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May 20, 2024

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Members of the State Board of Elections
Alan Hirsch, Chair
Jeff Carmon, Secretary
Stacy "Four" Eggers IV
Kevin N. Lewis
Siobhan O'Duffy Millen

Re: Request for Declaratory Ruling under N.C. Gen. Stat. § 150B-4

Conflict Between North Carolina Law Governing Voter ID and Absentee Ballots and Guidance from NCSBE

Dear Executive Director Bell and General Counsel Cox:

Baker Donelson Bearman Caldwell & Berkowitz, PC represents the Republican National Committee (the "RNC"), the National Republican Congressional Committee (the "NRCC"), the North Carolina Republican Party (the "NCGOP"), and Virginia Wasserberg a North Carolina citizen and voter registered to vote in Pasquotank County ("Ms. Wasserberg"), (collectively the "Aggrieved Parties"). This correspondence requests that the North Carolina State Board of Elections ("NCSBE") issue a declaratory ruling, pursuant to N.C. Gen. Stat. § 150B-4, as to the validity of the below-listed administrative rules promulgated by the NCSBE and Numbered Memo issued by Executive Director Bell. In summary, it appears that the NCSBE has promulgated administrative rules and Executive Director Bell has issued guidance regarding the implementation of Voter ID and Absentee Ballot law which

conflict with certain statutes enacted by the North Carolina General Assembly ("General Assembly").

I. The NCSBE's Guidance to County Boards of Election on How to Handle Civilian Absentee Ballots and Absentee Ballot Container-Return Envelopes is Inconsistent with the General Statutes.

As you are aware, the General Assembly has enacted detailed statutes governing the treatment of absentee ballots and absentee ballot container envelopes. *See generally* Chapter 163, Articles 20 and 21. These detailed requirements are necessary given that voting by absentee ballot necessarily implicates security concerns not raised by in-person voting, as the absentee ballot leaves the control of the county boards of election and is sent directly to the voter. Given the additional security concerns raised by voting via absentee ballot, the General Assembly enacted specific requirements governing, for example, who can vote an absentee ballot, the procedures for requesting an application for an absentee ballot, how the ballot is sent to the voter, the steps the voter must take to vote by absentee ballot, how the absentee ballot must be transmitted back to the proper county board of elections, and how county boards of elections are to process and count absentee ballots.

Administrative rules promulgated by the NCSBE and guidance issued by the Executive Director must be in compliance with, and not contrary to, these statutes from the General Assembly. *See* N.C. Gen. Stat. § 163-22(a) ("The State Board shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations with respect to the conduct of such primaries and elections as it may deem advisable *so long as they do not conflict with any provisions of this Chapter*." (Emphasis added). In several places, however, the administrative rules and guidance regarding the treatment of absentee ballots appear to conflict with Chapter 163 of the General Statutes.

A. Unsealed Container-Return Envelopes

Numbered Memo 2021-03 suggests that absentee ballots do not need to be returned to county boards of elections in sealed container-return envelopes as long as the ballots are sealed in the envelopes in which they and the container-return envelopes are returned to the boards of elections. Specifically, the numbered memo states that an absentee ballot should be considered to have been "received in a sealed envelope and . . . therefore not deficient" when:

- the "[b]allot is inside the executed ballot envelope, which is not sealed or which appears to have been opened and re-sealed, but the ballot envelope is received in a sealed return envelope;" or

- the "[b]allot is not inside the ballot envelope or has been placed inside the clear sleeve on the ballot envelope used for including the photo ID documentation, but the return envelope is sealed."

Numbered Memo 2021-03 at 3-4 (emphasis in original).[1] This opinion conflicts with the plain language of North Carolina's absentee-ballot statutes.

North Carolina General Statutes specifically and repeatedly require that absentee ballots be *sealed in container-return envelopes* and returned to county boards of elections *in sealed container-return envelopes*:

- N.C. Gen. Stat. § 163-231(a)(3) requires that, after an absentee voter marks his or her absentee ballots, the voter is required to place the "folded ballots *in the container-return envelope* and securely seal *it* or have this done in the voter's presence." (Emphasis added.)

- N.C. Gen. Stat. § 163-230.1(d) provides that an application for an absentee ballot "shall be completed and signed by the voter personally, the ballots marked, the ballots *sealed in the container-return envelope*, and the certificate [on the sealed container-return envelope] completed as provided in G.S. 163-231." (Emphasis added.)

- N.C. Gen. Stat. § 163-231(a) requires that, "*the sealed container-return envelope*, with ballots enclosed" be delivered to the appropriate county board of elections. (Emphasis added.)

- N.C. Gen. Stat. § 163-231(b) describes in detail how "*[t]he sealed container-return envelope* in which executed absentee ballots have been placed shall be transmitted to the county board of elections who issued those ballots." (Emphasis added.)

