July 22 declaratory ruling.

On May 14, 2022, two days after the Board’s latest guidance on absentee voting, Petitioners sent a Request for Declaratory Ruling to the Board under the North Carolina Administrative Procedure Act (“NCAPA”), asking it to issue a declaratory ruling that county boards of elections are either permitted or required—the request is not clear—to compare a voter’s signature on their absentee ballot request form and ballot envelope with their voter registration signature before issuing or counting an absentee ballot. *See* Pet., Ex. 6 (“Request”). On June 9, 2022, the Board granted Petitioners’ request to provide a declaratory ruling, commencing a 45-day deadline to “issue a written ruling on the merits” of the request. N.C.G.S. § 150B-4(a1)(3).

To aid its decision, NCSBE authorized the submission of public comments between June 10 and July 5, 2022. *See* Request at 1. NCSBE received more than 8,000 submissions from the public, *id.*, including a comment from the Alliance. *See* Mot. to Intervene, Ex. 1 (“Dworkin Aff.”), Ex. A; *see also* Dworkin Aff. Ex. A (“Alliance Public Comment”). Many of these submissions, including the Alliance’s, explained that the signature matching demanded by Petitioners is highly unreliable, leads to voter disenfranchisement, and is contrary to North Carolina law. *Id.*

On June 30, 2022, NCSBE voted 3-2 that North Carolina law does not permit the signature matching requirement demanded by Petitioners. In its subsequent July 22 written Declaratory Ruling, NCSBE began its analysis by addressing whether Petitioners qualified as “aggrieved persons” under North Carolina law, a preliminary requirement to “have standing to request a declaratory ruling” from the agency to begin with. *See* Decl. Ruling at 16 (citing N.C.G.S. § 150B-

4(a)). The Board made clear it was “doubtful” of Petitioners’ right to a declaratory ruling, summarizing that the “standing allegations offered by the Petitioners appear insufficient to meet the statutory requirements for a person to obtain a declaratory ruling under the [NCAPA].” *Id.* at 17. Despite these reservations, NCSBE “assume[d] without deciding that the Petitioners” had standing and proceeded to the merits of their request. *Id.* at 18

On the merits, NCSBE explained that North Carolina law does *not* authorize Petitioners’ request to require signature matching, and that state law instead requires voters requesting and casting absentee ballots to confirm their identity in expressly enumerated ways, such as “by providing two unique personal identifiers” and “having two witnesses or one notary public attest to having watched them vote their ballot.” *Id.* at 2. NCSBE further explained that no North Carolina statute conditions providing or counting an absentee ballot on the county board’s determination that the voter’s signature on either document matches his or her signature in a stored registration record. *Id.* at 18–22. It noted that while some other states require signature matching for the counting of absentee ballots, those state legislatures required such matching using “explicit[] and . . . unambiguous language,” in contrast to the statutory silence on the issue in North Carolina. *Id.* at 18-20 (citing signature matching laws in Arizona, California, Colorado, and Hawaii). NCSBE pointed out that Petitioners instead rely only on “statutes that purportedly *imply* such authorization.” *Id.* at 22. That argument was incongruent with the legislature’s choice to *expressly* “authorize other mechanisms to confirm the identity of” a voter requesting and casting an absentee ballot, ensuring the integrity of the voting process in accordance with state law. *Id.* at 26.

IV. Petitioners' lawsuit.

On August 22, 2022, the NCGOP, Cumberland County Board of Elections member James H. Baker, and Jerry “Alan” Branson, a candidate for the Guilford County Board of Commissioners, brought this suit, seeking to reverse the Board’s Declaratory Ruling and to impose a non-statutory signature matching requirement on North Carolina’s county boards of elections. Pet. at 11–12. Petitioners claim that (1) NCSBE’s decision “is vague, arbitrary and capricious;” (2) NCSBE’s decision “lacked a basis of legal authority;” (3) NCSBE’s decision failed to consider all necessary evidence; (4) NCSBE was motivated by partisanship; (5) Petitioners were not given an opportunity to properly represent their interests as part of NCSBE’s adjudication process; (6) NCSBE’s decision regarding the “lack of uniformity amongst signature verification, is per-se hypocritical” in light of its position in prior litigation; and (7) Numbered Memos 2020-15 and 2021-03 are facially contradictory. Pet. ¶¶ 31–38. Petitioners also purport to have suffered an injury because of NCSBE’s declaratory ruling and numbered memos, giving them standing to sue under the North Carolina Constitution. *Id.* ¶¶ 18, 19.

LEGAL STANDARD

“Standing concerns the trial court’s subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss.” *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (N.C. App. 2001) (citing *Energy Invs. Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 525 S.E.2d 441 (N.C. 2000)); N.C. G. S. § 1A–1, Rule 12(b)(1). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Kane v. Moore*, No. 17-CVS-13761, 2018 WL 6183317, *4 (N.C. Super. Nov. 26, 2018) (unpublished) (quoting *Est. of Apple v. Com. Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (internal quotation omitted).

“A Rule 12(b)(6) motion tests the legal sufficiency of the pleading.” *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (quoting *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003)). “It is well-settled that a plaintiff’s claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.” *Woolard v. Davenport*, 169 N.C. App. 674, 681, 601 S.E.2d 319, 322 (2004) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)).

