

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN RE: REQUEST FOR DECLARATORY)
RULING ON PHOTO IDENTIFICATION) **DECLARATORY RULING**
RULE AND ABSENTEE BALLOT)
ERRORS)
)

The State Board of Elections was sent a Request for Declaratory Ruling (“Request”), pursuant to N.C.G.S. § 150B-4(a), from the North Carolina Republican Party, the National Republican Congressional Committee, the Republican National Committee, and Pasquotank County voter Virginia Wasserberg (collectively, the “Petitioners”) on May 20, 2024.

The Petitioners ask the State Board to issue a declaratory ruling on the validity of the following:

- (1) a provision of an administrative rule governing the presentation of photo identification when voting in person that permits voters to provide an explanation of any difference between how their name appears on their photo identification versus on the voter registration records,
- (2) administrative guidance regarding whether absentee voters’ ballots must be rejected if sealed in one envelope versus another when returned in the two-envelope absentee ballot return package, and
- (3) administrative guidance regarding whether absentee voters’ ballots must be rejected if sent from the same household and the ballots or envelopes identified with those voters were swapped such that one voter attests to voting the ballot that has a tracking number

associated with the ballot that was sent to the other voter in the same household, and vice versa.

The State Board has issued administrative rules and guidance on these issues in the past, with which Petitioners disagree and request the State Board to declare invalid.

On June 18, 2024, the State Board agreed to consider the Petitioners' Request to issue a declaratory ruling, thereby triggering a 45-day deadline to "issue a written ruling on the merits" of the Request. N.C.G.S. § 150B-4(a1)(3).

On July 29, 2024, the State Board adopted three motions that disagreed with Petitioners: (1) the Board has concluded, by a 5–0 vote, that the name comparison procedures in 08 NCAC 17 .0101(a)(3) are valid; (2) the Board has concluded, by a 5–0 vote, that the instruction at issue in Numbered Memo 2021-03 pertaining to how county boards must address a ballot that is sealed in the return envelope rather than sealed in the ballot envelope is the correct application of the law; and, (3) the Board has concluded, by a 3–2 vote, that the guidance at issue in Numbered Memo 2021-03 pertaining to how county boards must address a ballot that is properly attested to and sealed but which has a tracking number corresponding to another voter at the same address is the correct application of the law. Accordingly, the relevant provision of the State Board's Rule and the relevant guidance in the State Board's Numbered Memo are reaffirmed.

I. BACKGROUND

N.C.G.S. § 150B-4(a) requires a state agency, upon the request of a person aggrieved, to issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. The declaratory ruling is binding on the agency and the person requesting the ruling, unless set aside by a court.

A. Review of Name on Photo ID

The language of 08 NCAC 17 .0101 (“the Rule”) regarding how an election official is to review the name on a voter’s photo ID when they present to vote has remained substantively unchanged since January 1, 2016.

Following the enactment of North Carolina’s first photo ID law through Session Law 2013-381 (*see* Parts 2 and 6 of N.C. Session Law 2013-381 which added a photo ID requirement beginning with the 2016 primary and general elections), the State Board permanently adopted 08 NCAC 17 .0101. The language of the Rule at that time that is pertinent to Petitioners’ Request stated that the election official reviewing a voter’s photo ID shall determine:

That the name appearing on the photo identification is the same or substantially equivalent to the name contained in the registration record. *The election official shall make this determination based on the totality of the circumstances, construing all evidence, along with any explanation or documentation voluntarily proffered by the person presenting to vote, in the light most favorable to that person.*

08 NCAC 17 .0101(c)(4) (eff. January 1, 2016) (emphasis added). After the Rule was implemented in the 2016 primary election, Session Law 2013-381 was permanently enjoined by a federal court. *NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

A new photo ID law was enacted through Session Law 2018-144, and this included the addition to our general statutes of N.C.G.S. § 163-166.16—the statute governing the requirements for photo identification to vote in person, including how an election official is to evaluate a voter’s photo ID. The State Board thereafter adopted a temporary amendment to 08 NCAC 17 .0101, which became effective on August 23, 2019. While the temporary amendment made various changes to the existing text of the Rule, it left unchanged the above-quoted text of 08 NCAC 17 .0101(c)(4).

