

STATE OF NORTH CAROLINA
COUNTY OF WAKE

MARK E. HARRIS,

Petitioner,

v.

THE NORTH CAROLINA BIPARTISAN
STATE BOARD OF ELECTIONS AND
ETHICS ENFORCEMENT a/k/a THE NORTH
CAROLINA STATE BOARD OF
ELECTIONS AND ETHICS
ENFORCEMENT,

Respondent,

and

DAN MCCREADY and MCCREADY FOR
CONGRESS,

[Proposed] Intervenor-
Respondents.

IN THE GENERAL COURT OF
JUSTICE
SUPERIOR COURT DIVISION
No. 19 CVS 0025

WAKE
COUNTY, C.S.C.

2019 JUN 14 PM 3:42

FILED

**MOTION TO DISMISS HARRIS'S
PETITION FOR WRIT OF MANDAMUS**

BY: DAN MCCREADY and MCCREADY
FOR CONGRESS

NOW COME Proposed Intervenor-Respondents Dan McCready and McCready for Congress (the "Campaign"), and respectfully move the Court to dismiss Petitioner Mark E. Harris's ("Harris") petition for the extraordinary and unwarranted relief of a writ of mandamus, in which he seeks to compel the North Carolina Bipartisan State Board of Elections and Ethics Enforcement a/k/a the North Carolina State Board of Elections and Ethics Enforcement ("the Board") to certify the results of an election alleged to have been pervaded by fraud perpetrated, at least in part, by Harris's own handpicked and paid agents, pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

In support of their Motion, and as set forth in the accompanying Memorandum in Support, Proposed Intervenor-Respondents state as follows:

1. Mark E. Harris's Petition for Writ of Mandamus and Appeal from State Board for Failure to Act should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim because Harris's demand for a writ of mandamus ordering that he be immediately certified as the winner of the Ninth Congressional District ("CD-9") fails to satisfy even one—let alone all—of the legal requirements for the issuance of the writ.

2. A writ of mandamus is an "extraordinary" remedy, *In re T.H.T.*, 362 N.C. 446, 453 (2008), which will *not* lie unless *all* of the following circumstances are present: (1) the party seeking relief has a clear legal right to the act requested; (2) the respondent has a legal duty to perform the act requested; (3) performance of the act at issue is ministerial in nature and does not involve the exercise of discretion; (4) the respondent did not perform the act requested and the time for performance of the act has expired; and (5) no alternative, legally adequate remedy is available. *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty.*, 368 N.C. 360, 364 (2015) (*citing In re T.H.T.*, 362 N.C. at 453-54).

3. Harris does not allege, and he does not in fact have, any "clear legal right" to be certified as the winner, and the Board has no "clear and not reasonably debatable" duty to do so, giving that publicly available evidence before the Board strongly suggests that Harris's handpicked agent conducted wide-scale fraudulent activity in CD-9 for Harris's benefit.

4. To the contrary, the Board has a clear statutory duty to withhold certification until it determines whether irregularities affected a sufficient number of votes to change the outcome of the election, N.C. Gen. Stat. § 163A-1181(a)(1)-(3) (163-182.13(a)(1)-(3)), *or* that "irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast

doubt on its fairness,” *id.* § 163A-1181(a)(4) (163-182.13(a)(4)), either of which would require the ordering of a new election.

5. The act of certifying the election with a protest pending would, by definition, involve the exercise of the Board’s discretion.¹

6. Resolving factual and legal claims in a contested election protest, particularly determining whether a new election is required based on fraud that changed the outcome or “irregularities or improprieties [that] occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness,” *id.* at § 163A-1181(a)(4) (163-182.13(a)(4)), are quintessentially discretionary acts. *See, e.g., Batdorff v. N. Carolina State Bd. of Elections*, 150 N.C. App. 108, 113 (2002) (finding that Board’s decision not to take further investigatory actions with respect to campaign finance complaint was a discretionary act undertaken in its investigatory and quasi-judicial capacity) (“[I]t is not the role of the trial court or our Court to direct the Board of Elections in what manner to exercise its discretion.”); *see also Appeal of Judicial Review by Republican Candidates for Election in Clay Cty.*, 45 N.C. App. 556, 559 (1980) (citing *Sharpley v. Board of Elections*, 23 N.C. App. 650 (1974) (the Board has the inherent authority to make such findings, including on its own motion and regardless of whether a protest is pending)).