When reviewing a state agency’s declaratory ruling, “[t]he duty of the superior court . . . is . . . to apply the appropriate standard of review to the findings and conclusions of the underlying tribunal.” *Brunson v. Tatum*, 196 N.C.App. 480, 484, 675 S.E.2d 97, 100 (2009) (citation omitted); see also *High Rock Lake Ass’n Inc. v. N.C. Env’t Mgmt. Comm’n*, 51 N.C. App. 275, 277, 276 S.E.2d 472, 474 (1981) (“A declaratory ruling by an administrative agency is subject to judicial review as though it were an agency final decision or order in a contested case.”). This Court should “consider the agency’s expertise and previous interpretations of the statutes it administers, as demonstrated [by]. . . previous decisions outside of the pending case.” *Rainey v. N.C. Dep’t of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007); see also *N.C. Dep’t of Env’t & Nat. Res. v. Carroll*, 358 N.C. 649, 662–63, 599 S.E.2d 888, 897 (2004). The NCSBE is a state agency entitled to deference when its decisions are under review. See *Disability Rights N.C. v. N.C. State Board of Elections*, No. 5:21-CV-361-BO, 2022 WL 2678884, *1 (E.D.N.C. July 11, 2022) (“The [Board] is the state agency responsible for managing and supervising elections in North Carolina.”).

ARGUMENT

I. Petitioners lack standing because they are not persons aggrieved under the North Carolina Administrative Procedure Act.

Under the NCAPA, only a “person aggrieved” is entitled to a declaratory ruling from a state agency. *See* N.C.G.S. § 150B-4. In turn, only a party or person “aggrieved” may then avail themselves of the NCAPA’s right to judicial review of a declaratory ruling. *See id.* § 150B-43. Accordingly, “[i]n order to have standing to petition for judicial review” of a declaratory ruling, “the petitioner must be an aggrieved party” as defined by the NCAPA. *Steward v. Green*, 189 N.C. App. 131, 136, 57 S.E.2d 719, 722 (2008) (quotation omitted); *see also Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 609, 853 S.E.2d 698, 729 (2021) (explaining that to have standing under a statute, a claimant must show “he is in the class of persons on whom the statute confers a cause of action”).⁶ A “person aggrieved” for purposes of the NCAPA 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.” N.C.G.S. § 150B-2(6).

Petitioners have failed to plausibly allege that they are aggrieved persons. Indeed, the Board itself said as much when considering their request for a declaratory judgment. It explained that “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.”

⁶ Petitioners misunderstand the North Carolina Supreme Court’s recent decision in *Committee to Elect Dan Forest*, asserting without explanation that “[a]ll three petitioners have a legal interest that serves to create ‘concrete adverseness’ as required by the North Carolina Constitution.” Pet. at 6 (quoting 853 S.E.2d at 717). “Concrete adverseness” is not “required” by the North Carolina Constitution; it is an aspect of the “direct injury” standing requirement applicable “in cases involving constitutional challenges to the validity of government action.” *Comm. to Elect Dan Forest*, 853 S.E.2d at 733. But Petitioners do not raise a constitutional challenge—they assert a statutory claim under the NCAPA. To have standing for such a claim, Petitioners must show that they are within “the class of persons on whom the statute confers a cause of action.” *Id.* They have failed to do so here because they have not shown they are “persons aggrieved” under the NCAPA.

Decl. Ruling at 17. Nonetheless, the Board “assume[d] without deciding that the Petitioners ha[d] standing,” noting that “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.” *Id.* at 17-18. These proceedings should have ended once the Board determined the Petitioners were not aggrieved persons. Regardless of NCSBE’s desire for judicial review, the NCAPA does not permit non-aggrieved parties to obtain declaratory rulings from agencies or judicial review from North Carolina’s courts. *See* N.C.G.S. §§ 150B-4, 150B-43. Under Rule 12(b)(1), Petitioners’ lack of standing to bring their claim deprives this Court of “subject matter jurisdiction to hear the claim.” *Kane*, 2018 WL 6183317 at *4 (quoting *Est. of Apple*, 607 S.E.2d at 16).

In their request for a declaratory ruling, Petitioners alleged the NCGOP was aggrieved due to its interest in ensuring that “individuals running as Republican candidates are afforded the opportunity to do so” and that Republican voters “have the right to select the candidate of their choosing” in free and fair elections. Request at 6. Those may well be legitimate interests, but Petitioners failed to explain how North Carolina’s lack of a signature matching requirement actually impacted them. As noted by the Board, “[t]hese interests do not suggest any substantial effect [sic] of the signature verification rules to the ‘person, property, or employment’ of the Republican Party,” and it is “therefore doubtful [NCGOP] fits the definition of an aggrieved party under the statute.” Decl. Ruling at 16.

As to Cumberland County Board of Elections Member Baker, Petitioners alleged that he was aggrieved due to “being prevented from fulfilling his oath-bound duty to follow the law as a board member,” which could subject him to criminal liability. *See id.* at 16-17. But the Board did not find it plausible that Mr. Baker risked criminal liability for failing to enforce a non-existent signature matching requirement. North Carolina law only makes it a misdemeanor “to fail or

neglect, *willfully or of malice*, to perform any duty, act, matter or thing required or directed . . . to be performed in relation to any . . . election and the returns thereof.” N.C.G.S. § 163-274(a)(11). Mr. Baker therefore did not plausibly allege any risk of criminal liability because his “failure to conduct signature matching” cannot be “willful[] or of malice,” *id.*, “since he claims that he is being ordered to refrain from doing so by the State Board under penalty of removal.” Decl. Ruling at 17. The Board also correctly explained that even if his office as a county board member was threatened—and nothing indicates that it is or was threatened—Mr. Baker’s employment interests were likewise not impacted because county board members are appointed, rather than hired, by NCSBE. *See* N.C.G.S. § 163-22(c). They also “are not paid a salary or wage, and are provided only \$25 per meeting, along with reimbursement for expenses”—an arrangement “unlikely” to be considered employment. *See* Decl. Ruling at 16-17 (citing N.C.G.S. § 163-32).

