

Burgos, Alexander N

From: Philip Thomas <philip.thomas@ncgop.org>
Sent: Wednesday, August 24, 2022 4:58 PM
To: rrc.comments
Cc: Alyssa Specht - Legal; John Branch; Kevin Cline; Tucker, Tommy; Eggers, Stacy; Circosta, Damon; Anderson, Stella; Carmon, Jeff; Bell, Karen B; Love, Katelyn; Cox, Paul; SVC_SBOE.RuleMaking
Subject: [External] RNC-NCGOP Letter re Temporary Rules filed by the State Board of Elections on August 25, 2022
Attachments: Letter to Rules Review Commission re NCSBE Temporary Rules (8-24-22).pdf

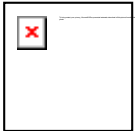
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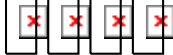
The Republican National Committee and the North Carolina Republican Party submit the attached letter in opposition to the North Carolina State Board of Elections Proposed Temporary Rules. Please let me or Alyssa Specht know if you have any questions.

Best regards,

Philip



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VIA Electronic Mail

August 24, 2022

To: Rules Review Commission

From: Republican National Committee
310 First Street SE
Washington, DC 20003

North Carolina Republican Party
1506 Hillsborough St.
Raleigh, NC 27605

Re: *Temporary Rules filed by the State Board of Elections on August 25, 2022*

Dear Commission Members,

The Republican National Committee (“RNC”) and the North Carolina Republican Party (“NCGOP”) submit this letter concerning Proposed Temporary Rule 08 NCAC 10B.0101 and 08 NCAC 20.0101 (together, the “Proposed Rules”). This letter supplements the public comment submitted by the RNC and NCGOP to the North Carolina State Board of Elections (“State Board”) on August 12, 2022 concerning the Proposed Rules.

While the Proposed Rules that were filed by the State Board differed from the temporary rules that were originally put forth by it, several issues remain with the Proposed Rules.

The State Board Lacks the Authority to Promulgate the Proposed Rules

As an initial matter, the State Board does not appear to have met the statutory prerequisites for avoiding the regular rulemaking process for the Proposed Rules. As the Rules Review Commission (the “Commission”) is aware, N.C. Gen. Stat. § 150B-21.1(a)(11) provides two sets of requirements agencies must meet in order to promulgate temporary rules:

- (1) The agency must find that adherence to the notice and hearing requirements of adopting a permanent rule would be contrary to the public interest; and
- (2) After notice or hearing or upon any abbreviated notice or hearing the State Board finds the need to adopt a temporary rule practical for one or more of the following:

- (a) In accordance with the provisions of G.S. 163-22.2.
- (b) To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
- (c) The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

Here, the State Board has not shown that promulgation of these temporary rules, in lieu of the regular rulemaking process, is in the public interest; nor has it shown that it is necessary to preserve the integrity of the 2022 elections or elections process.

Public Interest

In determining the need for temporary rulemaking, the State Board has stated “[t]he need for these rules became apparent after experiences in the May primary election and feedback from county elections officials, and there is insufficient time remaining before the general election to follow the lengthier permanent rulemaking procedures.” Any claim that undergoing the permanent rulemaking process would be contrary to the public interest fails, because the State Board had the necessary amount of time to use the permanent rulemaking process. Once a Proposed permanent rule is published, the agency must accept public comment for 60 days. N.C. Gen. Stat. § 150B-21.2(f). At that point, the agency may submit the Proposed rule(s) to the Rules Review Commission (“Commission”), which has a deadline to conduct its review. This deadline is calculated in N.C. Gen. Stat. § 150B-21.9(b),¹ but the Commission has discretion to review such rules on a timeline that makes sense to them. Our understanding is that historically the entire process for permanent rulemaking takes approximately 90 days.

The State Board claims the need for the rules became apparent after the May 17, 2022 primary election. Any “experiences” concerning the Proposed rules would have concluded on May 17, 2022. County Boards of Elections conducted canvass and certified the primary results on May 27, 2022 and the State Board certified the results on June 9, 2022. Even if the State Board wanted to wait until after certifying the election to make changes, there was more than sufficient time to undergo the permanent rulemaking process. June 10, 2022, was 132 days before early voting begins for the November 8, 2022, General Election in North Carolina. Instead of acting upon the apparent need for rulemaking, the State Board waited 33 days after the State Canvass to publish the Proposed rules on their meeting website (99 days prior to the start of early voting).