On the other hand, no statute permits voters to submit their absentee ballots in an envelope other than the container-return envelope and as shown above, the statutes require that the container-return envelope be sealed.

Not just any envelope meets the General Assembly's standards for a container-return envelope. The General Assembly took great care and went into great detail when describing the requirements that a container-return envelope must satisfy.

[1] The numbered memo uses the term "ballot envelope" when referring to container-return envelopes. Numbered Memo 2021-03 at 1.

Each container-return envelope must have an application printed on it that satisfies several requirements. *See* N.C. Gen. Stat. § 163-229(b). The application on the container-return envelope must contain: (1) a certificate of eligibility to vote for execution by the absentee voter; (2) a space for identification of the envelope with the voter and the voter's signature; (3) a space for the signatures, printed names, and addresses of two witnesses who witnessed the voter casting his or her absentee ballots; (4) a space for the name and address of any person who assisted the absentee voter in casting the ballots; (5) a space for approval by the county board of elections; (6) a space for reporting if the voter's name has changed; (7) a list of certain acts related to absentee voting that are unlawful; (8) an area to attach documents related to the requirement that the voter provide legally acceptable identification of him- or herself; and (9) a bar code or other unique identifier used to track the ballots. *Id.* It is only in an envelope that satisfies these specific criteria that an absentee ballot must be placed, sealed, and submitted to the proper county board of elections.

The container-return envelope has great significance in absentee voting. The absentee voter and two witnesses[2] must confirm that the votes to be counted are those that have been made on the ballots that have been placed into the sealed container-return envelope. *See* N.C. Gen. Stat. § 163-229(b)(1) (requiring that the container-return envelope contain a certificate that the voter has "voted the enclosed ballot"); *id.* § 163-231(a)(4) (requiring the voter to complete the certificate); *id.* § 163-231(a)(5) (requiring witness signatures). If that envelope is left unsealed (or is allowed to be unsealed and then resealed), the confirmation provided by the voter and the witnesses can be rendered meaningless. Someone could simply remove the ballots, tamper with the ballots (including, for example, marking votes in races in which a voter chose not to vote), or replace the ballots, put the altered or new ballots in the container-return envelope, and then submit the container-return envelope and the fraudulent ballots to the county board of elections.

The container-return envelope is somewhat analogous to a traditional ballot box. After a ballot is deposited into the box, it is only reviewed by elections officials, thereby reducing the chance that it will be tampered with between the time it has been marked and the time it is counted. Similarly, once a ballot is sealed in a container-return envelope, it should only be unsealed and then reviewed by duly authorized elections officials. If the container-return envelope is left unsealed, it could be virtually impossible for the county board of elections to detect the fact that the absentee ballots had been removed and tampered with before submission to the board. Furthermore, if the county board is allowed to count ballots in container-

[2] Alternatively, a single notary public, rather than two witnesses who are not notaries public, may witness the voting and sign and affix his or her notarial seal to the envelope. *See* N.C. Gen. Stat. § 163-231(a).

return envelopes that have been unsealed and then resealed, the board might very well be allowing someone who unsealed a container-return envelope, tampered with the ballots, and resealed the envelope to commit fraud. Consequently, there is good reason not to count a ballot in an unsealed container-return envelope or in a container-return envelope that has been unsealed and then re-sealed.

Irrespective of whether it was a good idea to require the submission of absentee ballots in sealed container-return envelopes, the fact remains that the General Assembly specifically enacted statutes expressly requiring that absentee ballots must be submitted in such envelopes. And it is a well-established canon of statutory construction that "a statute may not be interpreted in a manner which would render any of its words superfluous." *State v. Geter*, 383 N.C. 484, 492 (2022) (cleaned up). Thus, "significance and effect should, if possible, . . . be accorded every part of [an] act, including every section, paragraph, sentence or clause, phrase, and word." *Hall v. Simmons*, 329 N.C. 779, 784 (1991) (cleaned up). This is because "[i]t is presumed that the legislature intended that each portion . . . be given full effect and did not intend any provision to be mere surplusage." *Geter*, 383 N.C. at 492 (cleaned up); *see also N.C. Dept. of Correction v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used.").

Statutes governing elections should not be treated differently. Indeed, the North Carolina Supreme Court recently observed that a ruling ignoring a law governing the casting of election ballots would impermissibly "imply that the law has no meaning." *Holmes v. Moore*, 348 N.C. 426, 456 n.10 (2023); *see also id.* ("The right to vote and have a vote counted is dependent upon compliance with established rules and procedures . . . .").

Accordingly, the absentee-ballot statutes should not be interpreted in a manner that effectively ignores the legislature's decision to expressly and repeatedly require that ballots be sealed in container-return envelopes and submitted in those sealed container-return envelopes to county boards of elections. *See State ex rel. Comm'r of Ins. v. Integon Life Ins. Co.,* 28 N.C. App. 7, 11 (1975) ("An administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law.").