Finally, Petitioners alleged that Mr. Branson, both as a voter and a candidate for county commissioner, is harmed by the inability of county boards to engage in signature matching. *See* Request at 7. But Mr. Branson’s interest in his constitutional right to run for office is simply not impacted by whether signature matching is performed on absentee ballot requests or forms. Nor did he ever explain how NCSBE’s interpretation of North Carolina law harms his electoral prospects or the ability of voters to support his candidacy. NCSBE therefore found his standing to seek a declaratory ruling “questionable.” Decl. Ruling at 17. The Board was correct to express doubt as to Petitioners’ right to a declaratory ruling and it should have dismissed their request as a result. *See* N.C.G.S. § 150B-4.

The Petition does not ameliorate the Petitioners’ lack of standing to obtain either a declaratory ruling or judicial review under the NCAPA. Beyond echoing the alleged harms above that the Board already found insufficient, *see* Pet. ¶¶ 1-3, Petitioners allege they have been “caused

. . . harm” because “the State Board’s July 22, 2022 ruling . . . contradicts the election safeguards put in place by the General Assembly.” *Id.* ¶ 18. But a bare disagreement with a state agency over a question of North Carolina law does *not* suffice to make the Petitioners “aggrieved” under the NCAPA. “In order for petitioner to prevail on her claim to status as a ‘person aggrieved’ under the NCAPA, petitioner must first demonstrate that her *personal, property, employment or other legal rights* have been in some way impaired.” *In re Denial of Request for Full Admin. Hr’g as to Compl. No. 97025-1-1 & Appeal of Consent Agreement*, 146 N.C. App. 258, 261, 552 S.E.2d 230, 232 (2001) (emphasis added). Abstract disagreement on a point of law does not suffice—as with ordinary standing principles, a person aggrieved must present “a genuine grievance.” *Hist. Pres. Action Comm., Inc. v. City of Reidsville*, 230 N.C. App. 598, 753 S.E.2d 400 (Table), 2013 WL 6096749, *4 (N.C. App. 2013) (quotation omitted).

Relatedly, while Petitioners vaguely claim the ruling has caused them harm, they do not actually point to any concrete harm they have suffered. The Petition contains no plausible allegation that NCSBE’s declaratory ruling will harm the electability of North Carolina Republican candidates generally or Mr. Baker specifically. Any actual harm to Petitioners is purely conjectural, and thus insufficient to make them persons aggrieved. *See Diggs v. N.C. Dep’t of Health & Hum. Servs.*, 157 N.C. App. 344, 346, 578 S.E.2d 666, 668–69 (2003) (rejecting the plaintiff’s argument that she was a “person aggrieved” under N.C. Gen. Stat. § 150B–4 when plaintiff failed to demonstrate that her hypothetical injury was “certain to come to pass, . . . imminently threatened, or . . . even likely to occur”).

The Petition’s vague claim of “an interest in the integrity of elections in which [Petitioner Baker] votes” also does not suffice. Pet. ¶ 18. That is a generic interest common to any North Carolina voter, and regardless, Petitioners do nothing to explain how North Carolina’s lack of

signature matching impacts the “integrity” of its elections, particularly in view of the other comprehensive measures enacted by the legislature around absentee voting. Petitioners’ claims of harm are similar to those in *Historic Preservation Action Committee*, where an organization and its supporters claimed harm from a city’s refusal to re-erect a confederate monument after it was damaged. *See Hist. Pres. Action Comm.*, 2013 WL 6096749 at *4-*5. The Court of Appeals affirmed the trial court’s dismissal of their appeal for a declaratory ruling because the organization’s purported harms—the economic impact of not reinstalling the statue and the alleged aesthetic injury to the petitioners—were too generalized “to constitute injury and confer standing upon plaintiffs who seek judicial review of an administrative agency decision.” *Id.* at *5.⁷ The same is true here—Petitioners’ mere disagreement with the Board about the meaning of North Carolina law, and their abstract interest in “election integrity,” do not supply the discrete personal, property, employment, or legal interest necessary to confer standing for judicial review under the NCAPA.

II. Petitioners fail to state a claim under the North Carolina Administrative Procedure Act.

The Petitioners have similarly failed to allege that the declaratory ruling is arbitrary and capricious, or contrary to the law in any way. The Board’s interpretation is consistent with North Carolina law and its declaratory ruling well within its statutory authority.

“When the trial court exercises judicial review over an agency’s final decision, it acts in the capacity of an appellate court.” *Carroll*, 599 S.E.2d at 896. By statute, the Court may only “reverse or modify [the Board’s] decision if the substantial rights of the petitioners may have been

⁷ That decision likewise made clear that merely receiving an adverse declaratory ruling from a state agency does not, on its own, suffice to confer “person aggrieved” status. *Id.* at *6. Decl. Ruling at 17–18. Such “[p]rocedural injury, standing alone, cannot form the basis for aggrieved status under the NCAPA.” *In re Denial of Request for Full Admin. Hearing*, 552 S.E.2d 230, 232 (N.C. App. 2001).

prejudiced because the findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion.” N.C.G.S. § 150B-51(b). “The first four grounds for reversing or modifying an agency’s decision . . . may be characterized as ‘law-based’ inquiries.” *Carroll*, 599 S.E.2d at 896. “The final two grounds . . . may be characterized as ‘fact-based’ inquiries.” *Id.* “[W]here the findings of fact of an administrative agency are supported by substantial competent evidence in view of the entire record, they are binding on the reviewing court, and that court lacks authority to make alternative findings at variance with the agency’s.” *Id.* at 897. Petitioners fail to show any such violation here.

