STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2022 SEP 27 P 3:07
WAKE CO. C.S.C.
BY

22CVS10520

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

MOTION FOR PRELIMINARY INJUNCTION

NOW COME Petitioners, the North Carolina Republican Party, James H. Baker, and Jerry "Alan" Branson, by and through undersigned counsel and hereby move the Court to enter a preliminary injunction enjoining the State Board of Elections from enforcing its Declaratory Ruling in a manner to prohibit county Boards of Elections from comparing and verifying signatures on absentee ballot containers in the November 2022 General Election. In support of their motion, petitioners state as follows:

I. PARTIES, FACTS, AND PROCEDURAL HISTORY

The issue before the Court is simple.[1] The North Carolina General Assembly requires county Boards of Elections to verify that an absentee container-return envelope was properly executed, including having been personally signed by the

[1] While petitioners raise other issues in its appeal of the Declaratory Ruling, for the purposes of this motion, petitioners only seek injunctive relief regarding the processing of absentee container-return envelopes.

voter. However, the State Board of Elections has prohibited county Board of Elections members from comparing that signature with the signature contained on the voter's registration form.

Petitioner North Carolina Republican Party (referred to throughout as the "NCGOP") represents the interests of all Republican voters across the state, which as of August 13, 2022, included more than 2.2 million individuals. Petitioner James H. Baker is a Cumberland County Board of Elections Member. As a county board member, Baker has a duty to follow the law as passed by the North Carolina General Assembly. Petitioner Jerry "Alan" Branson is running as the Republican Party nominee for an at-large seat on the Guilford County Board of Commissioners.

Respondent North Carolina State Board of Elections ("State Board") is the agency tasked by law to oversee the elections process in North Carolina, to ensure compliance with North Carolina election law, and to follow North Carolina election law as set out by the North Carolina General Assembly.

On May 14, 2022, petitioners collectively sent a Request for Declaratory Ruling to the State Board. (Admin. R. 16). Petitioners asked the State Board to clarify the guidance sent to county boards. Specifically, the request was that the State Board issue a ruling that clarified the responsibility and manner in which county boards were to determine that an absentee application on a container-return envelope was "personally signed" by that voter. Petitioners' position was that county boards have the authority to verify a voter's signature on their absentee ballot

container-return envelope, by comparing such signature with signatures contained in the voter registration records, before approving their absentee ballot for counting.

On June 9, 2022, the State Board granted the Request for a Declaratory Ruling. (Admin. R. 11). The State Board also authorized the submission of public comments between June 10th and July 5th, 2022, prior to making a ruling. (Admin. R. 19).

On June 30, 2022, the State Board voted 3-2 along party lines against the petitioners. (Admin. R. 67). On July 22, 2022, the State Board issued the written Declaratory Ruling, concluding:

> 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.

(Admin. R. 4).

Petitioners timely filed for judicial review of the State Board's ruling on August 19, 2022. On September 21, 2022, the State Board, by and through its counsel, filed the official record in this case. With the petition having been filed and the record fully before the Court, this matter is ripe for the issuance of a preliminary injunction pending further hearings before this Honorable Court.

II. STANDARD OF REVIEW

a. Standard of Review of Administrative Decisions.

Pursuant to N.C. Gen. Stat. § 150B-51 (2022), the standard of review of a final decision or declaratory ruling by a state agency is subject to two different standards of review. In the event a petitioner is seeking reversal or modification of the declaratory ruling because "the substantial rights of the petitioners may have been 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 . . . ; (3) Made upon unlawful procedure; [or] (4) Affected by other error of law," N.C. Gen. Stat. § 150B-51(b), then "the court shall conduct its review of the final decision using the de novo standard of review." N.C. Gen. Stat. § 150B-51(c). In the event the assigned errors claim that the agency decision was "(5) Unsupported by substantial evidence . . . in view of the entire records as submitted; or (6) Arbitrary, capricious, or an abuse of discretion," N.C. Gen. Stat. § 105B-51(b), then "the court shall conduct its review of the final decision using the whole record standard of review." N.C. Gen. Stat. § 150B-51(c).

b. Standard of Review and Requirements for Injunctive Relief

N.C. Gen. Stat. § 150B-48 (2022) provides that "[a]t any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65."