¹ “Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1.”

On July 14, 2022, the State Board voted to consider the Proposed rules. The State Board further delayed the rulemaking process by waiting 8 days after that vote to provide notice of the public comment period, which they finally did on July 22, 2022 (90 days prior to the start of early voting). These delays were solely caused by the State Board.

Inapplicability of G.S. § 163-22.2

North Carolina General Statute 163-22.2 provides that:

In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of this Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly.

In relation to these Proposed rules, no law has been held unconstitutional or invalidated. Thus, the provisions of § 163-22.2 do not support the State Board’s Proposed temporary rules.

Implementation of State or Federal Law with Granted Authority

The State Board currently has rules in place regarding poll observers and election officials, which applied during both the 2022 primary and second primary elections. Federal and state law relating to the subject matter of the Proposed Rules have not changed since then, and the State Board has made an insufficient showing that the Proposed Rules are necessary to implement now, as opposed to through the regular rulemaking process. As such, there is no pressing need to implement any provisions of State or federal law regarding these two subject matters prior to the 2022 general election. Any changes the State Board wishes to make to the current rules should be carried out through the regular rulemaking process.

The North Carolina General Assembly (“General Assembly”) granted the State Board a general supervisory authority “over the primaries and elections in the State,” and the “authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable *so long as they do not conflict with any provisions of* [Chapter 163].” N.C. Gen. Stat. § 163-22(a) (emphasis added).

Provisions of the Proposed Rule Conflict with its Authorizing Statute

08 NCAC 20.0101

N.C. Gen. Stat. § 163-45 (the “Authorizing Statute”) provides the process for the county and state party chairs to appoint poll observers and places restrictions on who may serve as a poll observer. In part, N.C. Gen. Stat. § 163-45 provides “[p]ersons appointed as observers must be registered voters of the county for which appointed and must have good moral character. No person who is a candidate on the ballot in a primary or election may serve as an observer or runner in that primary or election. Observers shall take no oath of office.”

Specifically, the Authorizing Statute limits those who may serve as a poll observer to those who are registered voters², who have good moral character, and are not a candidate on the ballot. N.C. Gen. Stat. § 163-45. These are the only limitations the General Assembly included in the Authorizing Statute. *Id.*

First, the Administrative Rule, as currently written, already conflicts with the Authorizing Statute. The Rule provides “[n]o person who serves as an observer or runner in a primary or general election may serve as a precinct official or one-stop election official in that primary or that general election.” *Current* 08 NCAC 20.0101. The Authorizing Statute contains no restriction on a registered voter serving as an observer and a precinct or one-stop election official. The Proposed Rule by the State Board provides “[n]o person who serves as a county board member, county board staff, precinct official, or one-stop election official in a primary or election may serve as an observer or runner in that primary or general election.”³ This Proposed rule clearly expands and extends the current rule by expanding the restriction from only observers or runners to also include county boards members, county board staff, precinct officials, or other one-stop election officials. The current Rule is an improper overreach by the State Board and such impropriety should not be expanded upon as the Proposed Rules would.

Secondly, Proposed Rule 08 NCAC 20.0101 seeks to restrict the observation rights granted to observers by N.C. Gen. Stat. § 163-45(c), which provides:

An observer shall do no electioneering at the voting place, and shall in no manner impede the voting process or interfere or communicate with or observe any voter in casting a ballot, but, subject to these restrictions, the chief judge and judges of elections *shall permit the*

² For clarification, a precinct specific observer and county at-large observers must be registered voters of the county for which appointed, while state at-large observers must be registered voters of the State of North Carolina.

³ A full copy of the Proposed rule as adopted by the State Board of Elections can be seen here: https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-08-16/Election%20Rules/08%20NCAC%2020%20.0101%20-%20as%20adopted%208-16-22.pdf

observer to make such observation and take such notes as the observer may desire.