Session Law 2018-144 was subsequently enjoined by both federal and state courts. *N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 54 (M.D.N.C. 2019); *Holmes v. Moore*, 384 N.C. 426, 432, 886 S.E.2d 120, 127 (2023) (noting that the three-judge panel trial court issued the preliminary injunction after the North Carolina Court of Appeals reversed the panel’s earlier decision to deny the injunction). On June 12, 2020, during the time in which Session Law 2018-144 remained enjoined by the courts, the State Board’s temporary amendment to 08 NCAC 17 .0101 expired.

The court-ordered injunctions were eventually lifted at both the federal and state level. *N.C. State Conference of the NAACP v. Raymond*, 981 F.3d 295, 310-11 (4th Cir. 2020); *Holmes*, 384 N.C. at 460, 886 S.E.2d at 144 (reversing and remanding to the trial court for entry of an order dismissing the plaintiffs’ claim with prejudice). As a result, the photo ID provisions enacted in Session Law 2018-144 were then enforceable as of April 23, 2023, which required the State Board to again adopt rules to implement the newer photo ID law.¹

The State Board first adopted a temporary amendment to the Rule, which became effective on August 1, 2023. The temporary amendment shifted the above-quoted text to a new subdivision, but the specific text in question remained almost verbatim as originally adopted in 2016 with the only change being to use the word “offered” instead of “proffered.” The language of the temporary amendment to the Rule read as follows:

The name appearing on the photo identification is the same as or substantially equivalent to the name contained in the voter’s voter registration record. *The election official shall make this determination based on the totality of the circumstances, construing all evidence, along with any explanation or documentation voluntarily offered by the person presenting to vote, in the light most favorable to that person.*

¹ Due to the expiration of the 2019 temporary amendment to the Rule, the 2016 permanent version of the Rule become effective again. But that version of the Rule was based on the first photo ID law and contained obsolete provisions. Those provisions are not pertinent to the Request.

08 NCAC 17 .0101(a)(3) (eff. August 1, 2023) (emphasis added). Prior to the expiration of this temporary amendment to the Rule, the State Board adopted a permanent amendment to the Rule. The language in question was unchanged in the permanent rule from that of the temporary amendment. The Rule became effective on April 1, 2024, after the North Carolina Rules Review Commission unanimously approved the Rule.

B. Sealing of Absentee Ballot in Return Envelope

Numbered Memo 2021-03 (“the memo”) was first issued by the Executive Director of the State Board on June 11, 2021, replacing Numbered Memo 2020-19, which was first issued on August 21, 2020, and subsequently revised and reissued on September 22, 2020, and October 17, 2020. As noted above, no photo ID law was enforceable at the time Numbered Memo 2021-03 was first issued.

After the photo ID provisions enacted in Session Law 2018-144 became enforceable on April 23, 2023, the Executive Director issued an updated Numbered Memo 2021-03 on September 25, 2023, to include processes related to photo ID requirements for absentee-by-mail voting. As explained in the memo regarding deficiencies in the return of an absentee ballot:

Previously, a voter transmitted their absentee-by-mail ballot to the county board in a single ballot container-return envelope. However, with the implementation of photo ID requirements starting with the 2023 municipal elections, the ballot envelope is now transmitted to the county board in an outer return envelope to ensure the privacy of the accompanying photo ID documentation. As a result, there may be certain instances where the return of the absentee ballot requires the ballot to be spoiled and the absentee package reissued to the voter.

Numbered Memo 2021-03, p. 2 (issued September 25, 2023). The memo identified deficiencies that required the ballot to be spoiled and anomalies that are not considered deficiencies. In respect to the latter, the memo included the following guidance relevant to Petitioners’ request:

- Ballot 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. Immediately upon opening the return envelope and noticing this situation, staff should re-seal the return envelope with a notation of “sealed in return envelope.” The county board should open the return envelope and address that ballot at its next absentee meeting.
- Ballot 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. Immediately upon opening the return envelope and noticing this situation, staff should re-seal the return envelope with a notation of “sealed in return envelope.” The county board should open the return envelope and address that ballot at its next absentee meeting.

Id. at p. 3. As explained in the memo, “[i]n all of the above situations, the ballot was received in a sealed envelope and is therefore not deficient.” *Id.* at p. 4 (citing N.C.G.S. §§ 163-230.1(d), 163-231(a)(3)).