It is well-settled law that a preliminary injunction should only be issued if (1) the moving party is able to show the likelihood of success on the merits of its case, and (2) the moving party is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of the moving party's rights during the course of litigation. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983) (citing *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)). First, the court must examine the facts of the case and the law at issue to determine whether the underlying case is reasonably likely to succeed on its merits. *Id.* at 402. The court must then consider the injury, or potential injury, and determine whether the moving party is likely to sustain irreparable loss. *Id.* at 404. If the moving party will not suffer irreparable loss, the court should then evaluate whether the issuance of the injunction is necessary by assessing whether the moving party has another adequate remedy at law. *Id.* at 406. If the moving party is likely to suffer irreparable loss or if there is no other adequate remedy at law, the court may issue a preliminary injunction.

III. ARGUMENT

a. Petitioners Have a Likelihood of Success on the Merits.

i. The declaratory ruling was in excess of the State Board's authority and was affected by errors of law. N.C. Gen. Stat. § 150B-51(b)(3) and (b)(4).

In its Declaratory Ruling, the State Board explained:

> 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.

(Admin. R. 67). This decision by the State Board was in conformance with its prior guidance as found most recently in Numbered Memo 2021-03, which was quoted in the declaratory ruling: "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." (Admin R. 68). The State Board erred in prohibiting signature matching simply because it did not believe that it was required by law. According to the State Board's reasoning, anything that is not expressly permitted, must therefore be prohibited. This is faulty reasoning at best. The statutory scheme surrounding absentee ballot approval and the examination of absentee ballot container-return envelopes does not prohibit signature matching, but requires county boards to ensure the container-return was "personally signed" by the voter.

N.C. Gen. Stat. § 163-230.1 provides county boards with guidance and the legal requirements for the approval of absentee ballots.

> (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.

N.C. Gen. Stat. § 163-230.1(e) (2022) (emphasis added). The State Board quoted this subsection in full, and added emphasis exactly as shown above. (Admin R. 78). What the State Board did not quote in full was the subsection immediately above subsection (e): "(d) Voter to Complete. – 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. § 163-230.1(d) (2022) (emphasis added). Reading these two subsections *in pari materia* demonstrates that a determination of whether the "container-return envelope has been properly executed" necessarily includes a determination that the application was "signed by the voter personally." Rather than prohibiting a county board from matching signatures, N.C. Gen. Stat. § 163-230.1 permits a county board to use all information at its disposal to verify a signature and ensure the integrity of the absentee ballot process.

When general principles of statutory construction are followed, it becomes clear that the law does not prohibit signature matching in the approval of absentee ballot container-returns:

> "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 (2021) (alterations in original). Further, "[s]tatutes *in pari materia* should be construed together and harmonized whenever possible . . . *In pari [materia* is] defined as upon the same matter or subject." *In re Borden*, 216 N.C. App. 579, 581, 718 S.E.2d 683, 685 (2011)); *see also State v. Mayo*, 256 N.C. App. 298, 301, 807 S.E.2d 654, 657 (2017). "Portions of the same statute dealing with the same subject matter are 'to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment . . . .'" *Huntington Props., LLC v. Currituck Cty.*, 153 N.C. App. 218, 224, 569 S.E.2d 695, 700 (2002) (quoting *In re Hickerson*, 235 N.C. 716, 721, 71 S.E.2d 129, 132 (1952)).

The State Board asserted in its declaratory ruling that the provision of N.C. Gen. Stat. § 163-230.1(e) requiring the county board to "determine whether the container-return envelope has been properly executed" is a reference to N.C. Gen. Stat. § 163-234(11), rather than a reference to N.C. Gen. Stat. § 163-230.1(d), which is the subsection immediately preceding the subsection at issue. Subsection (d) requires, among other things that the application be "signed by the voter personally." It further references N.C. Gen. Stat. § 163-231, which requires that the voter shall "[m]ake 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)." N.C. Gen. Stat. § 163-231(a)(4). N.C. Gen. Stat. § 163-229(b)(2) requires "the *voter's* signature." (emphasis added).

The State Board's ruling is that if there is a signature on the line, and there are two witness signatures on the line, then the application must be approved. It does not matter if there appears to be any discrepancy, as long as those three signatures appear on the container-return, then it must be approved. This interpretation is a far cry from the language of N.C. Gen. Stat. § 163-230.1(e) that requires that the county board approve only those envelopes that have "been properly executed," *e.g.* in compliance with N.C. Gen. Stat. § 163-230.1(d), which requires that the application was "signed by the voter personally." Rather than construing subsection (e) *in pari materia* with subsection (d), the State Board completely ignores subsection (d) and prohibits county boards from exercising their discretion in whether to verify a signature with a known exemplar. To be sure, we are not asking county board members to become experts in handwriting and signature analysis. We are asking them to use every tool at their disposal to comply with the provisions of the law.[2] The State Board's theory is a novel one indeed—that everything not prescribed by law is necessarily prohibited by law. Such an interpretation is contrary to reason and contrary to the very foundation of a free society.

