

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURTS OF JUSTICE  
SUPERIOR COURT DIVISION  
19 CVS 000025

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.

**RESPONSE TO  
PETITION FOR WRIT  
OF MANDAMUS**

NOW COMES Respondent, the North Carolina State Board of Elections, and responds to the petition for writ of mandamus filed by Petitioner Mark E. Harris.

**INTRODUCTION**

Petitioner seeks from this Court the issuance of a writ of mandamus upon the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (“Former State Board”),<sup>1</sup> and demands certification of the 6 November 2018 election in North Carolina’s 9<sup>th</sup> Congressional District (“CD 9”). Despite an ongoing investigation into election irregularities in the CD 9 election, Petitioner asks this Court to decide the election in his favor irrespective of what that investigation may reveal.

Petitioner’s demand that a writ be issued ordering that he be declared the winner of the election is predicated upon three particular issues, to wit:

---

<sup>1</sup> As of 28 December 2018, the Board of Elections is separate from the North Carolina State Ethics Commission.

- Petitioner's argument that the Former State Board acted outside the scope of its authority by delaying certification and conducting an investigation into the elections results, when no formal protest has been filed to contest those results;
- Petitioner's contention that time is "of the essence" because the constituents of CD 9 will not have timely representation in Congress, and the newly formed State Board of Elections will not convene for "many weeks;" and,
- Petitioner's belief that mandamus is appropriate as the State Board of Elections must simply perform a ministerial task by certifying the subject election results.

Each of Petitioner's contentions is refuted by law and fact. The truth is that the actions taken by the Former State Board, and continuing with the State Board of Elections, to investigate and verify the integrity of the CD 9 election have been grounded in sound legal authority.

Given our State's jurisprudence on mandamus, Petitioner seeks relief from this Court that is legally impermissible. Further, developments surrounding the subject election, including an investigation to be conducted by the United States House of Representatives, serve to deny Petitioner from taking a seat with the 116<sup>th</sup> Congress. This Court should therefore deny Petitioner's petition for writ of mandamus.

### **FACTUAL BACKGROUND**

Following the elections held 6 November 2018, and in light of significant potential voting irregularities, on 27 November the Former State Board unanimously declined to certify the results of the CD 9 race. That decision stemmed from a variety of sources of information including preliminary investigation, leads that appeared to warrant further investigation, and data related to absentee ballots. These sources of information prompted the Former State Board to launch a comprehensive investigation into the alleged irregularities.

After receiving a closed-session briefing on the status of the investigation on 30 November 2018, the Former State Board again declined to certify the race by a bipartisan vote of 7-2. The successful motion made by Vice-Chair Malcolm was as follows:

In light of claims of numerous irregularities and concerted fraudulent activities related to absentee by-mail ballots and potentially other matters in Congressional District 9, the State Board hold, as then constituted, an evidentiary hearing on or before December 21 pursuant to its authority under G.S. §§ 163A-1180 and 1181 to assure that the election is determined without taint of fraud or corruption and without irregularities that may have changed the result of the election; and that the Bladen County Board of Elections is hereby directed to withhold issuance of certificates of elections in the following contests: Bladen County Commissioner District 3 and Bladen Soil and Water Conservation District Supervisor.

An Order of Proceedings issued on 17 December 2018 calendaring a hearing on 11 January 2019 by the Former State Board, or by a newly appointed State Board of Elections “as the body then-authorized to enforce G.S. §§163A-1180 and 163A-1181 or G.S. §§163-182.12 and 163-182.13.” See attached “Exhibit A.”

The investigation into the alleged irregularities continued, and had been scheduled to culminate in a public hearing on 11 January 2019. At that time, the Former State Board would have considered, and potentially ordered, a new election for CD 9. The investigation into the matter included requests for documents from Petitioner. Within the last few days preceding this Response, the “Harris Committee” provided what it represents are all responsive documents. That delayed production is a substantial source of the prolonged investigation, and continuations of the proposed hearing.

Prior to the completion of the investigation and attendant hearing, by order of a three-judge panel, and for reasons unrelated to the situation in the 9<sup>th</sup> district, the Former State Board was dissolved on 28 December 2018. The State Board of Elections, as constituted by S.L. 2018-146,

will be seated on or after 31 January 2019. In the meantime, staff members of the State Board of Elections continue their investigative endeavors.