(emphasis added). Poll observers are restricted from impeding the voting process, but they are granted the right to “make such observation . . . as the observer may desire.” *Id.* The Proposed Rule would strip poll observers of said right. Poll observers, as indicated in their title, should have the right to observe and that is clear in the statute. However, there is a great difference between interfering and observing. It is clear observers cannot interfere with the voting process, but observing from a distance is still allowed. *See* N.C. Gen. Stat. 163-45(c).

Specifically, Proposed Rule 08 NCAC 20.0101 provides “[p]rohibited activities by observers include: . . . (9) Using doors designated for precinct officials or one-stop workers, except when using doors for the general public, observers need not wait in the voting line to enter the voting enclosure and (10) Leaving the area designated for observers by the county board of elections, provided the area designated allows the observer to observe each part of the voting process except for the marking of ballots.” *Proposed* 08 NCAC 20.0101. Observers should not be restricted in their observation of the election except as set out in the Authorizing Statute. The Proposed Rule would allow election officials to be in a position of imposing arbitrary and capricious standards for movement by poll observers in the execution of their tasks and functions.

Furthermore, such a rule lacks clarity and would cause confusion. For example, are observers allowed to leave the designated area to use the bathroom? According to the Proposed Rule, the answer would be no. Are observers allowed to walk around and view other areas of the polling site? According to the Proposed Rule, the answer would be no. Are observers allowed to leave the polling site to answer a personal phone call? According to the Proposed Rule, the answer would be no. Furthermore, there should be no reason why a poll observer cannot use a common doorway to gain access to the voting area along with all of the site workers. At the very least, this rule would cause confusion and contention. Are all doors going to be labeled as designated for staff? What if an observer, who is unfamiliar with the site, enters one of the doors by accident? By having a designated area for observers, there is no way for observers to observe as they “may desire.” N.C. Gen. Stat. § 163-45(c). Therefore, these sections of the Proposed temporary rule should be stricken.

Lastly, the State Board has continued to improperly apply the 4-hour restriction, which pertains to site-specific observers, to at-large observers. The State Board could rectify this issue by clarifying in the Proposed temporary rule that the 4-hour restriction does not apply to at-large observers. A plain reading of the statute makes clear that the four-hour restriction applies only to site-specific observers. The first sentence of the section states:

The chair of each political party in the county shall have the right to designate two observers to attend each voting place at each primary and election and *such observers* may, at the option of the designating party chair, be relieved during the day of the primary or election after serving no less than four hours and provided the list required by this section to be filed by each chair contains the names of all persons authorized to represent such chair's political party.

N.C. Gen. Stat. § 163-45(a) (emphasis added).

The addition of “such observers” clearly limits the four-hour time restraint to the site-specific observers, which are the only type of observers mentioned in that sentence. The second sentence of the section states “[t]he chair of each political party in the county shall have the right to designate 10 additional at-large observers who are residents of that county who may attend any voting place in that county.” Under the doctrine of *expressio unius exclusio alterius*, it is clear the Legislature intended to place the four-hour restriction on site-specific observers, but chose not to apply the same restriction upon at-large observers.

It appears the State Board is seeking to promulgate the Proposed rules in order to restrict who is “allowed” to serve as a party-appointed poll observer under § 163-45. As currently drafted, however, the Proposed Rules are inconsistent with the Authorizing Statute in that it seeks to place extra-statutory restrictions on North Carolinian voters who intend to participate in the election process as party-appointed poll observers.

08 NCAC 10B.0101

Proposed Rule 08 NCAC 10B.0101 creates a rule that is vague and ambiguous. Ultimately, the passage of the Proposed rule would lead to greater conflict during the voting process. Many of the “prohibited acts” in the Proposed rule are already addressed in “other provisions of law.”⁴ As discussed *supra*, the State Board has already created a rule concerning election officials and should go through the proper permanent rulemaking process.

Need to Become Effective Immediately to Preserve Integrity of Upcoming Elections

The State Board has continuously claimed the validity of elections in North Carolina. The elections they are referencing were conducted under the rules as they are currently written. It is contradictory for the State Board to tout their election process and then claim ambiguous temporary rules must be immediately enacted. Furthermore, the Proposed rules do not ensure the

⁴ NCSBE Meeting, July 14, 2022.

integrity of the election process, rather, they restrict the ability of North Carolina voters to observe and report election fraud and irregularities.