[2] See Admin. R. 39, Page 463-65 of link "Comments Submitted by Email" for a letter submitted as a public comment from county board members discussing prior practice of signature matching.

There is no need to resort to the laws of other states, as the State Board did in its declaratory ruling. (Admin R. 84-85). There is also no need to interpret the statute in light of other articles of Chapter 163 as the State Board did in its declaratory ruling. (Admin R. 86). The answer to this question is in N.C. Gen. Stat. § 163-230.1, and N.C. Gen. Stat. § 160-230.1 does not prohibit signature matching.

Each American—each North Carolinian—has the right to have their vote counted, and counted on equal terms. *See Harper v. Hall*, 2022-NCSC-17, ¶ 146, 380 N.C. 317, 378, 868 S.E.2d 499, 543, *cert. granted sub nom. Moore v. Harper*, __ U.S. ___, 142 S. Ct. 2901 (2022). Every vote that is cast in North Carolina is diluted when illegal or fraudulent votes are cast. In the event an absentee ballot container-return is forged, and the witness signatures are forged, there is a very real possibility that the true voter's vote will not be counted. For every person that votes more than once, it dilutes the voting power of every other voter. The State Board's declaratory ruling makes fraudulent voting by absentee ballots easier. Appropriate and legal signature matching would make it more difficult.

The State Board's declaratory ruling was in excess of its statutory authority. It created a prohibition that does not exist in law. It further suffered from an error of law by failing to properly interpret N.C. Gen. Stat. § 163-230.1(e) *in pari materia* with N.C. Gen. Stat. § 163-230.1(d). Petitioners are likely to prevail on the merits and demonstrate that the State Board exceeded its authority and made its ruling based upon an error of law.

ii. The declaratory ruling was arbitrary, capricious, and an abuse of discretion. N.C. Gen. Stat. § 150B-51(b)(6).

A review of the State Board's declaratory ruling demonstrates that its decision was arbitrary, capricious, and an abuse of discretion. It does not reflect an interpretation of the law, but rather reflects the policy preferences of three of the five members of the State Board. While more evidence of this exists in the declaratory ruling; three examples are highlighted below.

First, the State Board criticizes the request for a declaratory ruling for not setting forth possible circumstances that would trigger signature matching. The State Board wrote:

> 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.

(Admin. R. 70). It is not surprising that the request did not make suggestions as to when signature matching would be required. It is not the role of petitioners to decide how a county board complies with its duty to "determine whether the container-return envelope has been properly executed." N.C. Gen. Stat. § 163-230.1. Such a decision should be made by the county boards, as they are the ones tasked to make the determination. The State Board's criticism of the request, shows that, while the State Board purported to make its decision based upon the pure letter of the law, it simply desired to avoid the issue entirely to avoid administrative hurdles

to the proper implementation of the law and to enshrine the policy preference of three members that signature matching is not required.

Second, the State Board's declaratory ruling states:

> 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.

(Admin. R. 79). There is no reason for this rationale to be in the State Board's declaratory ruling if it is simply a matter of the interpretation of state law. It does not matter if there were 10,000,000 absentee ballots or 10 absentee ballots. The law is what the law is. The inclusion of this rationale further shows that the three members of the State Board were not overly concerned with the law, but were concerned about what the implications of permitting signature matching may be. The State Board couches its decision as a valiant effort to interpret statutory law, but the extraneous inclusion of rationale like the one above demonstrate that this was a political and policy decision, rather than a legal decision.

Finally, the State Board was concerned with the "difficulty for the administration of signature matching," (Admin. R. 80), and that verifying whether a container-return was "properly executed" by allowing a county board to review a known exemplar would "fashion new hurdles to the effective exercise" of the right to

vote. (Admin. R. 87). This makes it clear that the question presented to the State Board—what does the law allow or require—was not foremost in the minds of the three members voting in favor of the declaratory ruling, but rather how it might impact certain groups of voters. This is further clear when the State Board, in supposedly interpreting a statute, references "[t]he public comments received by the State Board regarding the Request for Declaratory Ruling, especially those from elderly and disabled voters (and their advocates) . . . ." (Admin. R. 86 fn. 5).

The State Board's decision was not based in law, but was based upon the arbitrary policy preferences of three of its five members. Accordingly, petitioners are likely to prevail on the merits and demonstrate the State Board's declaratory ruling was arbitrary, capricious, and an abuse of discretion.

b. Without injunctive relief, the petitioners will suffer irreparable loss.