### **THE APPLICABLE LEGAL PRINCIPLES FOR ISSUING A WRIT OF MANDAMUS**

A writ of mandamus is an extraordinary court order to “a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.” *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971). Courts may only issue mandamus to enforce established rights, not to create new rights. *Moody v. Transylvania Cty.*, 271 N.C. 384, 390, 156 S.E.2d 716, 720 (1967).

A successful petitioner must establish five elements before mandamus may properly issue. First, the party seeking relief must demonstrate a clear legal right to the act requested. *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968). Second, the defendant must have a legal duty to perform the act requested. *Moody*, 271 N.C. at 391, 156 S.E.2d at 721; *see also Steele v. Locke Cotton Mills Co.*, 231 N.C. 636, 640, 58 S.E.2d 620, 624 (1950) (noting that a defendant’s duty to perform the act requested must exist both at the time of application for the writ and when the court issues the writ). The duty must be clear and not reasonably debatable. *See Moody*, 271 N.C. at 390–91, 156 S.E.2d at 720–21.

Third, performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion. *See id.* at 390, 156 S.E.2d at 720–21. Fourth, the defendant must have “neglected or refused to perform” the act requested, and the time for performance of the act must have expired. *Sutton*, 280 N.C. at 93, 185 S.E.2d at 99. Finally, the court may only issue a writ of mandamus in the absence of an alternative, legally adequate remedy. *King v. Baldwin*, 276 N.C. 316, 321, 172 S.E.2d 12, 15 (1970); *Snow*, 273 N.C. at 570, 160 S.E.2d at 727.

**PETITIONER HAS FAILED TO ESTABLISH**  
**THAT MANDAMUS IS WARRANTED**

Pursuant to N.C.G.S. § 163A-1180, the Former State Board was entitled to take actions “to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election.” The duty to ensure that elections are conducted fairly and legally comports with the fundamental principle that citizens deserve election integrity, and that anything less “would result in a mockery of the democratic processes for nominating and electing public officials.” *Ponder v. Joslin*, 262 N.C. 496, 500, 138 S.E. 2d 143, 147 (1964). As the successor in interest, the State Board of Elections is vested with that same authority. *See* S.L. 12018-146, § 3.5.(c) (“The reorganization provided for under this act shall not affect any ongoing investigation or audit. Any ongoing hearing or other proceeding before the Bipartisan State Board of Elections and Ethics Enforcement on January 31, 2019, shall be transferred to the former entity, as re-recodified by this act...)

By law, the State Board of Elections is therefore obligated to conduct, and complete, a full investigation into the alleged fraud impacting the CD 9 election. Petitioner’s contrary demand that the election be certified prior to the completion of that investigation is supported by neither sound electoral principles nor the State’s law regarding mandamus.

**A. Petitioner Has Failed To Demonstrate A Clear Legal Right To The Act Requested.**

1. The State Board of Elections may conduct an investigation without a pending electoral protest.

Petitioner contends that he is entitled to certification of the election results because there exist no pending protests of those results. Petitioner apparently labors under the mistaken impression that elections must always be certified by the State Board of Elections if no protest is lodged with it. However, it is well established that the Former State Board could, *sua sponte*,

inquire into any purported elections irregularities, and if necessary, order a new election without the filing of an elections protest:

The State Board may consider protests that were not filed in compliance with G.S. 163A-1177, *may initiate and consider complaints on its own motion*, may intervene and take jurisdiction over protests pending before a county board, *and may take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election.*

N.C.G.S. § 163-182.12 (former N.C.G.S. § 163A-1180) (emphasis added).

The authority of the Former State Board to conduct public inquiry and enter an order calling for a new election was simply not reliant upon a pending protest:

In our opinion, and we so hold, the authority of the State Board to conduct the investigation and to enter the order in this case was not dependent upon the filing of a timely protest. The mandatory tone of the statute which directs that the Board “shall investigate when necessary or advisable . . . frauds and irregularities in elections,” makes clear that the Board in appropriate circumstances may take action on its own motion even in the absence of any protest. *A fortiori* the Board may in its discretion consider and act upon a protest, even though such protest may not have been filed within the time period prescribed by the Board’s own rules. By adopting those rules the Board did not, and could not, inhibit or curtail the performance by it of duties otherwise expressly imposed upon it by statute. That this is so is further borne out by the directive in G.S. 163-22(c) that the State Board “shall compel observance of the requirements of the election laws by county and municipal boards of elections and other election officers,” and that “[i]n performing these duties, the Board shall have the right to hear and act on complaints arising by petition or otherwise. . . .”