Nor should the statutes be interpreted in such a way as to add a provision for a county board of elections to unilaterally cure the failure to seal a container-return envelope. Specifically, the numbered memo suggests that, "[i]mmediately upon opening the return envelope and noticing" that the container-return envelope is not sealed, the county elections "staff should re-seal the return envelope with a notation of 'sealed in return envelope' " and "[t]he county board should open the return

envelope and address that ballot at its next absentee meeting." Numbered Memo 2021-03 at 4. While there are now cure provisions in the absentee-ballot statutes, *see* N.C. Gen. Stat. § 163-230.1(e), no statutes require, permit, or contemplate the numbered memo's re-sealing and re-labeling procedure. And the NCSBE is not free to add another cure provision that the legislature did not see fit to include. *See Integon Life Ins.,* 28 N.C. App. at 11.

B. Submission of Absentee Ballots in the Wrong Container-Return Envelopes

Numbered Memo 2021-03 posits a scenario in which "[t]wo voters' ballots and ballot envelopes . . . [are] switched." Numbered Memo 2021-03 at 9. The memo suggests that, "[i]f the two voters had their absentee ballots sent to the same address and there are no issues with the applications, then the county board should not spoil the ballots, because under those circumstances, each voter has properly attested to voting the ballot enclosed with their application." *Id.* The memo further asserts that, "voters in the same household should not have their ballots rejected for failing to ensure the[] [ballot identifying] numbers match between their ballots and applications." *Id.* The numbered memo suggests that it is not "a requirement for approval of the ballot under state law" that an absentee voter use the absentee ballot and container-return envelope sent to him or her.

The General Assembly has enacted statutes that make clear that county boards of elections are required to send each absentee voter absentee ballots that are linked to a particular container-return envelope. Once a county board of elections receives a proper request for an application to vote absentee and absentee ballots, the board is required to "issue and transmit" those items "in accordance with . . . instructions" plainly spelled out in the statutes. N.C. Gen. Stat. § 163-230.1(c). Those instructions specifically require, among other things, that "the number assigned the applicant's application" be written on each absentee ballot or that the board "cause to be barcoded on the ballot the voter's application number." *Id.* § 163-230.1(c)(1). Then, the instructions require that the board take steps to ensure that the absentee voter's container-return envelope is linked to his or her ballot. Specifically, the board is required to write on the container-return envelope "the absentee voter's name, the absentee voter's application number, and the designation of the precinct in which the voter is registered. If the ballot is barcoded . . . the envelope may be barcoded rather than having the actual number appear." *Id.* § 163-230.1(c)(2). To further ensure that the absentee voter's ballots and his or her container-return envelope stay together, the board is required to "fold and place the ballots" in the container-return envelope onto which the particular absentee voter's information has been printed. *Id.* Next, the board is required to transmit "the unsealed container-return envelope holding the

ballots together with printed instructions for voting and returning the ballots" to the absentee voter. *Id. Id.* § 163-230.1(c)(3).

Thus, the absentee ballot statutes, when read together (as they must be), confirm the legislature's intent that an absentee voter must use the ballots sent to him or her and the corresponding container-return envelope and application. *Morris v. Rodeberg*, 385 N.C. 405, 409 (2023) ("It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia, i.e.,* which relate or are applicable to the same matter or subject, must be construed together in order to ascertain legislative intent." (Cleaned up.)). Quoting the United States Supreme Court, the North Carolina Supreme Court recently observed that, " 'as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Holmes*, 384 N.C. at 434 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

The General Assembly carefully created an orderly process for the submission and tracking of absentee ballots. Allowing an absentee voter to mark someone else's ballot or use someone else's container-return envelope threatens the administration of elections in accordance with the legislature's process. It prevents county boards of elections and voters from accurately tracking ballots in transit and creates uncertainty as to whether absentee ballots received by the county boards of elections were properly marked, submitted, and accepted. Finally, to the extent a county board's unilateral decision to count ballots that are submitted in the wrong container-envelopes may be characterized as a cure, it is not a cure that is authorized by the General Assembly's absentee-ballot cure statute. *See* N.C. Gen. Stat. § 163-230.1(e). Thus, such a cure may not unilaterally be provided by an administrative agency.

The numbered memo suggests that absentee voters residing at the same address "should not have their ballots rejected for failing to ensure the[] [ballot identifying] numbers match between their ballots and applications" partly because—according to the memo—the failure to use the absentee ballots and container-return envelope specifically sent to them is not "material to determining a voter's eligibility to cast the ballot under federal law." Numbered Memo 2021-03 at 9. The numbered memo cites 52 U.S.C. § 10101(a)(2)(B) in an effort to support this assertion, but that statute does not apply to the situation outlined in the memo. *Id.* at 9 n.29.