Following the implementation of photo ID in the 2023 municipal elections, the Executive Director issued an updated Numbered Memo 2021-03 on January 19, 2024, to make further refinements to the processes related to photo ID requirements for absentee-by-mail voting.² The above-quoted text from the version of Numbered Memo 2021-03 issued on September 25, 2023, remained unchanged in the version issued on January 19, 2024. One addition, however, was made to the section for anomalies that are not considered deficiencies—a footnote was added to the section heading that clarified why the anomalies identified in that section were not considered deficiencies that required the ballot to be spoiled:

With all ballot mistakes or anomalies, elections officials must be guided by the clear instruction in the federal Civil Rights Act of 1964 to not allow an error on ballot materials to lead to a ballot’s rejection when that error is immaterial to determining a voter’s eligibility to cast the ballot: “No

² The current version of Numbered Memo 2021-03, issued on January 19, 2024, is available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2021/Numbered%20Memo%202021-03_Absentee%20Deficiencies.pdf.

person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

Numbered Memo 2021-03, fn. 11, pp. 3–4 (issued January 19, 2024).

C. Switched Ballots Sent to and Received From the Same Household

In the version of Numbered Memo 2021-03 issued September 25, 2023, the section entitled “Deficiencies that require board action” advised as follows:

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot is in the ballot envelope, more than one ballot is in the ballot envelope, *or two voters’ ballots and ballot envelopes were switched.*

Numbered Memo 2021-03, p. 7 (issued September 25, 2023) (emphasis added). The Numbered Memo at that time did not, however, include guidance as to whether such a deficiency required the county board to spoil and reissue the ballot.

When Numbered Memo 2021-03 was issued with updates on January 19, 2024, this section was renamed as “Deficiencies that are first discovered at a board meeting” and added the following guidance pertinent to Petitioners’ request:

Two voters’ ballots and ballot envelopes were switched, based on the county board’s review of the CIV numbers (ballot identifying numbers). In this situation, the county board will need to consider the circumstances of the ballots and ballot envelopes together to decide whether to approve the ballots. **If 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. The ballot identifying numbers associated with the enclosed ballots are used for official tracking purposes, and voters in the same household should not have their ballots rejected for failing to ensure these numbers match between their ballots and applications, which is neither a

requirement for approval of the ballot under state law nor material to determining a voter's eligibility to cast the ballot under federal law. The board staff should make a note of the ballot number that now corresponds with the voter in the SEIMS record.

Numbered Memo 2021-03, p. 9 (issued January 19, 2024) (citing 52 U.S.C. § 10101(a)(2)(B)).

II. ANALYSIS

Petitioners' Request presents questions of how to interpret the governing statutes. The North Carolina Supreme Court has explained the basic rules of statutory interpretation as follows:

“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, 376 N.C. 782, 785–86, 855 S.E.2d 158, 161 (2021).

Petitioners' Request also implicates the State Board's authority to promulgate an administrative rule or guidance through a Numbered Memo. The State Board has 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 of the General Statutes].” N.C.G.S. § 163-22(a). Various statutes also provide more specific rulemaking authority. *See e.g., id.* § 163-166.7 (“The State Board of Elections shall promulgate rules for the process of voting. Those rules shall emphasize the appearance as well as the reality of dignity, good order, impartiality, and the convenience and privacy of the voter.”).

Furthermore, the State Board “may assign responsibility for enumerated administrative matters to the Executive Director by resolution, if that resolution provides a process for the State Board to review any administrative decision made by the Executive Director.” *Id.* § 163-22(p). The State Board has done so in regard to the issuance of Numbered Memos through a resolution adopted on November 28, 2023. *See* Resolution on State Board Delegation of Authority to Issue Directives to County Boards (November 28, 2023).³

A. Review of Name on Photo ID

Section 163-166.16 of the North Carolina General Statutes provides the following direction as to how an election official is to evaluate the photo ID shown by a voter when they present to vote:

Verification of Photo Identification. - After presentation of the required identification described in subsection (a) of this section, the precinct officials assigned to check registration shall compare the photograph contained on the required identification with the person presenting to vote. The precinct official shall verify that the photograph is that of the person seeking to vote. If the precinct official disputes that the photograph contained on the required identification is the person presenting to vote, a challenge shall be conducted in accordance with the procedures of G.S. 163-88. A voter shall be permitted to vote unless the judges of election present unanimously agree that the photo identification presented does not bear a reasonable resemblance to that voter.

N.C.G.S. § 163-166.16(b).