*Sharpley v. Board of Elections*, 23 N.C. App. 650, 651-52, 209 S.E. 2d 513, 514-15 (1974).

According to the Court of Appeals, “[t]he Legislature has mandated that the State Board of Elections shall compel observance of the election laws. To do so, the State Board of Elections must have authority to hear and act on complaints, whether they arise by petitions filed in

accordance with the rules and regulations promulgated by the Board or *otherwise*.” *Appeal of Judicial Review by Republican Candidates for Election in Clay County*, 45 N.C. App. 556, 559-60, 264 S.E.2d 338, 340 (1980) (emphasis in original). In *Appeal of Judicial Review by Republican Candidates*, the Court of Appeals further noted that:

The State Board of Elections is not limited in its authority to merely investigate alleged frauds and irregularities in elections for the sole purpose of making a report of the same to the Attorney General or District Attorney for further investigation or prosecution, but is empowered as well to determine that discovered fraud and irregularities militate against the propriety of certifying election results and to order new elections or to take such other action as its findings of fact may justify.

*Id.* at 569, 264 S.E.2d at 569. The Court of Appeals also opined that the State Board of Elections need not first demonstrate that irregularities altered the outcome of an election, before it chooses to launch an investigation. *Id.* at 570, 264 S.E.2d at 346.

The Former State Board declined to certify the results or issue a certificate of election for the CD 9 election based on its authority under N.C.G.S. § 163A-1180 “to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election.” Contrary to Petitioner’s contentions, a formal, instigating election protest was unnecessary. Given that the Former State Board could initiate its own investigation, Petitioner does not now have the right to demand that the election be certified by the State Board of Elections.

**B. Respondent Is Under No Legal Duty to Certify Election Results At This Time.**

For mandamus to issue, the legal duty that is owed must be clear and not reasonably debatable. *See Moody*, 271 N.C. at 390–91, 156 S.E.2d at 720–21. Here, Executive Director Strach owes no duty to certify the CD 9 election. By law, that obligation is owed exclusively by the State Board of Elections. Moreover, the State Board of Elections itself is under no duty to certify the election during the course of the investigation into potential electoral fraud.

1. Executive Director Strach does not have legal authority to certify any election.

Petitioner seeks from this Court a writ ordering “the North Carolina Bipartisan State Board of Elections and Ethics Enforcement, though its Executive Director, Kimberly Strach” to authenticate and certify Petitioner as the winner of the 2018 9<sup>th</sup> Congressional District election. However, even if she were a proper Respondent, under no circumstance may the Executive Director certify the result of any election.

According to N.C.G.S. § 163A-1184(b), the authority to certify an election was exclusively reserved to the Former State Board.<sup>2</sup> Consequently, by granting a writ of mandamus, this Court would effectively compel Executive Director Strach to commit an act that not only surpasses the parameters of her legal authority, but further, to commit that act in defiance of the General Assembly’s legislative mandate. Petitioner does not have a basis to demand that the Executive Director engage in that act.

2. The State Board of Elections is not obligated to certify the election during the pendency of the investigation into the alleged fraud.

As previously noted, pursuant to N.C.G.S. § 163A-1180, the Former State Board was legally authorized to conduct an investigation into the alleged fraud committed during the CD 9 election. The investigatory authority accorded to the Former State Board by the General Assembly featured no time limitation, and instead, focused on ensuring that elections were determined without “taint of fraud or corruption and without irregularities that may have changed the result of an election.” According to staff members, the investigation initiated by the Former State Board is ongoing, and will continue under the State Board of Elections.

---

<sup>2</sup> Pursuant to N.C.G.S. § 163-182.15, as of 31 January 2019, the State Board of Elections will maintain the authority to certify elections.



Whether the investigation will yield conclusions that the alleged fraud altered the outcome of the election or tainted the public's confidence in the election results remains an open question. However, the mere existence of that open question, and reports of widespread fraud, more than satisfy the "may have changed the result of an election" qualifier of N.C.G.S. § 163A-1180. The Former State Board refrained from canvassing the results of the CD 9 election, and did not issue a certificate of election. That discretionary act was based upon "claims of numerous irregularities and fraudulent activities," which fully warrant and substantiate the ongoing investigation.