In determining whether injunctive relief is proper, the Court must determine whether "[the moving party] is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [the moving party's] rights during the course of litigation." *A.E.P. Indus., Inc.*, 308 N.C. at 401. In this case, injunctive relief is appropriate, as petitioners will sustain irreparable loss unless injunctive relief issues from this Court.

Petitioner 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.

Petitioner James Baker, as a member of the Cumberland County Board of Elections has a duty to follow the law enacted by the North Carolina General Assembly. 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. Gen. Stat. §§ 163-104 & 163-274(a)(11). Further, Petitioner Baker has an obligation to uphold his oath of office as a county board member.

Petitioner Jerry "Alan" 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.

Pursuant to N.C. Gen. Stat. § 163-230.1(f), county boards will begin the approval process of absentee ballot container-return envelopes on October 4, 2022. Given the enormous consequences of this election (as with all elections among free

people), it is vital that a preliminary injunction be issued directing the State Board to inform county boards that signature matching is a permissible safeguard in determining "whether the container-return envelope has been properly executed." N.C. Gen. Stat. § 163-230.1(e).

In the event injunctive relief is not granted by this Court prior to the October 4th meetings of county boards, irreparable loss will occur to petitioners. Petitioner NCGOP will suffer irreparable loss in the counting of absentee ballots that may be fraudulently cast in a way that damages the candidates supported by the time, talent, and treasure of the Party. Petitioner Baker will suffer irreparable loss in the processing of absentee ballots in a manner that may subject him to penalty. Petitioner Branson will suffer irreparable loss in the counting of absentee ballots potentially cast in a fraudulent manner to deprive him of victory in a closely contested election.[3] Absent the rarest of circumstances, there is no "do over" when it comes to elections. Once the ballots are counted, the ballots are counted. "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." N.C. Gen. Stat. § 163-230.1(f). In the event the Court does not find irreparable harm will occur, it would still be appropriate to issue injunctive relief, as without injunctive relief it will be impossible for the Court to craft an adequate remedy to cure the absentee ballots that have already been counted without the county boards making a full determination that the container-return was signed by

[3] Petitioner Branson is especially familiar with close elections, having been defeated in the 2020 General Election for Guilford County Commission by only 72 votes out of more than 43,000 votes cast.

the voter personally. *See A.E.P. Indus., Inc.*, 308 N.C. at 406. Accordingly, injunctive relief is proper.

IV. CONCLUSION

The State Board's declaratory ruling is based upon an error of law, exceeded the State Board's statutory authority, and was arbitrary, capricious, and an abuse of discretion. Petitioners are likely to succeed on the merits of their appeal, and failure to grant injunctive relief would result in irreparable harm to petitioners. Accordingly, this Court should enter a preliminary injunction prohibiting the State Board from directing county boards to refrain from comparing signatures on absentee ballot container-return envelopes to known signatures of the voters purporting to have signed the container-return envelopes.

PRAYER FOR RELIEF

For the foregoing reasons, the petitioners move that this Honorable Court:

1. Grant a preliminary injunction, pending further hearing and orders of the Court, enjoining the State Board from directing county boards to not conduct signature matching as explained in this motion; and
2. For other such relief the Court finds necessary and proper.

RESPECTFULLY SUBMITTED, this 27th day of September, 2022.

[SIGNATURE ON FOLLOWING PAGE]

ATTORNEYS FOR PETITIONERS
NORTH CAROLINA REPUBLICAN PARTY
JAMES H. BAKER
JERRY ALAN BRANSON

David "Steven" Walker
NC Bar #34270
Walker Kiger, PLLC
100 Professional Ct, Ste 102
Garner, NC 27529
(984) 200-1930 (Phone)
(984) 500-0021 (Fax)
Steven@walkerkiger.com
Philip R. Thomas
NC Bar #53751
100 Professional Ct, Ste 102
Garner, NC 27529
philipthomasnc@gmail.com

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on this day, served the foregoing upon counsel for the State Board of Elections by email, as agreed upon by the parties as follows:

Terrance Steed, tsteed@ncdoj.gov
Mary Carla Babb, mcbabb@ncdoj.gov

This, the 27th day of September, 2022.

David "Steven" Walker
NC Bar #34270
Walker Kiger, PLLC
109 Professional Ct, Ste 102
Garner, NC 27529
(984) 200-1930 (Phone)
(984) 500-0021 (Fax)
Steven@walkerkiger.com