Notably, this statute does not expressly require a comparison of names at all—only the photograph to the person. Neither did the first photo ID law, which was the original basis of the rule language in question. *See* Sess. Law 2013-381, sec. 2.1, § 163-166.13(d). The State Board

³ Available at https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Resolutions/20231128%20Resolution%20on%20directives%20from%20executive%20director.pdf.

maintained the name-comparison requirement in the Rule so that the comparison of the photo ID made sense in light of the purpose of the ID requirement stated in the very same statute: “The purpose of the identification required pursuant to subsection (a) of this section is to confirm the person presenting to vote *is the registered voter on the voter registration records.*” N.C.G.S. § 163-166.16(g) (emphasis added.)). A comparison of a photo on an ID to the person presenting to vote does not, by itself, connect that person to the voter listed on the registration records. By incorporating an examination of the name on the ID, however, the election official is able to determine that the person checking in to vote and presenting the ID is the voter whose name is listed on the registration rolls, and therefore carry out the legislative intent of requiring the presentation of photo ID by voters. See *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 67, 241 S.E.2d 324, 329 (1978) (“The construction of statutes adopted by those who execute and administer them is evidence of what they mean.”).

Regardless of the rationale for including this provision in the Rule, however, because the statute does not speak to how the agency should be comparing names at all, it is within the agency’s discretion to require a voter-friendly assessment in making this comparison.⁴ The Board has the authority to exercise this discretion under N.C.G.S. § 163-166.7(c) and § 163-22(a). First, providing this standard for the verification decision falls within the State Board’s authority to “promulgate rules for the process of voting”—rules which “shall emphasize the appearance as well as the reality of dignity, good order, impartiality, and the convenience and

⁴ In fact, some public commenters questioned the State Board’s authority to require a comparison of names at all, based on the absence of any explicit statutory reference to doing so. See pages 2-3 of the letter attached to the comment on the temporary rule submitted by the Southern Coalition for Social Justice (page 3 of the PDF accessible at [https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2023-06-27/Photo%20ID%20Rules/Email%20comments%20\(set%201\)%20combined.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2023-06-27/Photo%20ID%20Rules/Email%20comments%20(set%201)%20combined.pdf)). For the reasons discussed above, the State Board disagreed with that interpretation.

privacy of the voter.” N.C.G.S. § 163-166.7(c). The rule language at issue requires poll workers to construe the information before them about any variation in the voter’s name in the “in the light most favorable to that person” and to consider “the totality of the circumstances.” 08 NCAC 17 .0101(a)(3). This can include “any explanation or documentation voluntarily offered by the person presenting to vote” regarding any variation in the name on the poll book from the name on the ID. *Id.* Requiring a construction of evidence in favor of the exercise of the franchise, allowing voters to explain variations in their name, and minimizing the second-guessing of voters on changes to their names promotes dignity and good order at the polls. It also promotes the convenience of the voter, by allowing a voter to cast their ballot with minimal impediment, even if their name has changed or it appears differently in different government databases (e.g., the DMV database for a driver’s license versus the voter rolls maintained by their county board of elections).

Second, this rule text also falls within the State Board’s 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 this Chapter.” N.C.G.S. § 163-22(a). Providing a standard to poll workers on how they are to construe evidence about name variation on an ID does not conflict with any provision of Chapter 163. As explained, there is no provision in Chapter 163 directly addressing the examination of a voter’s name on their photo ID. The State Board “deem[ed] advisable” a standard that requires poll workers to take all available information under consideration and to construe the available evidence in the light most favorable to the voter.

A practical example shows why this is advisable. Imagine that a voter checks in under the name “Lucille Arnaz,” which appears on the voter rolls, and presents a photo ID with the name

“Lucille Ball.” The election official should be able to take into account Lucille’s explanation that she recently got married to Desi Arnaz but hasn’t changed her driver’s license yet. This type of situation is likely to play out thousands of times across the state in any given election, and it is likely to occur most frequently to female voters who are more likely to change their names based upon marriage and separation, due to social norms. Accordingly, accepting a voter’s photo ID based on such explanations helps ensure that the photo ID law is not enforced in a way that may lead to disparate treatment of voters, in the aggregate, based on gender.