The State Board claims “[t]he need for these rules became apparent after experiences in the May primary election and feedback from county elections officials . . .” The State Board is relying on the results from a survey they sent out to county elections directors. The complaints do not seem to be any different than those from years past, which the State Board did not voice concern over. Ultimately, the State Board has failed to show a need for the Proposed temporary rules to become effective immediately and should go through the permanent rulemaking process if they wish to make the Proposed changes to the rules.

Procedural Argument

The North Carolina Legislature set out clear rules for the rule-making process for an administrative agency like the State Board of Elections. Specifically, when agencies develop rules, they should follow the following guidelines:

- (1) “An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is Proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.”

N.C. Gen. Stat. § 150B-19.1. In creating these rules, the State Board of Elections did not follow any of the guidelines set forth in the statute.

First, 08 NCAC 10B.0101 has been effective since August 1, 2004 and 08 NCAC 20.0101 has been effective since October 1, 2018. The State Board opened up public comment to allow for the public's input on these Proposed amendments to the administration code. The public overwhelmingly is against these amendments, as seen in the public comments against them.⁵ With

⁵ A copy of the public reactions can be seen at the following links:

the public backlash and opposition to these changes, the State Board cannot claim the Proposed rules are meant to serve the public interest. Thus, the first statutory requirement has not been met.

Second, the burden on the observers will be increased, not reduced, by having to comply with the changes. Instead of having less administrative and statutory requirements to follow, observers are now required to follow more rules and more regulations.

Third, as stated prior, these Proposed rules are unclear and ambiguous. This is evidenced by the simple questions stated above and as follows: Are observers allowed to leave the designated area to use the bathroom? Are observers allowed to leave the polling site to answer a personal phone call? Are observers allowed to walk around and view other areas of the polling site? What if an observer, who is unfamiliar with the site, enters one of the doors by accident? Also, poll observers have largely already been trained for the upcoming election, and now they are expected to forget all of this training to learn completely new and different information, with under 3 months until the election. Also, poll observers would now have to undergo different election day procedure than they did just a few months ago in the primary elections. All of these results would lead to more confusion and ambiguity, not clarity as required by the statute above.

Fourth, the Proposed rule changes are already addressed, making them clearly redundant. Specifically in 08 NCAC 10B.0101, there is a section for duties of precinct officials, when there is a similar section within that already in place in our state statutes. *See* N.C. Gen. Stat. § 163-182.17(b). Furthermore, the Proposed changes in 08 NCAC 10B.0101 relate to prohibited acts by precinct officials. However, the Proposed changes even reference the applicable statute, which is clear about what can and cannot be done by a precinct official. *See* N.C. Gen. Stat. § 163-41(e). Why does there need to be another administrative code change to say the exact same thing and provide the exact same requirements as already done by our state legislature?

Fifth, there is no scientific or technical evidence to base these rules on. Specifically, they rely on subjective determinations from the Chief Judges themselves, which can result in different interpretations, depending on the judge. Specifically, the most basic question arises as to what the definition of observe is? *See* N.C. Gen. Stat. § 163-45(c). Unfortunately, these rules do little to answer or clarify that question. The Proposed Rule 08 NCAC 20.0101 also appears to have no scientific basis or evidence to base the change that observers are not allowed to leave their

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- (1) https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-08-16/Election%20Rules/Mail%20comments.pdf
 - (2) https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-08-16/Election%20Rules/Online_Comments_Observers.pdf
 - (3) https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2022-08-16/Election%20Rules/Online_Comments_Precinct_Officials.pdf

designated area. In fact, wouldn't the act of observing in itself lead one to believe that poll observers are allowed to look around and observe, whether in a designated area or not?

Sixth, these rules were not designed in a timely manner as required by the statute. A timely manner would not be under three months before an election, rather this seems like a rushed, last-minute decision to change the process of an election, after the primary election was taken place. A timely decision would have resulted in these changes occurring many months ahead of the election, even before the primary, to have a chance to try the rules out. These rules have been in place for multiple years and election cycles with no issue, so why does there need to be last-minute changes now?

Conclusion

Changes in law should come from the democratic process involving the State Legislature and the Governor, not from the partisan State Board of Elections.