A. The Board’s declaratory ruling is consistent with North Carolina law.

While Petitioners purport to challenge the Board’s declaratory ruling under each of the grounds in § 150B-51(b), *see* Pet. ¶¶ 32-38, the actual substance of their argument primarily amounts to the assertion that the Board made an “error of law” because a North Carolina statute requires signature matching for absentee ballot requests and return envelopes, *see id.* ¶¶ 20-30. But that is simply not the case—nothing in North Carolina’s comprehensive set of statutes governing absentee voting even suggests that an appropriate way to verify an absentee voter’s identity is to match their signature to the one on their registration file. No matter how much Petitioners want signature matching to be consistent with the state’s election laws, it is not.

The Board has consistently and accurately advised county boards that North Carolina law does not allow signature matching. *See, e.g.*, N.M. 2020-19 at 1–2. Instead, the voter’s identity is verified through the provision of certain personally identifying information when requesting an

absentee ballot, N.C.G.S. §§ 163-230.2(a), 163-230.3, and attested to twice when completing the container-return envelope—once by the voter, and again by either two witnesses or a notary, *id.* §§ 163-22(o1), 163-229(b). Nowhere do Petitioners explain why the North Carolina legislature would have spelled out these specific mechanisms for identity verification but left another—signature matching—simply implied. As the Board noted, some states *do* require signature matching, but each does so *expressly* through statute. Decl. Ruling at 18-19 (noting that “states that require signature matching . . . have generally done so using explicit statutory language”). North Carolina law does not.

Petitioners’ view is particularly flawed because the North Carolina legislature knows how to draft a signature matching requirement when it desires one. As noted by the Board, state law includes signature verification requirements in the statute governing petitions for official recognition of political parties. *See id.* at 21 (citing N.C.G.S. §§ 163-96(c)). Meanwhile, the absence of “even a suggestion” of signature matching in the numerous statutes specifying how to conduct ballot approval (*id.*; N.C.G.S. §§ 163-230.1(f), -232, -234(2)-(4), (6), (9)) indicates the legislature’s determination not to include it. *See, e.g., Jama v. ICE*, 543 U.S. 335, 341 (2005) (explaining courts “do not lightly assume that [the legislature] has omitted from its adopted text requirements that it nonetheless intends to apply, and [that] reluctance is even greater when [the legislature] has shown elsewhere . . . that it knows how to make such a requirement manifest.”); *In re Stephens*, 402 B.R. 1, 7 (B.A.P. 10th Cir. 2009) (“[o]ne basic principle of statutory construction is that, where the legislature includes specific language in one provision and omits it another, it is presumed that it acted intentionally with respect to the omission”); *GMAC LLC v. Treasury Dep’t*, 781 N.W.2d 310, 316 (Mich. 2009) (“[t]he omission of a provision should be construed as intentional. It is a well-known principle that the Legislature is presumed to be aware

of, and thus to have considered the effect on, all existing statutes when enacting new laws”) (internal quotations omitted); *see also* Decl. Ruling at 20-21 (citing *AH NC Owner LLC v. N.C. Dep’t of Health & Hum. Servs.*, 240 N.C. App. 92, 110, 771 S.E.2d 537, 548 (2015); *N.C. Dep’t of Revenue v. Hudson*, 196 N.C. App. 765, 767, 675 S.E.2d 709, 711 (2009)).

Nor would the signature matching requested by Petitioners even make sense given the way the North Carolina legislature has designed the state’s absentee ballot system. As explained above, nearly a third of North Carolina voters requesting an absentee ballot for the 2020 general election did so online or by relying upon a relative or guardian’s signature. Petitioners fail to reconcile North Carolina’s *express* provision of these methods of requesting an absentee ballot with their view that county boards may or must engage in signature matching. There is therefore nothing “contradictory” (Pet. ¶ 38) about directing county boards to accept signatures if they appear to be made by the voter, their near relative, or legal guardian, but not to engage in signature matching—it is just what the law commands.

Petitioners’ suggestion that the ruling somehow contradicts the Board’s numbered memos is similarly unavailing. *See, e.g. id.* ¶¶ 18, 26. The Board’s guidance that county boards “shall review” container-return envelopes for deficiencies does not imply that county boards should engage in signature matching, only that they should identify errors or omissions relating to statutory requirements. For example, Numbered Memo 2021-03 enumerates the various deficiencies it instructs county boards to review, including a lack of signatures or incorrectly located signatures, but says nothing about signature matching. N.M. 2021-03 at 2-3.

The Board correctly noted Petitioners’ misplaced reliance on “statutes that purportedly *imply*” authority to condition ballot approval on signature matching. Decl. Ruling at 22. But the Petition goes even further, resorting to *serial misstatements* of North Carolina statutory text.