Petitioners contend that 08 NCAC 17 .0101(a)(3) “appears to conflict” with N.C.G.S. § 163-166.16(b), because it permits a voter to voluntarily provide information or documentation that will help an election official determine whether the name on the voter’s photo ID is similar enough to their name in the registration records, when the statute is silent in that regard. But by objecting to the Board’s ability to set a standard for and process to arrive at a decision on a requirement that is not, itself, explicitly stated in statute, Petitioners are essentially objecting to the Board’s authority to impose any requirement to begin with—because there is no alternative, statutorily prescribed standard or process for such a decision. The end result of that logic is that election officials would be left to merely confirm that the person looks like the photo on their ID, and check that person in to vote, even if the name on the ID is drastically and inexplicably different from the name on the voter rolls that the person is voting under. The State Board does not agree with an interpretation of the statutes that could lead to such a result.⁵

⁵ In fact, two of the Petitioners, the Republican National Committee and the North Carolina Republican Party, submitted a written comment on the permanent rule, specifically addressing the comparison of names in 08 NCAC 17 .0101(a)(3) by stating that they “recognize there may be minor variances between the name displayed on the photo ID and the name in the registration record and the regulation addresses that adequately” (see pages 41 and 42 of the PDF accessible at this link: https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-02-15/Photo%20ID%20Rules/Photo%20ID%20comments%20submitted%20by%20email.pdf).

Moreover, the process provided in the Rule for an election official to evaluate the name on the photo ID does not conflict with N.C.G.S. § 163-166.16(b). Instead, it is filling the gaps left in the statutory language, which provides no standard for the verification decision, to ensure that the statute can be implemented uniformly and in an orderly fashion. Absent such a direction in rule, it is possible that local officials could apply differing standards throughout the state for determining whether someone can have their vote counted, thereby risking liability under the federal constitution. *See Bush v. Gore*, 531 U.S. 98, 104–06 (2000) (invalidating different rules for counting ballots in different counties for a statewide election).

In sum, the Rule, as written, is well within the authority of the State Board to adopt and enforce.

B. Sealing of Absentee Ballot in Return Envelope

Petitioners' request contends that the administrative guidance in Numbered Memo 2021-03 regarding whether absentee voters' ballots must be rejected, if sealed in one envelope versus another when returned in the two-envelope absentee ballot return package, runs counter to the plain text of certain absentee voting statutes, N.C.G.S. §§ 163-229, -230.1, and -231, and permits a process that is otherwise not authorized in statute.

In short, Petitioners contend that only *one* envelope in the two-envelope absentee ballot return package can be the “container-return envelope,” relying on the following statutory provisions:

- “Application on Container-Return Envelope. – . . . the county board of elections shall print a sufficient number of *envelopes in which persons casting absentee ballots may transmit their marked ballots* to the county board of elections. . . . *Each container-return envelope shall have printed on it an application* which shall be designed and prescribed by the State Board[.] . . . The container-return envelope shall be printed in accordance with the instructions of the State Board, which shall prohibit the display of the voter's

party affiliation on the outside of the container-return envelope.” N.C.G.S. § 163-229(b) (emphasis added).

- “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.G.S. § 163-230.1(d) (emphasis added).
- “Procedure for Voting Absentee Ballots. – In the presence of two persons who are at least 18 years of age, and who are not disqualified by G.S. 163-226.3(a)(4) or G.S. 163-237(c), the voter shall do all of the following: . . . *Place the folded ballots in the container-return envelope and securely seal it*, or have this done in the voter’s presence.” N.C.G.S. § 163-231(a)(3) (emphasis added).
- “When thus executed, *the sealed container-return envelope, with the ballots enclosed*, shall be transmitted in accordance with the provisions of subsection (b) of this section to the county board of elections which issued the ballots.” N.C.G.S. § 163-231(a).
- “Transmitting Executed Absentee Ballots to County Board of Elections. – The 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” N.C.G.S. § 163-231(b) (emphasis added).

These statutes referencing container-return envelopes envision the voter sending back only one envelope, as was the case prior to the implementation of the voter ID requirement. However, the General Assembly has now added a requirement to absentee voting which makes it impossible to have the voter send back only one envelope—the requirement to include a photocopy of a photo ID or a photo ID exception form. *See* N.C.G.S. § 163-229(b)(8) (“An area to attach additional documentation necessary to comply with the identification requirements”). As such, the statutes involving the container-return envelope must also be read in conjunction with the other requirements for voting absentee by mail. *See Schroeder v. City of Wilmington*, 282 N.C. App. 558, 568, 872 S.E.2d 58, 65 (2022) (explaining that provisions of a statute should be construed together to “harmonize such statutes, if possible, and give effect to each” (quoting *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956))).

