



NORTH CAROLINA

State Board of Elections

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NOTICE OF EMERGENCY STATE BOARD MEETING

The State Board of Elections will hold a public meeting by teleconference on **Sunday, November 20, 2016 at 4:00 p.m.** Interested members of the public may listen to proceedings by dialing (213) 929-4212 (code: 327-427-829) or online at <https://goo.gl/96LSfy>. Materials will post as they become available here: <https://goo.gl/aZUaug>.

AGENDA

Call to order

Statement regarding ethics and conflicts of interest
[G.S. § 138A-15\(e\)](#)

Authorization to request and secure outside counsel, as necessary
[G.S. §§ 114-2.3](#) and [147-17](#)

Executive Director Report

Provisional research with Division of Motor Vehicles
Use of maintenance databases under [G.S. § 163-82.14](#)

Request to assume jurisdiction over certain protests of elections filed with county boards of elections
[G.S. § 163-182.12](#)
[Protests posted here](#)

Adjourn

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November 18, 2016
Via Hand Delivery

A. Grant Whitney, Jr.
Chairman

Kimberly Westbrook Strach
Executive Director

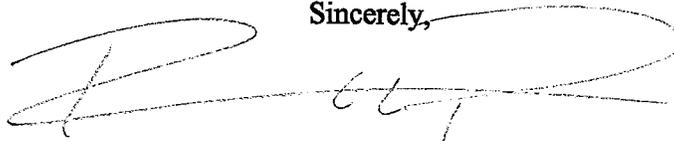
North Carolina State Board of Elections
441 N. Harrington Street
Raleigh, NC 27603

Dear Chairman Whitney and Director Strach:

As you are aware, a number of election protests related to, *inter alia*, absentee ballot fraud, felon voting, double voting, and dead people voting have been filed with various county Boards of Election over the past few days. In addition, it is our understanding that the county Boards of Election have had to conduct substantial additional work researching provisional ballots in light of the Federal Court's decision in *N.C. Conference of NAACP v. N.C. State Board of Elections*, 1:16-CV-1275, 2016 WL 6581284 (M.D.N.C. Nov. 4, 2016). The result of this has been that, as of now, 85 of 100 county Boards of Election have rescheduled their respective county canvasses, with some scheduled to occur as late as November 30, 2016.

Pursuant to N.C. Gen. Stat. § 163-182.12, the North Carolina State Board of Elections has the power to intervene and take jurisdiction over protests pending before county Boards of Election. In light of the delay that is occurring, I hereby request that the State Board of Elections exercise its power to take jurisdiction over all protests currently pending in front of the county Boards of Election so that it may consolidate those protests raising similar issues to prevent inconsistent results among the counties and facilitate a quicker resolution of the issues raised by the protests.

Sincerely,

A handwritten signature in black ink, appearing to read 'Russell Peck', written over a horizontal line.

Russell Peck
Campaign Manager
Pat McCrory Committee

November 20, 2016

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VIA EMAIL TRANSMISSION

A. Grant Whitney, Jr., Chairman
Rhonda K. Amoroso, Secretary
Joshua D. Malcolm, Member
James Baker, Member
Dr. Maja Kricker, Member
Kimberly Westbrook Strach, Executive Director
North Carolina State Board of Elections
441 N. Harrington Street
Raleigh, NC 27603

Re: McCrory Campaign's Request for State Board of Elections to Intervene

Dear Members of the State Board of Elections:

I write on behalf of the gubernatorial campaign of Attorney General Roy Cooper to respectfully request that the State Board of Elections ("SBE") decline to "exercise its power to take jurisdiction over all protests currently pending in front of the county Boards of Election," as proposed by the McCrory campaign. 11/18/16 Letter from R. Peck to Chairman Whitney and Director Strach.

The McCrory campaign has bombarded the counties with protests challenging the eligibility of individual voters. To date, the county boards that have considered these protests have generally rejected them based on a dearth of factual evidence. Now, after multiple defeats in the counties, the McCrory campaign is asking the SBE to bail it out, take over the process, and consolidate *all* of these county protests before the Board. But the campaign's stated justification for the request—that the SBE can "facilitate a quicker resolution of the issues raised by the protests"—is simply incorrect. Requiring the SBE to hold hundreds of hearings to determine the eligibility of individual voters will slow down the process and impose undue burdens on both the SBE and the voters themselves, who would be forced to either travel to Raleigh or forego their statutory right to resist these challenges in person. Moreover, the SBE would be taking on substantial legal risk by acceding to the McCrory campaign's request: any voter whose vote was improperly discarded following a rushed hearing could sue in federal court. The factual determinations necessitated by the McCrory campaign's flailing legal strategy are best left to the county boards.