Petitioners claim that under N.C.G.S. § 163-234(11) county boards “have a duty to determine whether absentee container-return envelopes . . . have been ‘signed personally by the voter.’” Pet. ¶ 28 (emphasis added); *see also id.* ¶ 19 (“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).”) (quotation marks and emphasis in the original). But *no section* of the state’s election law—never mind the one twice quoted by the Petitioners—contains the quoted language or imposes that requirement. Petitioners simply pull that supposed “duty” “required by the General Assembly” out of thin air. Similarly, Petitioners claim absentee voters “must personally sign the container-return envelope and return it to the county board of elections.” *Id.* (citing N.C.G.S. § 163-231) (emphasis added). Not true. The law allows “the voter [to] request[] assistance” and expressly provides that absentee ballots may be transmitted to county boards “by the voter’s near relative or verifiable legal guardian.” N.C.G.S. § 163-231(b)(1).

Despite their purported deference to the General Assembly’s lawmaking powers, *see, e.g.*, Pet. ¶ 20 (quoting U.S. Const. art. I, § 4, cl. 1), Petitioners blatantly rewrite the state’s election laws in an effort to obtain their desired outcome. But the Board got it right on this point, and this Court therefore has no grounds under the NCAPA to disturb the Board’s declaratory ruling on the merits. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Examiners*, No. 16 CVS 9539, 2017 WL 3298548, at *10-14 (N.C. Super. Aug. 2, 2017) (unpublished), *aff’d*, 371 N.C. 697, 821 S.E.2d 376 (2018) (affirming declaratory ruling on the basis that the agency had properly construed the relevant statutes and noting that the petitioner had taken “glaring liberties with the cited regulation”).

B. The Board acted within its statutory authority.

In concluding that North Carolina law does not permit signature matching, the Board acted entirely within the scope of its “authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable” and to “advise” county boards “as to the proper methods of conducting . . . elections.” N.C.G.S. §§ 163-22(a), 163-22(c). The Board’s prior guidance and ruling simply advise county boards as to proper and improper methods of issuing and reviewing absentee ballots in accordance with the state’s election laws.

Moreover, the declaratory ruling comes as a result of Petitioners’ request that the Board “clarify the guidance sent to county boards.” Pet. ¶ 11. Assuming Petitioners were even entitled to a ruling as “persons aggrieved,” there was nothing procedurally improper about the Board’s “adjudicati[on] of the issues.” *Id.* ¶¶ 18, 26. Petitioners do not allege the Board failed to consider any specified pieces of evidence or “noticed facts” that “on timely request” Petitioners “request[ed]” to dispute, *see* N.C.G.S. § 150B-30. And Petitioners’ “failure to identify how the Board acted arbitrarily or capriciously . . . compels [this Court] to hold that the petition falls short of the specificity required by N.C. Gen. Stat. § 150B-46” *McCarter v. N.C. Bd. of Licensed Pro. Couns.*, 2021-NCCOA-467, ¶ 22, 861 S.E.2d 771 (Table), 2021 WL 4059785, *4 (N.C. App. 2021) (unpublished) (citing *Gray v. Orange Cty. Health Dep’t*, 119 N.C. App. 62, 72, 457 S.E.2d 892, 899 (1995)). Now that Petitioners are displeased with the clarity the ruling provided, they argue that the Board “usurped [its] statutory authority.” *Id.* at 6.

That argument fails because, as explained, the Board has correctly interpreted the laws enacted by the General Assembly regarding absentee ballots. It is in fact Petitioners who essentially ask the Board to “creat[e] a law that does not exist” by requiring county boards to conduct signature matching. *See* Pet. ¶ 23. Petitioners’ “independent state legislature” argument

has it backwards. *See id.* ¶ 25. Subject to federal and state constitutional limitations, the General Assembly is free to pass a signature matching statute like other states, but it has not done so. *See* Decl. Ruling at 18-20. Had the Board endorsed signature matching, it would have “deprive[d] [the General Assembly] of their lawmaking powers.” *See id.* Indeed, “[t]o 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.” *Id.* Clearly if the Board “cannot make law,” *id.* ¶ 21, neither can Petitioners force them to do so. This Court should dismiss Petitioners’ last-ditch effort to circumvent the authority of the legislature and the Board for failure to state a claim.

III. The Court should avoid modifying North Carolina’s rules regarding absentee ballots while voters are currently requesting absentee ballots.

The equities strongly weigh against granting the relief requested, particularly at this point in the election cycle. Should this Court vacate the Board’s declaratory ruling, voters will lack clear guidance on how to properly execute their absentee ballot request forms, the ballot itself, and the absentee container-return envelope in such a way that their ballot is accepted and counted. County election officials likewise need to know whether they are required to match signatures, as Petitioners apparently urge, or prohibited from doing so under state law, as the Board correctly determined.

Voters are already able to request absentee ballots for the forthcoming November election, and thus are already completing application forms in reliance on the Board’s current interpretation of the law. *See* N.C. State Bd. of Elections, *FAQ: Voting By Mail*, <https://www.ncsbe.gov/voting/vote-mail/faq-voting-mail#when-can-i-request-my-ballot-for-the-2022-general-election> (last visited Aug. 25, 2022) (explaining that voters are presently able to request absentee ballots for the November 2022 election). Changing the laws now will only further

complicate the process for those who have already requested, or soon will, an absentee ballot, and will confuse those who will request and complete absentee ballots later. Such a significant shift in the state's absentee ballot framework will facilitate voter confusion and disincentive to participate in the election. See Melissa R. Michelson, et al., *The Effect of Prepaid Postage on Turnout: A Cautionary Tale for Election Administrators*, 11 ELECTION L.J. 279 (2012) (explaining throughout that unexpected changes to voting laws can increase voter confusion and reduce voter turnout when voters, who are used to voting in a specific way, are confronted with unfamiliar rules and requirements).