As explained in Numbered Memo 2020-25⁶ (“Absentee Board Meetings”), the county board in receipt of an absentee-by-mail ballot envelope must review the photo ID documentation along with the application *before* opening a ballot. *See* Numbered Memo 2020-25, p. 6 (Staff Review of Envelopes) explaining staff review requirements under 08 NCAC 17 .0109(a) and (b); *see also* N.C.G.S. § 163-230.1(e), (f), and (f1) (collectively indicating that photo ID documentation must be separate from the ballot it accompanies); *id.* § 163-234(3) (providing for removal of ballots from their envelope *only after the application has been approved*). But that photo ID documentation must also be concealed from view in transit to protect voters’ personal identifying information. *See* N.C.G.S. § 163-82.10(a1) (“ . . . photocopies of identification for voting . . . whether held by the State Board or a county board of elections, are confidential and shall not be considered public records and subject to disclosure to the general public under Chapter 132 of the General Statutes”); *id.* § 163-233(a) (“Any copies of any photographic identification associated with the absentee ballots shall not be a public record.”); *see also id.* § 163-230.1(g)(2) (requiring voters who have a certain exception to the photo ID requirement to include confidential identification numbers on their completed photo ID exception form). As a result, changes to the absentee-by-mail voting process were required after the photo ID laws went into effect, and this included a redesign to the container-return envelope so that it constituted two separate envelopes: (1) an inner “ballot envelope” that contains a ballot surrounded by the application form and a slot to enclose photo ID documentation; and (2) an outer “return envelope” that fits a return mailing label and postage while containing the aforementioned materials and protecting the confidentiality of the photo ID documentation. In

⁶ Available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-25_Absentee%20Board%20Meetings.pdf.

short, voters must now send back two absentee ballot envelopes to their county board of elections when the law envisions only one envelope being used—and this is due to the photo ID law which did not account for the effect it would have on envelope transmission.

Under the new two-envelope system, it is likely that some voters will mistakenly seal their ballots not in the inner ballot envelope, but instead in the outer return envelope or place an unsealed ballot envelope in the sealed return envelope, even though the absentee ballot instructions included with the absentee ballot package guide the voter on the process. If the Board were to strictly require the voter to seal their ballot only in the inner envelope in order for that ballot to be counted, the photo ID law would lead to some level of voter disenfranchisement due to its requirement of returning two envelopes which will understandably cause some voters to mistakenly proceed under the impression, or simply make the mistake, that only the outer envelope needs to be sealed. While spoiling and reissuing a ballot for this reason will work for some voters; for others it will not, most commonly due to time constraints as Election Day nears, and for those voters, their ballots would not be counted.

Importantly, whether their ballot was sealed in the inner or outer envelope, the voter sealed their ballot in an envelope and attested (with witnesses) to having voted the enclosed ballot, after having established their substantive qualifications to vote through the absentee request process. Therefore, whether the ballot is sealed in one envelope versus another, the voter's qualifications to vote the ballot may still be ascertained, while the ballot remains sealed from view in transit. In other words, the purposes of the absentee application and sealed ballot are accomplished.

Petitioners' request focuses on scenarios where fraud allegedly could be permitted to occur as a result of the guidance at issue in Numbered Memo 2021-03. Petitioners note that a

voter is to “[p]lace the folded ballots in the container-return envelope and securely seal it, or have this done in the voter's presence.” N.C.G.S. § 163-231(a)(3). But Petitioners fail to note that while the steps for voting an absentee ballot are delineated in a numbered list in N.C.G.S. § 163-231(a), the plain language of the text does not strictly require that the steps occur in the order listed. In other words, the statute does not require that the application on the envelope be completed after the voter inserts and seals the ballot in the container-return envelope. Indeed, the witnesses or notaries who sign the application are not attesting to the voter inserting their ballot into any particular envelope. Instead, the witnesses or notary are attesting to the fact that the voter is the person who “marked that voter’s ballot[,]” *id.* §§ 163-231(a)(5), (a)(6), or, stated alternatively, “the voter is the registered voter submitting the marked ballot[,]” *id.* § 163-231(a)(6)b.

Furthermore, the guidance in Numbered Memo 2021-03 does not require the acceptance of a ballot that arrives completely unsealed or that indicates it may not have been sealed in the voter’s presence. In fact, the guidance is quite the opposite—county boards are instructed to spoil a ballot if it arrives in the ballot envelope, which is not sealed or which appears to have been opened and re-sealed, and the ballot envelope is received in a return envelope which is not sealed or which appears to have been opened and re-sealed. See Numbered Memo 2021-03, p. 3 (“Deficiencies that Require the Ballot to Be Spoiled (Civilian)”). In other words, despite what Petitioners contend, if there are indications that the ballot did not remain sealed from view from when it left the voter’s possession to when it arrives at the county board of elections, guidance to the county boards is that the ballot should be spoiled and reissued.