Out of a stated desire to ensure that constituents of CD 9 have timely representation in the House of Representatives, Petitioner suggests to this Court that the State Board of Elections should feel free to continue its investigation after certifying the election results. Indeed, Petitioner seems to offer his cooperation as part of that post-certification investigation.

However, once the election is certified, the State Board of Elections is divested of any authority to order re-canvassing or a new election. The grant of mandamus acts as a final adjudication on the merits, as certificates of election cannot be revoked once issued. "[T]he certificate of election is not subject to challenge except through an action *quo warranto*." *In re Election Protest of Fletcher*, 175 N.C. App. 755, 759, 625 S.E.2d 564, 567 (N.C. App. 2006); *see also Britt v. Board of Canvassers*, 172 N.C. 797, 805-806, 90 S.E. 1005, 1008 (N.C. 1916). Stated another way, and irrespective of the investigation results, the State Board of Elections may take no remedial action once the election is certified. The invitation to continue the investigation, and the degree of cooperation offered by Petitioner, is absolutely immaterial once the election is certified.<sup>3</sup>

---

<sup>3</sup> Except by act of the Congress, discussed *infra*.

Somewhat contradictorily, Petitioner also suggests that the Former State Board (and by extension, its investigation) is a legal fiction as the legislation establishing the North Carolina Bipartisan State Board of Elections and Ethics Enforcement was deemed unconstitutional. According to Petitioner, the “former State was promulgated pursuant to an unconstitutional statute and therefore any action taken by it is void *ab initio*[.]” That assertion is incorrect.

This Court has repeatedly recognized the legal existence of the Former State Board through the issuance of orders permitting the Board to continue operations, and to conduct the investigation into the subject election. On one occasion, this Court has done so *sua sponte*. Specifically, a three-judge panel of this Court concluded that:

On December 3, the court entered an order, sua sponte, extending the stay for the third time, through noon on December 12, 2018. The extension of the Stay was in full recognition of the need for stability and the orderly function of the Board during its work in dealing with the elections which had not been certified, and the integrity of the decisions of the Board, such as not to confuse or negatively impact the confidence of the people in the results of the elections. We still adhere to these principles and public policies[.]

See attached “Exhibit B.”

Indeed, counsel for the Harris Committee expressed that Committee’s desire that the Former State Board be permitted to continue the investigation until that time that the election should be “certified or a new election ordered.” See attached “Exhibit C.” That contention is seemingly at odds with Petitioner’s current claim that actions of the Former State Board were void *ab initio*.

**C. Petitioner Incorrectly Contends That Certifying An Election Is A Ministerial Duty.**

In an effort to satisfy the mandatory criteria for issuance of mandamus, Petitioner repeatedly contends that certifying the results of the CD 9 election is a ministerial task that may

be performed by Executive Director Strach. As with Petitioner's previous contentions, that assertion is mistaken.

"Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are 'absolute, certain, and imperative involving merely the execution of a specific duty arising from fixed and designated facts.'" *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236 (citations omitted), *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). The issuance of a certificate of election is the culmination of canvass, the "entire process of determining that the votes have been counted and tabulated correctly, culminating in the authentication of the official election results." N.C.G.S. § 163A-1172(a). With N.C.G.S. § 163A-1180, the General Assembly granted the Former State Board the option to initiate its own investigation to ensure that elections are conducted "without taint of fraud or corruption and without irregularities."

The Former State Board affirmatively decided not to canvass the results in CD 9 and did not issue a certificate of election. The decision to initiate an investigation, and refuse to certify the subject election, were within the sound discretion of the Former State Board. Petitioner's characterization that the role of the Former State Board (and by extension the State Board of Elections) is "ministerial" is supported by neither applicable legislation nor interpreting case law.

A court may issue a writ of mandamus to a public official compelling the official to make a discretionary decision as long as the court does not require a particular result. *Hamlet Hosp. & Training Sch. for Nurses, Inc. v. Joint Comm. on Standardization*, 234 N.C. 673, 680, 68 S.E.2d 862, 868 (1952) (noting that mandamus lies to "compel public officials to take action, but ordinarily [does] not require them, in matters involving the exercise of discretion, to act in any particular way" (citation omitted)). Yet, that is precisely what Petitioner seeks; a court order that

commands the conclusion that he is the rightful winner of the CD 9 race. The accuracy of such a conclusion is questionable, and further belies the discretionary authority possessed by the State Board of Elections.