Moreover, if implemented, the signature matching regime Petitioners demand would harm North Carolina voters, including the Alliance's members. As the Alliance explained in its public comment to the Board, signature matching is unreliable when performed by untrained election officials, particularly when they use a single handwriting sample. See Alliance Public Comment at 5-6. Experts prefer to review "at least 20 past signature examples" when verifying a handwriting sample, *id.* at 5, but North Carolina officials would only have one example of a voter's signature available to them. Decl. Ruling at 14-15. The requirement disparately impacts "people who are elderly, disabled, or who speak English as a second language" as these groups are more likely to have unintentional variations in their signatures that will lead to their disenfranchisement. See *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 206 (D.N.H. 2018); see also *Frederick v. Lawson*, 481 F. Supp. 3d 774, 785-86 (S.D. Ind. 2020) (explaining that election officials are rarely trained to "properly account for signature variability" attributable to "age, health, native language, and writing conditions," meaning they are likely to make "erroneous authenticity determinations, which are particularly pronounced in populations with greater variability, such as elderly, disabled, ill, and non-native English signatories"); *Lewis v. Hughs*, 475 F. Supp. 3d 597, 604 (W.D. Tex.

2020)⁸ (explaining that “elderly and disabled voters are more likely to have varying signatures” and concluding Texas’s signature matching requirement “discriminates on the basis of age and disability”), *rev’d on other grounds, Lewis v. Scott*, 28 F.4th 659 (5th Cir. 2022). Rushing to implement a system that, at the best of times, leads to widespread voter disenfranchisement, particularly of select groups of voters, will only add to voter confusion and further incentivize voters to remain away from voting altogether.

This Court should bear these consequences in mind when reviewing the Petition and considering any relief requested therein.

CONCLUSION

For the reasons above, the Court should dismiss the Petition under Rule 12(b)(1) because Petitioners lack standing under the NCAPA to seek judicial review, or in the alternative, dismiss the Petition under Rule 12(b)(6) because Petitioners have not plausibly alleged a violation of the NCAPA.

⁸ The Texas Alliance for Retired Americans (“TARA”), one of the Alliance’s affiliates, was a plaintiff in this action.

Dated: August 26, 2022

Respectfully submitted,

By: 

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 22-CVS-10520

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the MOTION TO DISMISS in the above captioned matter (filed August 26, 2022) on counsel for Petitioners and the North Carolina State Board of Elections by mail at:

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RESPECTFULLY SUBMITTED, the 26th day of August, 2022.



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WAKE COUNTY, N.C.
BY _____

EXHIBIT A

RETRIEVED FROM DEMOCRACYPOCKET.COM

July 5, 2022

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RE: Public Comment on behalf of the North Carolina Alliance for Retired Americans on May 14, 2022 Request by the North Carolina Republican Party

Dear Chair Circosta, Executive Director Brunson, and Members of the Board:

We write to encourage the North Carolina State Board of Elections (“NCSBE”) to issue a declaratory ruling reaffirming its prior opinions correctly interpreting North Carolina’s election laws to not require the flawed and burdensome practice of signature matching by county boards of election. The request (the “Request”) by the North Carolina Republican Party, James H. Baker, and Jerry Alan Branson (collectively, the “Requesters”) to impose such a requirement is contrary to North Carolina law and should be rejected.

First, Requesters do not identify a single provision in North Carolina law that requires county boards of election to match the voter’s signature against the voter’s signature on file when reviewing an absentee ballot request form or an absentee container return-envelope. This is because no such provision exists. Instead, the legislature has chosen other methods to confirm identification of voters, including verifying personal voter identification information on the request form and requiring multiple witnesses or a notary to certify an absentee ballot.

In a 2020 case upholding the witness requirement, a federal court credited testimony from the Board’s executive director that the witness requirement served the same purpose as signature matching: “ensuring the person submitting the ballot was actually the person whose name was on the ballot.”¹ County boards, therefore, may carry out their lawful duties to ensure the container-

¹ *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 206 (M.D.N.C. 2020), reconsideration denied, No. 1:20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020).

return envelopes are properly executed and that ballots are tabulated correctly simply by enforcing these existing provisions of law, and referring suspected cases of fraud to the relevant prosecuting authorities. State law already provides strict criminal penalties for any instance in which a person would attempt to fraudulently sign the name of a qualified voter.²

Second, the Request is inconsistent with several other provisions of North Carolina law. The law permits third parties (near relatives and legal guardians) to sign absentee ballot request forms on behalf of voters. And voters unable to complete their own ballot and sign the certification may have an assistant do so on their behalf. There is no way to “match” signatures when voters use these authorized methods to request and complete absentee ballots. The Requesters’ system, therefore, would result in inconsistent treatment of voters based on how they requested ballots and whether assistance was utilized for completing a ballot.

Third, signature matching by election workers is a fundamentally flawed process that leads to the erroneous rejection of legitimate ballots, disenfranchising completely lawful voters.³ It has been described as the “witchcraft” of election procedures—far from identifying fraud (which is vanishingly rare), in states that have allowed it in past election cycles it has led to hundreds of thousands of lawful ballots being discarded, with “[r]ejections disproportionately hit[ting] certain demographic groups, including elderly voters, young voters, and voters of color.”⁴ There is absolutely no justification for any board of election to institute this unauthorized and arguably unconstitutional practice, absent any statutory requirement to do so.