The federal statute prohibits state actors from denying an individual "the right to . . . vote" in an election because of certain errors or omissions that are not material to determining whether the individual "is qualified under State law to vote." *Id.; see Pennsylvania State Conf. of NAACP Branches v. Sec. of Commonwealth of Pennsylvania*, 97 F.4th 120, 130 (3d Cir. 2024). The statute "is triggered when conduct or laws restrict *who* may vote. But it leaves it to the States to decide *how*

qualified voters must cast a valid ballot." *Id.* at 130 (emphasis in original). Because "a voter who fails to abide by state rules prescribing how to make a vote effective is not denied the right to vote when his ballot is not counted," the statute does not apply to such a situation. *Id.* at 133; *see id.* ("[W]e know of no authority that the 'right to vote' encompasses the right to have a ballot counted that is defective under state law."); *see also Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J. dissenting from denial of application for stay) ("Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right.").

The statutes at issue here do not implicate the right to vote. Instead, they outline the rules for casting a valid absentee ballot. Therefore, the federal statute is not concerned with them and simply does not apply. *See also Holmes*, 384 N.C. at 456 n.10 ("It is undisputed that every legal vote should be counted," but it is "plainly wrong" to suggest that "every provisional ballot should be counted as legal even if not lawfully cast.").

II. The NCSBE's Rule on Implementation of Voter ID Law is Inconsistent with the General Statutes.

In addition to the above-identified issues with the NCSBE's treatment of absentee ballots, the NCSBE has promulgated rules regarding the implementation of North Carolina's Voter ID statute, see *generally* N.C. Gen. Stat. § 163-166.16, that are inconsistent with the statutes enacted by the General Assembly.

The Constitution of North Carolina provides that "Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." N.C. Const. art. VI, sec. 2(4). In furtherance of this constitutional obligation for the state to require photo identification from voters as part of in-person voting, the General Assembly enacted statutes both implementing the photo identification requirement and providing exceptions from it. *See Holmes*, 384 N.C. at 428-31.

8 NCAC § 17 .0101(a)(3) appears to conflict with its authorizing statute. It allows a voter to voluntarily provide "any explanation or documentation" which could help an election official determine whether the name appearing on the photo identification is the same or substantially equivalent to the name contained in the voter's voter registration record. N.C. Gen. Stat. § 163-166.16(b) is the statute that describes the process for "Verification of Photo Identification", and it does not contain a process by which election officials can consider "any explanation or documentation" outside that listed in section 163-166.16. While there are exceptions to the requirement, see section 163-166.16(d), and sworn testimony can be offered if a

challenge ensures, see section 163-88, the statute does not provide for "any explanation or documentation", without limitation, to be used in this process.

III. The RNC, NRCC, NCGOP, and Ms. Wasserberg are "person[s] aggrieved" Under N.C. Gen. Stat. § 150B-4.

In the past, the NCSBE has argued that the RNC and the NCGOP are not "person[s] aggrieved" sufficient to submit a Request for Declaratory Ruling to the NCSBE. The NCSBE has appeared to back down from this position, as it issued its July 17, 2023 Declaratory Ruling in response to the May 5, 2023 Request for Declaratory Ruling from the RNC, NCGOP, and Ms. Barbara Deas. In any event, the RNC and NRCC submit that they are "person[s] aggrieved" under N.C. Gen. Stat. § 150B-4 and entitled to seek a declaratory ruling because the RNC and NRCC assist the NCGOP, its county party chairs, and other volunteers in recruiting and training elections officials and observers, as well as supporting the exercise voters' right to vote and to seek office. The NRCC also assists Republican Congressional candidates in their efforts to seek elected office to Congress. The NCGOP is a "person aggrieved" under N.C. Gen. Stat. § 150B-4 because, as a recognized political party under Article 9 of Chapter 164 of the North Carolina General Statutes, it supports its county parties (who recommend the judges and chief judges for precinct locations), and other volunteers in recruiting and training elections officials and observers, supporting candidates, and educating and assisting voters' exercise of their right to vote. Finally, Ms. Wasserberg is a "person aggrieved" under N.C. Gen. Stat. § 150B-4 because she is a voter in Pasquotank County, North Carolina, votes regularly in North Carolina state and federal elections, and participates in the voting process, including as the Pasquotank County Republican Party Chair (along with the Chair's statutory duties to nominate elections officials to the Pasquotank County Board of Elections).

We appreciate your prompt consideration of these issues. This request is not intended to waive any rights or remedies available to the Aggrieved Parties, and all such rights and remedies are specifically reserved.

Best regards,

John E. Branch III
Thomas G. Hooper