Both the Former State Board and State Board of Elections are quasi-judicial bodies that possesses the discretion to canvass, investigate, and certify elections. Mandamus may not be invoked to control the exercise of that discretion when the act is judicial or quasi-judicial "unless it clearly appears that there has been an abuse of discretion." *Ponder v. Joslin*, 262 N.C. 496, 504 (1964). Here, there is no claim for an abuse of discretion. Rather, Petitioner asks this Court to substitute its opinions regarding the propriety of CD 9 election, for those of the Former State Board and State Board of Elections, by camouflaging those opinions as being merely "ministerial." This Court should reject that request.

**D. Neither the Former State Board Nor The State Board Of Elections Have Neglected Or Refused To Perform The Requested Act.**

In its discretion, the Former State Board instigated an investigation that continues to this day. As noted above, that investigation is well within the Former State Board's statutorily defined authority. Should the investigation reveal that the alleged fraud did not imperil the election results, the State Board of Elections will be prepared to immediately certify Petitioner as the victor. However, given its obligation to protect the integrity of the election, the Former State Board deferred that certification until the investigation and hearing were complete. The time to perform the requested act simply has not yet arrived.

Mandamus may be issued as a relief from the inaction on the part of a particular official to whom it is directed. "It is, therefore, a personal action based upon allegation and proof that the defendant has neglected or refused to perform a personal duty which the plaintiff has a clear legal right to have him perform." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971). As noted

previously, mandamus may not be directed at Executive Director Strach. Likewise, Petitioner has failed to establish a clear legal right to have the election certified in his favor at this time. As a result, Petitioner may not now accurately claim that the Former State Board or the State Board of Elections have neglected or refused to perform the requested act.

**E. Alternative Remedies Render Mandamus Unnecessary.**

Petitioner claims that “[t]his Court provides the only available avenue to protect the citizens of the 9<sup>th</sup> Congressional District from being denied congressional representation as Congress prepares to be seated on January 3, 2019.” Petitioner’s contention fails to contemplate the General Assembly’s legislation regarding when the State Board of Elections may be constituted. According to S.L. 2018-146, the State Board of Elections will be seated on or soon after 31 January 2019.

Petitioner’s argument is mistakenly predicated upon his belief that “the terms of office of the new State Board will commence on May 1, 2019.” To the contrary, the General Assembly provided that the initial State Board of Elections shall be composed of appointments “made as soon as possible upon enactment of this act, and no further appointments shall be required in 2019.” S.L. 2018-146 § 6.2.(a). In turn, Governor Cooper has publically indicated that members will be appointed and the State Board of Elections will be formed January 31. As a result, it appears likely that the Board State Board of Elections will be seated soon after the filing of this Response. The chronological exigencies cited by Petitioner do not exist.

Given the interim absence of State Board of Election members, Petitioner analogizes the instant matter to *Furguele, et al. v. The North Carolina State Board of Elections & Ethics Enforcement* (17 CVS 15132, N.C. Super. Ct., Dec 14, 2017). Although this Court assumed an appeal and assessed duties normally reserved for the Former State Board, *Furguele* involved a

protracted period of time during which appointments were neither made nor expected. Impacting *Furgiuele* was a July 2017 special order of the North Carolina Supreme Court directing that the parties in *Cooper v. Berger* “ha[d] no duty to take action...providing for the establishment, qualification, or organization” of the State Board pending that appeal. *See* Order Extending Stay, *Cooper IV v. Berger and Moore, et al.*, 18 CVS 3348 (December 11, 2018), cf. Order on Motions to Extend Stay, *Cooper IV v. Berger and Moore, et al.*, 18 CVS 3348 (December 27, 2018). *See* attached “Exhibit D.” The Supreme Court’s order commenced a lengthy period of time during which appointments were neither made nor expected. That circumstance does not exist here, and Petitioner’s analogy suffers as a consequence.