This Comment separately addresses Requesters’ arguments regarding signature matching for absentee request forms and absentee ballots and then proceeds to discuss how signature matching is a fundamentally flawed verification process.

Signature Verification on Absentee Request Form

Numbered Memo (N.M.) 2020-15 determined for absentee request forms that “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.”⁵

The Request claims county board of elections members “have a duty to ensure only voters who have lawfully submitted absentee ballot requests are sent absentee ballots.”⁶ The Request goes on to claim that a board member is “neglecting his or her duties” if they do not “fully verif[y]” the

² N.C. Gen. Stat. § 163-237(d) (“Any person attempting to aid and abet fraud in connection with any absentee vote cast or to be cast, under the provisions of this Article, shall be guilty of a misdemeanor. Attempting to vote by fraudulently signing the name of a regularly qualified voter is a Class G felony”).

³ See, e.g., *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018) (describing signature matching as inherently “a questionable practice” that “may lead to unconstitutional disenfranchisement”).

⁴ Graham, David, *Signed, Sealed, Delivered—Then Discarded*, THE ATLANTIC (Oct. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/signature-matching-is-the-phrenology-of-elections/616790/>.

⁵ N.C. St. Bd. of Elections, Numbered Memo 2020-15.

⁶ Request at 3.

voter's signature.⁷ However, Requesters' "full verification" standard appears nowhere in the law,⁸ and Requesters do not provide any authority for their (apparently unilateral) determination that only signature matching can fulfil the board of elections' duty to ensure only qualified voters who have submitted an absentee ballot request receive an absentee ballot.

North Carolina law establishes extensive ballot request procedures to protect the integrity of its elections and the county boards have a duty to follow such procedures:

- Each absentee request form must include one of the following: (1) the voter's North Carolina driver's license or nonoperator I.D. number; or (2) the last four digits of the voter's social security number.⁹
- The request form requires the signature of the voter, the voter's near relative, or the voter's verifiable legal guardian.¹⁰
- To ensure that duplicate ballots are not issued, information on the request form is recorded by each county into the official state register, including the name of the voter for whom the application and ballots are being requested and, if applicable, the name and address of the voter's near relative or legal guardian requesting the ballot.¹¹
- Upon receiving a completed request form for absentee ballots, the county board must confirm that the voter is registered to vote in the county where the request form was submitted.¹² Only if that voter is confirmed as a registered voter of the county will the absentee ballots and certification form be provided to the voter.¹³
- To track all ballots issued and returned, the board of elections must barcode or handwrite the voter's unique absentee ballot number, which is assigned to each voter, when transmitting the ballot and container-return envelope.¹⁴

As the NCSBE explained in N.M. 2020-15, a duty to verify voter signatures through signature matching would be inconsistent with North Carolina law. A voter is not required to personally request an absentee ballot but may ask a near relative or legal guardian to submit the request on their behalf. No voter signature is required on an absentee request form when the request is submitted by a near relative or legal guardian.¹⁵ Because North Carolina law specifically provides for circumstances in which another person other than the voter signs and submits an absentee request form, it is not plausible that a county board's duty to ensure that only lawful ballots are issued creates a duty to match voters' signatures on returned absentee request forms.

⁷ *Id.*

⁸ The Request cites N.C. Gen. Stat. § 163-236 for authority, though that statute's relevance is unclear. The statute, which Requesters quote at length, simply provides that county boards must deliver applications for absentee ballots to those whose requests have been received by the county board in accordance with the law. N.C. Gen. Stat. § 163-236. The statute also states that the county board has a duty to keep records and make reports as required by law. *Id.*

⁹ *Id.* § 163-230.2(a)(4).

¹⁰ *Id.* § 163-230.2(a)(6).

¹¹ *Id.* § 163-228(a)(1).

¹² *Id.* § 163-230.2(d).

¹³ *Id.*

¹⁴ *Id.* § 163-230.1(c)(1).

¹⁵ *Id.* § 163-230.1(a).

Requesters' definition of "full verification" is also inconsistent with Section 163-230.3, which permits a voter to submit a request for an absentee ballot online through the state portal.¹⁶ The voter, a near relative or legal guardian must include an "electronic signature."¹⁷ The North Carolina legislature broadly defines "electronic signature" as 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."¹⁸ Requesters fail to provide any rationale for why the legislature would authorize an online portal where a symbol could constitute a signature if the county board of elections had a "duty" to match a voter's signature with the voter file.

Signature Verification on Absentee Container-Envelopes

N.M. 2021-03 determined "[v]erification 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."¹⁹

The Requesters outline general county board requirements such as determining whether absentee ballots have been properly executed, counted and tabulated correctly.²⁰ The Requesters conclude that because of these general requirements, it is the "duty" of the boards to "exhaust all available resources to confirm that the signature provided on an absentee container-return envelope is that of the purported voter."²¹ There is simply no basis for this conclusion and no explanation for why signature matching is the necessary solution.

As the Requestors themselves describe, North Carolina law provides detailed verification procedures throughout the process of requesting, completing, and returning an absentee ballot. And criminal penalties exist for fraudulent violations of those procedures.²² North Carolina law requires two witnesses or a notary public to witness and certify the voter casting an absentee ballot.²³

The law provides that, in the presence of two persons who are at least 18 years of age (or a notary public), the voter or someone assisting the voter marks the ballot.²⁴ If two witnesses are utilized, they must sign the application and certificate as witnesses and indicate their addresses.²⁵ The two witnesses are specifically certifying "***that the voter is the registered voter submitting the marked ballots.***"²⁶ Alternatively, a notary public may witness the voter marking their ballot and affix a valid notarial seal to the envelope, and include the word "Notary Public" below their

¹⁶ *Id.* § 163-230.3.