Furthermore, the timeliness of these changes brings them further into question. Why is the State Board rushing to make these changes right in between the 2022 Primary Election and 2022 General Election? The voters of this State deserve to have an election without last-minute rule changes. If nothing else, these last-minute changes will cause confusion and uncertainty among election workers and volunteers. Training for the 2022 General Election has already commenced and these rule changes will further confuse and disrupt that process.

Best regards,



Alyssa Specht
National Election Integrity Counsel
Republican National Committee



Philip R. Thomas
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Burgos, Alexander N

To: Cleta Mitchell; Peaslee, William W; rrc.comments
Subject: RE: [External] Speaking tomorrow at RRC

Received. Thank you.

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-----Original Message-----

From: Cleta Mitchell <cleta@cletamitchell.com>
Sent: Wednesday, August 24, 2022 5:38 PM
To: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>; rrc.comments <rrc.comments@oah.nc.gov>
Subject: RE: [External] Speaking tomorrow at RRC

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Thank you!

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August 11, 2022

North Carolina State Board of Elections
Dobbs Building
Third Floor
430 N Salisbury St
6400 Mail Service Center
Raleigh NC 27603-1362

RE: Comments Opposing NCSBE Proposed Temporary Rules

To the Members of the North Carolina State Board of Elections:

My name is Cletha Mitchell and I am a resident of Moore County, North Carolina. I have been an election and campaign finance attorney for many years, although I am no longer practicing law nor am I licensed to practice law in the State of North Carolina. These comments are submitted by me in my personal capacity, but drawing on decades of experience in election law and procedure, and administrative law at the state and federal levels. I have practiced before many administrative agencies across the country, particularly in the areas of campaign finance, election law, ethics, and other regulatory codes related to political and policy activities. Presently, I am the Senior Legal Fellow at the Conservative Partnership Institute in Washington, DC and I chair the Election Integrity Network.

The North Carolina State Board of Elections (NCSBE) has proposed to adopt temporary rules that attempt to supersede the statutes of North Carolina and the duly adopted procedures and regulations of the NCSBE. **These comments are submitted in opposition to the proposed temporary rules.**

There are numerous reasons to oppose the temporary rules, but I will focus on the following reasons:

1. **The NCSBE lacks the statutory authority to adopt temporary rules under the plain language of the statute under G.S. § 150B-21.1.**

North Carolina statutes set forth the conditions precedent to adopting a temporary rule, none of which factors exist and *none* of which have been articulated by the NCSBE for purposes of authorizing the proposed temporary rules. According to state law, the following are the relevant provisions of state law that could *conceivably* be applicable to the proposed temporary rules – followed by my comments regarding each statutory circumstance, at least one of which must be present and is necessary in order to adopt temporary rules. There is a total absence of any of the statutorily required circumstances or factors for engaging in a temporary rulemaking.

“§ 150B-21.1 Procedure for adopting a temporary rule.

- (a) Adoption. - An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following: (*emphasis added*)
- (1) A serious and unforeseen threat to the public health, safety, or welfare. ***Not applicable; no such threat has been articulated and no such threat exists.***
 - (2) The effective date of a recent act of the General Assembly or the United States Congress. ***Not applicable; there are no recent acts of Congress or the General Assembly to give rise to the need for the adoption of the temporary rules.***
 - (3) A recent change in federal or State budgetary policy. ***Not applicable; no such change has occurred that would necessitate the adoption of temporary rules.***
 - (4) A recent federal regulation. ***Not applicable; none exists.***
 - (5) A recent court order. ***Not applicable; no recent court order has been issued to necessitate the adoption of the proposed temporary rules.***
-
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
- a. In accordance with the provisions of G.S. 163-22.2.¹ ***Not applicable***

¹ There is no factor present under this section of the statute that would authorize the promulgation of temporary rules, which is very narrow and applies to invalidation of a provision of the NC election law under the Voting Rights Act, a fact not at issue in this proposed rulemaking.

Chapter 163 - Elections and Election Laws.

Article 3 - State Board of Elections.

§ 163-22.2 - 2. Power of State Board to promulgate temporary rules and regulations.

Universal Citation: [NC Gen Stat § 163-22.2 \(2015\)](#)

163-22.2. Power of State Board to promulgate temporary rules and regulations.