*Furgiuele* features other pivotal distinctions. That case featured no allegations of “irregularities or misconduct.” *See* attached “Exhibit E.” In light of the vacancies at the time, staff from the Former State Board indicated to all county boards of election that county decisions related to formal protests were deemed final, and that appeal should properly be taken to this Court. *See* attached “Exhibit F.” The individual who filed the original protest in that case failed to seek an appeal to this Court despite the directives of the Former State Board. *See* attached “Exhibit E.” As a result, mandamus in that case was appropriate. In the instant matter, there exists an ongoing investigation to determine whether the outcome of the election was impacted by the alleged fraud in CD 9; there is no final determination from which an appeal lies with this Court.

Similarly, in *Furgiuele* this Court noted that “the agency’s inability to resolve petitions and act on other statutorily mandated matters are effectively denials from which review by this Court may be sought.” In contrast, the investigation into the instant election irregularities is not a denial, but rather is ongoing effort that will culminate when the State Board of Elections is seated on or about 31 January. The Former Board was prepared to move quickly on the investigation (with a

hearing scheduled), staff work on the investigation continues now, and there is no reason at this time to anticipate any unwarranted delay in the investigation or certification decision once the State Board of Elections is constituted. The distinctions between *Furgiuele* and the instant matter call for a differing approach by this Court. The extraordinary departure from the statutory framework demanded by Petitioner is unjustified.

**WRIT OF MANDAMUS IS INAPPROPRIATE AS PETITIONER  
WILL NOT BE IMMEDIATELY SEATED WITH THE 116<sup>TH</sup> CONGRESS.**

As noted previously, “[t]he writ of mandamus is an ancient and carefully circumscribed extraordinary remedy.” *Lloyd v. Babb*, 296 N.C. 416, 452, 251 S.E.2d 843, 866 (1979). Petitioner here seeks relief from this Court so that he may assume the “seat to which he is now legally entitled,” and to prevent adverse effects upon the citizens of CD 9 though a lack of representation in Congress. However, even if it were appropriate, mandamus in this matter will not achieve the declared dual purpose of Petitioner’s action. Petitioner’s action is underpinned by the belief that upon certification, he will be seated with the 116<sup>th</sup> Congress. The reality, however, is that a premature certification by the Board will not result in Petitioner’s seating with the U.S. House of Representatives.

The United States House of Representatives is the judge of elections, returns, and qualifications of its own members, and is empowered to regulate their election. *See* U.S. Const. art. I, § 5, cl. 1 and art I, § 4, cl. 1, respectively. If all membership requirements are met, the right of an individual to be seated is a justiciable question. *See e.g. Powell v. McCormack*, 395 U.S. 486 (1969). However, the United States Supreme Court has concluded that resolution regarding the greater number of votes is a nonjusticiable question left exclusively to Congress. *See Laxalt v. Cannon*, 80 Nev. 588, 397 P.2d 466. The question of which candidate attracted the greater number

of lawful ballots is resolved by the each house of Congress, respectively. *Roudebush v. Hartke*, 405 U.S. 15, 32, 92 S. Ct. 804, 814, 31 L. Ed. 2d 1 (1972).

Indeed, on 11 January 2019 the Chairperson of the House Committee on House Administration, Representative Zoe Lofgren, dispatched a letter to the State Board of Elections seeking preservation of all investigatory evidence in anticipation of involvement “in the determination of the rightful claimant to the seat for North Carolina’s Ninth District[.]” As part of the House’s interest into the CD 9 election, Representative Lofgren noted that “[g]enerally, House precedent lends a great deal of deference to state certification with a presumption of regularity. However, a certificate is not ultimately determinative of the House’s course of action as the House is the final arbiter of who is the rightful claimant to its seats.” See attached “Exhibit G.”

The House of Representatives has interpreted its authority by formal adoption of the House Rules and Manual (revised edition adopted by House Resolution 945, December 6, 2016, available at <https://rules.house.gov/HouseRulesManual115/front.xml>). For instance, House Rules and Manual §47. Power of judging as related to State laws as to returns provides that:

As nearly all the laws governing the elections of Representatives in Congress are State laws, questions have often arisen as to the relation of this power of judging to those laws (I, 637). The House decided very early that the certificate of a State executive issued in strict accordance with State law does not prevent examination of the votes by the House and a reversal of the return (I, 637). The House has also held that it is not confined to the conclusions of returns made up in strict conformity to State law, but may examine the votes and correct the returns (I, 774); and the fact that a State law gives canvassers the right to reject votes for fraud and irregularities does not preclude the House from going behind the returns (II, 887). The highest court in one State (Colorado) has ruled that it lacked jurisdiction to pass upon a candidate’s allegations of irregularities in a primary election and that the House had exclusive jurisdiction to



decide such questions and to declare the rightful nominee (Sept. 23, 1970, p. 33320).