¹⁷ *Id.* § 163-230.3(b)(2).

¹⁸ *Id.* § 66-312(9).

¹⁹ N.C. St. Bd. of Elections, Numbered Memo 2021-03.

²⁰ Request at 4-5.

²¹ *Id.* at 4

²² See N.C. Gen. Stat. § 163-237.

²³ *Id.* § 163-231(a)

²⁴ *Id.* § 163-231(a).

²⁵ *Id.* § 163-231(a)(5).

²⁶ *Id.* § 163-231(a)(6)(b) (emphasis added).

signature.²⁷ This is the verification process that the North Carolina legislature has chosen to ensure the correct identify of the voter.

In 2020, a federal court upheld the witness requirement on the grounds that the requirement “plays a key role in preventing voter fraud and maintaining the integrity of elections, much like an in-person voter is required to state their name and address upon presenting themselves at an in-person polling place; *the act of identification, as witnessed by the poll worker, acts as the same deterrent from committing fraud.*”²⁸ The court credited testimony from the Board’s executive director, who testified that the witness requirement served the same purpose – “ensuring the person submitting the ballot was actually the person whose name was on the ballot” – as signature matching technology.²⁹

Requesters also repeatedly claim the absentee container-return envelope *must* be signed “personally” by the voter.³⁰ However, Requesters ignore the law’s clear allowance for a voter to have another person mark and sign the ballot when assistance is required.³¹ Similar to the NCSBE’s reasoning in N.M 2020-15 in the context of completing absentee request forms, here, any signature matching requirement would arbitrarily result in the different treatment of ballots from voters who require assistance and voters who do not.

Signature Matching is a Fundamentally Flawed Practice That Leads to Erroneous Rejections

A North Carolina forensic document examiner, Emily Will, stated in 2020 that she was “troubled” by comparing ballot signatures to just one or even a few samples, explaining her preference of “at least 20 past signature examples” when performing a verification.³² Ms. Will’s concerns are well founded: states that impose both a witness requirement *and* a signature-matching requirement have among the highest rates of absentee ballot rejection in the country.³³ And courts that have invalidated signature matching regimes in other states have relied upon

²⁷ *Id.* § 163-231(6)(a).

²⁸ *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 206 (M.D.N.C. 2020), reconsideration denied, No. 1:20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020) (emphasis added).

²⁹ *Id.*

³⁰ Request at 4.

³¹ Requesters cites Section 163-231(d) which states “The application shall be completed and signed by the voter personally, the ballots marked, the ballots sealed in the container-return envelope, and the certificate completed as provided in G.S. 163-231.” N.C. Gen. Stat. § 163-231(d) (emphasis added). Section 163-231(a)(1) permits a voter’s assistant to complete and sign the envelope on the voter’s behalf. *Id.* § 163-231(a)(1). Section 163-261 states a voter shall “[m]ark the voter’s ballots, or cause them to be marked by that person in the voter’s presence according to the voter’s instruction.” *Id.* § 163-231(a)(1) (emphasis added). A container return envelope must provide for “[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.” *Id.* § 163-229(b)(4) (emphasis added); *see also id.* § 163-226.3(a).

³² Lau, Maya, Nelson, Laura, ‘Ripe for error’: Ballot signature verification is flawed — and a big factor in the election, L.A. TIMES (Oct. 28, 2020), <https://www.latimes.com/california/story/2020-10-28/2020-election-voter-signature-verification>.

³³ Declan Chin, “A Deep Dive into Absentee Ballot Rejection in the 2020 General Election,” Elections Performance Index (Dec. 16, 2021) <https://elections-blog.mit.edu/articles/deep-dive-absentee-ballot-rejection-2020-general-election>.

expert testimony that has come to the same conclusion, emphasizing the difficulties in matching signatures accurately, even for those with extensive expertise and training.

In finding New Hampshire's signature matching requirement "fundamentally flawed," a federal district court explained: "A person's signature . . . may vary for a variety of reasons, both intentional and unintentional. Unintentional factors include age, physical and mental condition, disability, medication, stress, accidents, and inherent differences in a person's neuromuscular coordination and stance. Variations are more prevalent in people who are elderly, disabled, or who speak English as a second language. For the most part, signature variations are of little consequence in a person's life."³⁴

Individual county boards improvising ad hoc verification procedures would create a significant risk of error and uncertainty in the review of request forms and ballots, particularly for the elderly, the disabled, and voters who primarily write in a different language. This would constitute a denial of equal protection to voters improperly deprived of the ability to vote an absentee ballot and have their vote counted, which further weighs against grafting such a provision on to state law.

Conclusion

Requesters assert that the NCSBE's determination not to permit signature verification constitutes unlawful guidance that prevents county boards from fulfilling their duties. But Requesters fail to provide any support for the claim that the duties of the county boards extend beyond the extensive verification procedures already spelled out in state law and regulation, which do not include signature matching. We respectfully urge NCSBE to issue a declaratory ruling consistent with the determinations in Numbered Memos 2020-15 and 2021-03, and to prohibit ad hoc signature matching by county boards of election.

Sincerely,

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta

Counsel to the North Carolina Alliance of Retired Americans

³⁴ *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 205 (D.N.H. 2018).