In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes. (1981, c. 741; 1982, 2nd Ex. Sess., c. 3, s. 19.1; 1985, c. 563, s. 15; 1986, Ex. Sess., c. 3, s. 1.)

- b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules. ***Not applicable; the temporary rules are not proposed for the purpose of implementing a law.***
- c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process. ***Not applicable. There are no findings of fact that exist to necessitate the issuance or adoption of temporary rules.***

In short, the statutory bases necessary for the promulgation of temporary rules by the NCSBE do not exist, and any temporary rules that are adopted are *ultra vires* and subject to rejection by the North Carolina Rules Review Committee or subsequent invalidation by a court of competent jurisdiction.

2. The NCSBE has articulated no factual basis that would support or substantiate the need for emergency or temporary rules, which is required under G.S. § 150B-21.1.

On Thursday, July 21, 2022, the NCSBE announced via a press release the opening of a comment period for proposed temporary rules the NCSBE revealed that day for the first time.

Neither then nor in the succeeding weeks has the NCSBE presented the factual justification for its use of the extraordinary measures that a temporary rulemaking represents. The only reason presented by the NCSBE for engaging in this rulemaking is that “there isn’t time to engage in a formal rulemaking before the November election.” No factual predicate has been forthcoming. Only vague references to ‘experiences in May’ and “feedback from county election officials’, to-wit”

“The proposed changes would be made by temporary rule rather than permanent rule so the rules can be in effect for the November 2022 general election. *The need for these rules became apparent after experiences in the May primary election and feedback from county elections officials*, and there is insufficient time remaining before the general election to follow the lengthier permanent rulemaking procedures.” See NCSBE Press Release, July 21, 2022.

What ‘experiences...and feedback’ is the NCSBE talking about? Where is the factual record to support this urgent rulemaking? What happened during the May primaries that adversely impacted the integrity of the May 2022 primary elections? What ‘feedback’ has been investigated for accuracy? What reports have been published, detailing the ‘experiences’ and ‘feedback’? What facts substantiate these mysterious claims? To this commenter’s knowledge, there are no reports of investigation or public record detailing or recording the ‘experiences’ and ‘feedback’.

Most importantly, is the NCSBE now saying that the integrity of the May 2022 primaries was compromised? In what way? This is a very serious and concerning assertion by the NCSBE. To warrant this emergency process, there must have been situations that the NCSBE believes threatened the integrity of the May 2022 primary, and the public certainly has the right to know what those situations were. Not bare allegations, but fact situations that were investigated and found to be sufficiently serious as to give rise to this extraordinary proceeding. The NCSBE has disclosed no such cases or information and surely if the May 2022 primary elections were under serious threat, such facts should be made known to the voters of North Carolina.

It is wholly inappropriate and unlawful for the NCSBE to proceed to adopt temporary rules on some vague and unsubstantiated pretext as to what has prompted this type of emergency rulemaking. In fact, the only clue into the ostensible problems the proposed rules are supposed to be solving are news reports from biased media sources, where unsubstantiated and baseless claims are the norm. See <https://www.wunc.org/news/2022-08-10/state-elections-board-to-consider-changing-rules-for-partisan-poll-observers>

The temporary rulemaking is not predicated upon any verified or verifiable facts to support, much less require, immediate changes in the NCSBE rules and regulations.

The NCSBE is obligated to furnish a properly documented factual basis for their belief that these temporary rules are tied to specific issues or problems such that the rules are necessary to protect the integrity of the November 2022 general election. None of that has been developed or presented, and absent that factual predicate, the proposed temporary rulemaking is unlawful, not authorized by statute, and cannot proceed.

3. **The Proposed Temporary Rules are Constitutionally Defective and Constitute an Infringement on the First Amendment Rights of Precinct Officials.**

One of the proposed temporary rules that is particularly egregious is the new section of the rules creating new grounds for removal of a precinct official. See proposed new section 08 NCAC 10B.0o101(h).