Similarly, House Rules and Manual § 50 “Effect of interpretation of State election laws by State courts” reveals the House’s position that that state courts do not possess final authority to judge elections, qualifications, and returns of Representatives in Congress, (II, 959), and that Congress is not bound by those state conclusions. Action by this Court to issue a writ of mandamus does not supplant relief through Congress, and any action by this Court may be suspended or modified according to the contrary determinations of the House of Representatives.

The fact that Congress intends to perform its own investigation does not absolve the North Carolina Board of Elections of its statutory role and duty to the voters of North Carolina to continue its efforts to investigate and ensure the integrity of a North Carolina election. However, immediate certification by the State Board of Elections will not result in Petitioner being immediately seated with the 116<sup>th</sup> Congress. The authority and declarations of the House of Representatives demonstrate that Petitioner’s stated objectives are unattainable through the writ of mandamus sought in this action. Likewise, Petitioner suffers no harm from delayed certification by the State Board of Elections given that the House of Representatives is not inclined to seat him, no matter the outcome of the instant action.

The determinations by this Court should be guided by this knowledge. This Court should therefore refuse to compel the Executive Director to undertake a task that she is not legally authorized to perform, and order an extraordinary remedy when the relief sought is unachievable. Instead, Petitioner’s action should simply be dismissed by this Court.

### **CONCLUSION**


For the foregoing reasons, Respondent respectfully asks this Court to deny Petitioner’s petition for writ of mandamus, and order such other relief as the Court deems appropriate.

Respectfully submitted this the 14<sup>th</sup> day of January, 2019.

JOSHUA H. STEIN  
Attorney General



Stephanie A. Brennan  
N.C. State Bar No. 35955  
Special Deputy Attorney General



Amar Majmundar  
N.C. State Bar No. 24668  
Senior Deputy Attorney General

N.C. Dept. of Justice  
Post Office Box 629  
Raleigh, NC 27602  
Telephone: (919) 716-6900  
Facsimile: (919) 716-6920  
Email: [sbrennan@ncdoj.gov](mailto:sbrennan@ncdoj.gov)  
[amajmundar@ncdoj.gov](mailto:amajmundar@ncdoj.gov)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the forgoing document was served on the parties to this action by depositing a copy thereof in the United States mail, first class postage prepaid, and addressed as follows:

Dudley A. Witt  
dudley@cfpwlaw.com  
David B. Freeman  
david@cfpwlaw.com  
CRUMPLER FREEDMAN PARKER & WITT  
860 West Fifth Street  
Winston-Salem, NC 27101  
*Attorneys for Mark Harris*

This the 14<sup>th</sup> day of January, 2019.

  
Amar Majmundar  
Senior Deputy Attorney General



# NORTH CAROLINA

## State Board of Elections & Ethics Enforcement

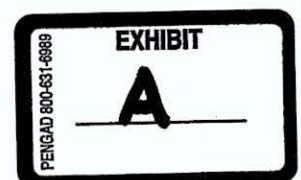
IN THE MATTER OF: )  
Investigation of election ) **ORDER OF PROCEEDINGS**  
irregularities affecting counties )  
within the 9th Congressional )  
District )

As directed on the Notice of Date of Hearing, this matter will come before the State Board of Elections and Ethics Enforcement ("State Board"), however constituted as the body then authorized to enforce G.S. §§163A-1180 and 163A-1181 or G.S. §§163-182.12 and 163-182.13, in a hearing to begin at 10 a.m. on January 11, 2019. The State Board will consider evidence and hear testimony in connection with an investigation into irregularities and alleged misconduct in certain counties within North Carolina's Ninth Congressional District. The proceedings affect the final certification of results in four contests in the 2018 general election: (1) U.S. Representative for North Carolina's Ninth Congressional District; (2) Seat 2 on the District Court in Judicial District 16B; (3) Bladen County Commissioner District 3; and (4) Bladen Soil and Water Conservation District Supervisor (together, the "Contests").