Finally, in these circumstances, strictly enforcing a requirement for a voter to seal their ballot in only the inner envelope when the ballot is nonetheless sealed in the outer envelope and

the voter is otherwise qualified to vote would violate federal law. Under the Civil Rights Act of 1964, “No person acting under color of law shall . . . deny the right of any individual to vote in any election because of *an error or omission on any record or paper relating to any application, registration, or other act requisite to voting*, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Sealing one’s absentee ballot in one envelope traveling with the absentee ballot versus another is “an error or omission” on a “record or paper relating to an[] application . . . or other act requisite to voting.” *Id.* When the voter has otherwise complied with the requirements establishing their voting eligibility (via the absentee ballot request form and application) and identity (via the request form, photo ID, witness, and application), the “error or omission” in sealing the ballot in one envelope versus another that is traveling with their absentee ballot is “not material in determining whether such individual is qualified under State law to vote.” *Id.* Given the clear prohibitory language employed by the federal law, which controls over state law and the State Board’s and county boards’ implementation of state law, U.S. Const. art. VI, cl. 2; N.C. Const. art. I, § 5, county boards should not reject a ballot in the circumstances described above.

In sum, the guidance in Numbered Memo 2021-03, as written, is within the authority of the State Board to issue and does not conflict with the general statutes pertaining to the absentee ballot container-return envelope and receipt of ballots transmitted therein.

C. Switched Ballots Sent to and Received From the Same Household

Petitioners’ request contends that the administrative guidance in Numbered Memo 2021-03, regarding whether ballots must be spoiled when two absentee voters in the same

household mistakenly switch their ballots before marking and transmitting them back to the county board of elections, runs counter to the plain text of N.C.G.S. § 163-230.1.

Petitioners essentially contend that it is a statutory requirement for a voter to only vote and transmit the ballot that was sent to them, no matter the circumstances, and that a failure to do so must result in that voter's ballot being spoiled. Petitioners rely on the following, relevant portions of N.C.G.S. § 163-230.1:

(c) Delivery of Absentee Ballots and Container-Return Envelope to Applicant. - When the county board of elections receives a completed request form for applications and absentee ballots from the voter, or the near relative or the verifiable legal guardian of that voter, the county board shall promptly issue and transmit them to the voter in accordance with the following instructions:

(1) *On the top margin of each ballot* the applicant is entitled to vote, the chair, a member, officer, or employee of the board of elections shall write or type the words "Absentee Ballot No. ____" or an abbreviation approved by the State Board and *insert in the blank space the number assigned the applicant's application* in the register of absentee requests, applications, and ballots issued. That person shall not write, type, or print any other matter upon the ballots transmitted to the absentee voter. *Alternatively, the board of elections may cause to be barcoded on the ballot the voter's application number, if that barcoding system is approved by the State Board.*

(2) The chair, member, officer, or employee of the board of elections shall fold and place the ballots (identified in accordance with the preceding instruction) in a container-return envelope and *write or type in the appropriate blanks thereon, in accordance with the terms of G.S. 163-229(b), 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 under this section, *the envelope may be barcoded rather than having the actual number appear.* The person placing the ballots in the envelopes shall leave the container-return envelope holding the ballots unsealed.

...

No election official shall issue applications for absentee ballots except in compliance with this Article.

N.C.G.S. § 163-230.1(c) (emphasis added). Petitioners contend that when reading together these subdivisions of the statute, the legislature’s intent that an absentee voter must use the ballot sent to them is confirmed.

Under a plain-language reading of these provisions, an absentee voter receives an absentee ballot package containing a ballot and ballot envelope that have corresponding numbers for the county board’s tracking purposes. But nothing in the plain language of N.C.G.S. § 163-230.1 requires that the voter’s ballot only be counted if it was the ballot that displays the tracking number assigned to that specific voter. Instead, N.C.G.S. § 163-230.1(c)(1) recognizes that the voter is to receive a “ballot the applicant is entitled to vote.” In other words, when speaking to what ballot the voter is to mark, the statute merely requires that the voter receive a specific ballot style containing the contests for which they are eligible to vote.

The guidance at issue does not require in every instance that a county board accept a ballot returned by a voter that was not mailed to them. Instead, the guidance in Numbered Memo 2021-03 is that “the county board will need to consider the circumstances of the ballots and ballot envelopes together to decide whether to approve the ballots.”