Nonetheless, the SBE could help facilitate the resolution of this process by issuing guidance on

several discrete legal questions, as explained below.

I. Factual Determinations Regarding Eligibility Should Be Left to County Boards

On November 16, the McCrory campaign announced that protests were being filed in 11 counties “over potentially fraudulent absentee ballots.”¹ On November 17, the McCrory campaign announced that it had organized protests that were being filed in 50 counties across North Carolina.² A *Fayetteville Observer* article indicated that the protests were prepared by Governor McCrory’s legal team and then signed by a resident of the counties in which the protests were filed.³

On November 18, the county boards began considering the requests:

- Following a hearing, the Durham County Board of Elections (“CBE”) unanimously dismissed a protest filed by Republican Party attorney Thomas Stark.⁴ Mr. Stark’s protest had accused the Durham CBE of “engag[ing] in malfeasance with regard to ensuring the accuracy of the tabulation”; described certain election results as “dramatically corrupted”; and maligned the CBE’s conduct as “wholly unreasonable.”⁵
- The Halifax CBE voted unanimously to dismiss a protest alleging absentee ballot fraud.⁶ The board members concluded, correctly, that the conduct alleged in the protest—serving as a witness on multiple voters’ absentee ballots—is perfectly legal. (It is, indeed, common both here and elsewhere in conjunction with get-out-the-vote activities.) The Halifax CBE also rejected a protest alleging that a felon had voted. One member of the Halifax CBE explained to the *News & Observer* that the protest did “not [offer] an ounce of proof or anything that we can go on.”
- The Wake CBE voted to dismiss two protests, including one involving alleged felon voting. Two of the three individuals whom the McCrory Campaign accused of being felons were entirely innocent.⁷
- The Orange CBE unanimously voted to reject a protest alleging that six voters had voted in other states.⁸ In addition to the fact that the protestor failed to appear at the hearing,

¹ <https://www.patmccrory.com/2016/11/16/protests-filed-11-counties-potentially-fraudulent-absentee-ballots/>

² <http://www.charlotteobserver.com/news/politics-government/article115509573.html>.

³ http://www.fayobserver.com/news/local/fayetteville-resident-files-election-protests-with-help-of-mccrory-campaign/article_988deeb3-416a-5f15-b6ec-07a4b1afca97.html.

⁴ <http://www.wral.com/durham-elections-official-no-evidence-vote-count-wrong/16238806/>.

⁵ [https://s3.amazonaws.com/dl.ncsbe.gov/Requests/2016_General_Election_\(post\)/11-11_Protest_Durham.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/Requests/2016_General_Election_(post)/11-11_Protest_Durham.pdf).

⁶ <http://www.newsobserver.com/news/politics-government/election/article115632368.html#storylink=cpy>.

⁷ <http://www.newsobserver.com/news/politics-government/state-politics/article115641378.html>.

⁸ http://www.sanfordherald.com/news/lee_county/mccrory-challenges-count-in-counties-lee-among-those-protested/article_9d1ee058-adde-11e6-b5ce-27170546eb3a.html.

the Orange CBE found that the protest was an untimely challenge under the wrong statute; the documentation presented was insufficient to substantiate the allegations; and the number of ballots at issue was not sufficient to affect the result of any election.

- The Mecklenburg CBE unanimously voted to reject two protests alleging that felons had voted. The Chair concluded, “We had two separate protests. In both cases, we did not find probable cause that there were irregularities in any of the precinct results.”⁹
- The Forsyth CBE rejected a protest alleging that an absentee voter had died.¹⁰ In fact, the voter was both alive and entirely qualified to cast a ballot in the election.
- The Lee CBE found no probable cause and dismissed a protest.¹¹

Significantly, the protests that the CBEs are rejecting have largely failed because they are *factually* unsound. The determinations required to resolve the pending protests—such as whether a ballot was impermissibly cast by a felon or whether an individual voted twice—are, for the most part, pure questions of fact. These decisions are best made at the local level. The CBEs have found that they cannot rely on the factual representations made in the McCrory campaign’s protests and must do their own fact-finding. As was the case in the Durham County protest of Mr. Stark, CBE members may well have been present on Election Day for events that are relevant to the resolution of these protests. In other instances, they may know the voters at issue and whether the voters are felons or deceased.

In addition, distributing responsibility among dozens of CBEs to review a large number of factual allegations makes far more sense than having a single entity—the SBE—make a large volume of highly consequential decisions about voter eligibility. If the SBE were to assert jurisdiction now, it would be required to hear from potentially hundreds of witnesses from dozens of counties. Voters would have to be notified of their right to appear. *See* Memo 2016-26 from Kim Westbrook Strach, Executive Director, to County Boards of Election (Nov. 18, 2016). And rather than making a relatively short drive to their local boards of election, voters from across the state would be forced to haul themselves to Raleigh or forego their statutory right to appear. *See* N.C. Gen. Stat. § 163-89. The SBE, too, would be taking on legal risk: wrongly discarding the votes of eligible voters after rushed hearings could subject the SBE to multiple federal court challenges. The McCrory campaign should not be permitted to overwhelm the SBE in an effort to skirt rigorous scrutiny of those claims on an individual basis, particularly when those claims have proven to be factually unsound to date.