While the entire section is onerous and not grounded in a lawfully developed record that would give rise to the need for this new temporary rule, one provision stands out:

(7) Intentionally providing inaccurate information about the administration of the election;

What, exactly, does that mean? Is this part of the national campaign by the leftwing media, organizations, and Democratic partisans to silence critics of election officials who disobey or disregard the law? An election official would now be able to remove a precinct official if there was criticism that the election official didn't like? That is exactly what this proposed new rule would accomplish.

The public policy imperative for precinct officials' involvement is to ensure that the election is conducted according to the law and established procedures. If a precinct official observes actions that

are contrary to law, or that reflect maladministration, mistakes, improper or willful disregard of the North Carolina election code, it is the *duty* of the citizen precinct official to report that information. An election official whose actions are criticized is going to deny any misconduct or mistake and will accuse a whistle-blower of ‘providing inaccurate election about the administration of the election...’ and seek that precinct official’s removal.

This proposed rule will act to intimidate and silence precinct officials and will keep them from doing their jobs. They will fear removal if they raise questions or make comments about the conduct of the election or statements that an election official doesn’t like – which the election official can unilaterally define as ‘inaccurate information about the administration of the election’.

This temporary rule is an undisguised effort to ensure that election officials are not subject to criticism or whistleblowers, regardless of observed failure to properly conduct the election in compliance with the statutes and NCSBE procedures. Exactly what ‘feedback’ and ‘experiences’ reported by county election administrators from the May primary have given rise to this entirely new section of the NCSBE’s rules to allow county election officials to remove precinct officials? No doubt, county election officials are not comfortable with citizens’ active engagement as permitted by the North Carolina statutes, and are particularly unhappy with criticism – but that does not justify the NCSBE’s adoption of vague and punitive temporary rules that can be used as a hammer to silence criticism.

Transparency and accountability are the only way to restore the public’s confidence in the administration of the elections. Threatening citizen precinct workers with removal should they criticize the actions of county election officials has the opposite effect of restoring the voters’ confidence in the election process. Removal of the precinct official due to ‘misinformation’ is constitutionally suspect, vague and wholly inconsistent with the purpose of involving citizens in the election process where they can participate in and observe the election process.

This is but one of the many examples of why these proposed temporary rules are hastily and wrongly conceived, are inappropriate and must be rejected.

4. The NCSBE is Engaged in Arbitrary and Capricious Conduct in the Temporary Rulemaking Process.

The NCSBE’s agenda for its August 16, 2022, meeting suggests that the citizen comments and public hearings are a mere formality. In its agenda for the August 16, 2022, meeting of the NCSBE, according to the meeting notice issued on August 9, 2022, the agenda item related to the temporary rulemaking states: “*Adoption of temporary election rules*”.

Not ‘consideration of the adoption of proposed temporary rules’. Perhaps it is not intended to state that the adoption is a foregone conclusion, but that is certainly what is stated on the agenda.

Likewise, the August 2, 2022, press release announcing the extension of the public comment period and the additional public hearing related to the proposed new rules, the following paragraph describes the next step in the process:

"... After the public comment periods, the State Board will consider the comments and approve final versions of the rules to submit to the NC Rules Review Commission..." (emphasis added)

Is the NCSBE simply going to disregard the opposition that has been expressed at both the public hearings? While there were numerous comments offered in opposition to the temporary rules, only three comments were in support, notwithstanding that the NCSBE extended the deadline for comments and conducted a second hearing, no doubt in hopes of generating greater support among the public after only one supporter appeared at the first hearing on July 28, 2022. And what about written comments such as these? How can the NCSBE know in advance that it intends to 'approve the final versions of the rules'?

Based on the public hearing statements of the citizenry, the NCSBE should reconsider its plans to force these temporary rules down the throats of the North Carolina electorate - and should at the very least seriously consider the valid objections that are being lodged against these proposed rules rather than stating as fact that the NCSBE plans to approve the proposed rules on August 16, 2022, despite the well-grounded opposition to their approval.

CONCLUSION

The proposed temporary rules are not based on any factual predicate necessitating their adoption nor does this rulemaking comply with the statutory requirements for adoption of temporary rules.

The content of the proposed rules is vague, unnecessary, confusing and raises serious constitutional questions insofar as it would silence criticism of election officials by precinct officials and would discourage commentary by firsthand witnesses about problems in election administration.

Accordingly, the proposed temporary rules must be rejected.

Sincerely,



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