7. Harris does not and cannot allege that the Board has neglected or refused to certify the election, and the time for certification of the election has not expired.

¹ While a “protest” is most often filed by an affected candidate or voter, North Carolina law clearly defines “protest” broadly to include a *sua sponte* proceeding by the Board, such as the proceeding pending here: “‘Protest’ means a complaint concerning the conduct of an election which, if supported by sufficient evidence, may require remedy by,” among other things, a new election. N.C. Gen. Stat. § 163A-1165(4) (163-182.16). Nothing in that statutory definition indicates that a “protest” can only be a complaint filed or initiated by an affected candidate or voter. In fact, the statute titled “Authority of State Board over protests” expressly states that the Board “may initiate and consider complaints on its own motion.” N.C. Gen. Stat. § 163A-1180 (163-182.12); *see also* Intervenor’s Memorandum in Support of Motion to Dismiss at 14-16.

8. Harris has an alternative, legally adequate remedy, which is to allow the Board, which will be appointed and reconvene less than three weeks, to finish its investigation and hold the evidentiary hearing that Board staff has announced will occur shortly thereafter. Notably, the evidentiary hearing would have already occurred but for the state Republican party's refusal to appoint interim members.

WHEREFORE, Proposed Intervenor-Respondents respectfully request that the Court dismiss Mark E. Harris's Petition for Writ of Mandamus and Appeal from State Board for Failure to Act in its entirety.

Dated: January 14, 2019

Respectfully submitted,

By 

John R. Wallace

Wallace & Nordan L.L.P.

3737 Glenwood Ave., Suite 260

Post Office Box 12065 (27605)

Raleigh, North Carolina 27612

Phone: (919) 782-9322

Fax: (919) 782-8113

Email: jrwallace@wallacenordan.com

Marc Erik Elias*

Jonathan Berkon*

Perkins Coie, LLP

700 13th St. N.W., Suite 600

Washington, D.C. 20005-3960

Phone: (202) 654-6338

Fax: (202) 654-9106

Email: MElias@perkinscoie.com

Email: JBerkon@perkinscoie.com

Attorneys for Intervenor-Respondents

*Motion for Admission *Pro Hac Vice* Filed
Contemporaneously

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MOTION TO DISMISS MARK E. HARRIS'S PETITION FOR WRIT OF MANDAMUS** has been served upon all parties to this matter by US mail and electronic mail:

Dudley A. Witt
NC State Bar No. 11155
dudley@cfpwlaw.com
David Freeman
NC State Bar No. 10334
860 W. Fifth St.
Winston-Salem, NC 27101
336-725-1304
david@cfpwlaw.com
Attorneys for Mark E. Harris

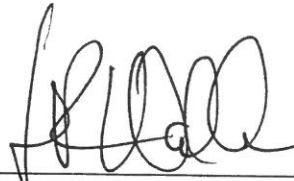
Josh Lawson
General Counsel
State Board of Elections & Ethics Enforcement
Third Floor, Dobbs Building
430 N. Salisbury Street
Raleigh, NC 27611
joshua.lawson@ncsbe.gov

Alexander McPeters
Chief Deputy Attorney General
NC Department of Justice
114 W. Edenton Street
Raleigh, NC 27603
apeters@ncdoj.gov

John E. Branch III
128 E. Hargett Street
Third Floor
Raleigh, NC 27601
jbranch@shanahanmcdougal.com
Attorney for Mark E. Harris

This the 17th day of January, 2019.

By:



John R. Wallace, Bar No. 7374
Wallace & Nordan, LLP
P.O. Box 12065
Raleigh, NC 27605
jrwallace@wallacenordan.com
Telephone: (919) 782-9322
Facsimile: (919) 782-8113
*Attorney for Dan McCready and
McCready for Congress Committee*