⁹ <http://www.wncn.com/news/politics/elections/mecklenburg-delays-count-of-provisional-ballots/353905283>.

¹⁰ http://www.journalnow.com/news/elections/state/gop-official-alleges-illegal-voting-in-forsyth/article_c4970ef2-935d-5b14-90ff-79df32723663.html.

¹¹ http://www.sanfordherald.com/news/lee_county/mccrory-challenges-count-in-counties-lee-among-those-protested/article_9d1ee058-adde-11e6-b5ce-27170546eb3a.html.

II. The SBE May Provide Legal Guidance Without Exercising Jurisdiction Over the Pending Protests

Although the SBE should decline to take jurisdiction over the pending protests for the reasons set forth above, nothing prevents the SBE from issuing legal guidance to the CBEs at the same time (or thereafter), as it has throughout the canvass process. The Cooper campaign would welcome such guidance and respectfully requests that the SBE make the following points clear in order to streamline the resolution of the pending protests.

First, the SBE should explain that all individualized challenges to absentee voters are untimely and may not be restyled as protests to circumvent the statutory deadline (which passed on 5 p.m. on Tuesday, November 15 for most voters). Under N.C. Gen. Stat. § 163-89, the absentee ballot of a voter may only be challenged under the following circumstances:

- The challenging voter must live in the same precinct as the challenged voter;
- The challenge must occur on the day of the election beginning no earlier than noon and ending no later than 5:00 p.m. (or, for ballots received after that time, no later than 5:00 p.m. on the business day after the deadline for receipt);
- Each challenge shall be made separately;
- The challenge shall be made on SBE forms; and
- The voters whose ballots have been challenged may, either personally or through an authorized representative, appear before the board and present evidence.

Challenges to the eligibility of individual voters through election protests—such as the challenges raised in many of the pending protests—do not comply with these requirements and thus attempt to deny voters the important protections of N.C. Gen. Stat. § 163-89, including sufficient time to gather evidence and appear to argue that their vote should count. The CBEs should be directed to dismiss such protests as frivolous under 8 N.C. Admin. Code § 2.0109.

Second, the SBE should clarify that protests concerning the counting or tabulation of votes may no longer be filed and that the deadline for such protests was the morning of Friday, November 18. N.C. Gen. Stat. § 163-182.9(b)(4) requires that a protest be filed with a CBOE “before the beginning of the [CBOE’s] canvass meeting” if the protest “concerns the manner in which votes were counted or results tabulated.” And CBEs were required by law to meet at 11 a.m. on Friday the 18th of November to canvass the results. *See id.* § 163-182.5(b). While CBOEs are permitted to delay their canvassing of the results until “a reasonable time thereafter” if required, *id.*, the extension of the canvass due to unforeseen results should not affect the time to file a protest. Protests must be filed by the statutory deadline for the beginning of the canvass, and at this point

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it is simply too late to bring new claims to CBEs already under tremendous pressure to complete the canvass. Otherwise, protests could be timed—as they appear to have been here—to delay the canvass by relying on the fact that such protests must be resolved before the canvass is complete. *See id.* § 163-182.9(a)(2). Further, if a CBE has *begun* the canvass, then any protest regarding the counting of votes or the tabulating of results must be dismissed as untimely. *See id.* § 163-182.9(b)(4).

Third, the SBE should make clear that that these protests—taken together—fail on their face because they do not allege conduct sufficient to affect an election. North Carolina law is clear that a protest must be dismissed if “there is not substantial evidence of any violation, irregularity, or misconduct *sufficient to cast doubt on the results of the election.*” *See* N.C. Gen. Stat. § 163-182.10(d)(2)c (emphasis added). The margin in the gubernatorial election is several *thousand* votes. A review of the protests filed by the McCrory campaign suggest that the number of voters being challenged is in the *hundreds*. That is not enough to cast doubt on the results of the election, even if each challenge were upheld (which has not been the case, to date) and each challenged voter supported Attorney General Cooper (which is unlikely). Accordingly, the SBE should make clear that these protests must be dismissed.

CONCLUSION

I will be available and happy to discuss these issues at today’s emergency conference call if that will be helpful to the Board. Thank you for your consideration.

Very truly yours,



Kevin J. Hamilton

Counsel for Attorney General Roy Cooper