Furthermore, although Petitioners imply that the guidance at issue could effectively create “uncertainty as to whether absentee ballots received by the county boards of elections were properly marked, submitted, and accepted,” this position ignores the voter’s and witnesses’ attestations. Fulfillment of the witness requirements in N.C.G.S. § 163-231, along with the voter’s own attestation—not a matching of the ballot numbers—is how a county board will determine whether the voter has marked the ballot that accompanies the application and photo ID documentation received by the county board of elections. The ballot number assists administratively with tracking, and this is why Numbered Memo 2021-03 instructs that “board

staff should make a note of the ballot number that now corresponds with the voter in the SEIMS record.”

Finally, in these circumstances, strictly enforcing a requirement for a voter to mark only the ballot that was sent to them, when the voter is otherwise qualified to vote the ballot they marked and returned to the county board, would violate federal law. As noted above, under the Civil Rights Act of 1964, “No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B).

Petitioners contend in their request that this provision of federal law does not apply to the rules about *how* a voter must vote, as here, but is instead concerned only with rules deciding *who* may vote. Petitioners’ proffered application of the law incorrectly limits the Materiality Provision. Indeed, the Civil Rights Act provides that “the word ‘vote’ includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election[.]” 52 U.S.C. § 10101(e).

If two voters were sent absentee ballots to the same address yet marked the ballot sent to the other voter, then that is “an error or omission” on a “record or paper relating to an[] application . . . or other act requisite to voting.” *Id.* When the voter has otherwise complied with the requirements establishing their voting eligibility (via the absentee ballot request form and application) and identity (via the request form, photo ID, witness, and application), the “error or

omission” in marking one ballot versus another that was sent to the same address and the voter is otherwise eligible to vote is “not material in determining whether such individual is qualified under State law to vote.” *Id.* Given the clear prohibitory language employed by the federal law, which controls over state law and the State Board’s and county boards’ implementation of state law, U.S. Const. art. VI, cl. 2; N.C. Const. art. I, § 5, county boards should not reject the ballot.

As stated in Numbered Memo 2021-03:

[U]nder those circumstances, each voter has properly attested to voting the ballot enclosed with their application. The ballot identifying numbers associated with the enclosed ballots are used for official tracking purposes, and voters in the same household should not have their ballots rejected for failing to ensure these numbers match between their ballots and applications, which is neither a requirement for approval of the ballot under state law nor material to determining a voter’s eligibility to cast the ballot under federal law.

Numbered Memo 2021-03, p. 9 (citing 52 U.S.C. § 10101(a)(2)(B)).

Accordingly, rather than run contrary to the statutory requirements, the guidance at issue is appropriately in furtherance of the State Board’s duty to “by instruction to the county board of elections, . . . establish procedures to provide appropriate safeguards in the implementation of [the statute].” N.C.G.S. § 163-230.1(g). And even assuming for argument’s sake that such an interpretation is incorrect, federal law would require the same result under these circumstances—that a ballot that is properly attested to and sealed but which has a tracking number corresponding to another voter at the same address be accepted. 52 U.S.C. § 10101(a)(2)(B).

In sum, the guidance in Numbered Memo 2021-03, as written, is within the authority of the State Board to issue and does not conflict with the general statutes pertaining to the transmittal, receipt, and acceptance of absentee ballots.

III. CONCLUSION

Pursuant to N.C.G.S. § 150B-4, the State Board of Elections DECLARES:

- (1) by a 5–0 vote, that the name comparison procedures in 08 NCAC 17 .0101(a)(3) are valid;
- (2) by a 5–0 vote, that the instruction at issue in Numbered Memo 2021-03 pertaining to how county boards must address a ballot that is sealed in the return envelope rather than sealed in the ballot envelope is the correct application of the law; and,
- (3) by a 3–2 vote, that the guidance at issue in Numbered Memo 2021-03 pertaining to how county boards must address a ballot that is properly attested to and sealed but which has a tracking number corresponding to another voter at the same address is the correct application of the law.

This 2nd day of August, 2024.



Alan Hirsch, Chair
STATE BOARD OF ELECTIONS

CERTIFICATE OF SERVICE

I, Adam Steele, Associate General Counsel for the State Board of Elections, today caused the forgoing document to be served on the following individual via U.S. mail and via email:

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Counsel for Petitioners

This 2nd day of August, 2024.



Adam Steele