The Board on November 30, 2018, determined it was necessary to stay final certification of those Contests because the apparent margin of victory in each race represents fewer votes than those under scrutiny in the State Board's investigation.

The hearing will commence at 10:00 a.m. in the courtroom of the North Carolina State Bar, located at 217 East Edenton Street in Raleigh, North Carolina.

The matter will be considered as follows:



---

### Written Briefs

1. Candidates in the affected Contests shall have the opportunity to submit written briefs describing their positions on whether the State Board should either (a) certify their respective elections under G.S. § 163A-1184 (163-182.15) or (b) order that new elections be held under G.S. § 163A-1181 (163-182.13). All written briefs must be received by the State Board no later than 5:00 p.m. on January 6, 2019. Submissions must be filed electronically by email to [legal@ncsbe.gov](mailto:legal@ncsbe.gov). See Paragraph 6 for distribution of materials.
2. Candidates with aligned interests are encouraged to coordinate among themselves to minimize duplication in their written briefs.
3. No brief may exceed 20 pages produced to conform with the font size and spacing specifications found in Rule 28(g)(1) of the North Carolina Rules of Appellate Procedure. Exhibits will not count against the maximum page count. Among other issues, the briefs should address the application of *In re Judicial Review by Republican Candidates for Election in Clay County*, 45 N.C. App. 556, 264 S.E.2d 338 (1980).
4. Statutory citations may reference section numbers either from Chapter 163A or Chapter 163, understanding that the proper citations are not easily obtainable through publicly available sources or subscription services. Parallel citations are encouraged but not required: "G.S. § 163A-1184 (163-182.15)." A conversion table is available at <https://goo.gl/19pRR4>.
5. General objections may be attached to the filed brief as an addendum, which shall not count against the page count specified in Paragraph 3. It will not be necessary to raise objections orally at the hearing if they have been filed as described. Such written objections shall be deemed under the State Board's advisement once filed, and any objection not specifically sustained shall be deemed denied.
6. Given the compressed deadlines governing this matter, parties are not required to individually serve materials on each other. Rather, all briefing materials or supplemental orders shall be uploaded to the following online portal, and all parties shall be responsible to check the portal for updated

---

information: <https://goo.gl/GjxKh5>. Any party for whom online access poses a prejudicial burden shall petition the State Board in writing for an exception.

### Documents

7. All candidates and other interested parties will continue to have access to relevant documents in the online portal first announced and made available by the State Board on December 4, 2018: <https://goo.gl/GjxKh5>. The State Board will continue to make documents available at that online portal at least through the January 11, 2019, and likely thereafter. Parties are encouraged to reference documents by the exhibit number identified in the portal.

8. All candidates and other interested parties who wish to submit affidavits or other pieces of evidentiary information may upload the same through a portal opened for that purpose until 5 p.m. on December 21, 2018: <https://goo.gl/forms/fVVyTBuLcgRNePxu1>. The deadline in no way obviates the deadline for production required under any subpoena issued by the State Board on this matter.

### Order of Matters Presented at the Hearing

9. At the hearing, the State Board's staff will make an initial presentation regarding the underlying information learned in the course of their investigation.

10. After the initial presentation, the State Board chair will call witnesses and staff will examine those witnesses to develop the record on which the State Board will make factual findings necessary to certify the Contests, order new elections, and/or take other appropriate action.

11. Those witnesses will also be available for supplementary examination by State Board members and for cross-examination by counsel for candidates in the affected Contests, or by the candidates themselves if they are unrepresented.

12. Duplicative questioning will be severely restricted, and the State Board's Chair will retain discretion to limit questioning by time.

13. Candidates in affected Contests, either personally or through counsel, will have the opportunity to make their cases in chief after the State Board

---

staff's presentation and calling of the staff's witnesses. The candidates, either personally or through counsel, will be allowed to call further witnesses, who will be subject to examination as described in Paragraphs 10, 11 and 12. Witnesses who testified as part of the State Board staff's presentation will be available for examination only at the Board Chair's discretion.

### Evidentiary Standards

14. The hearing will not be subject to the North Carolina Administrative Procedure Act (the "APA"), but the Board will be guided by the criteria laid out in the APA. For example, hearsay evidence will likely be admitted if found to be reliable. *See, e.g., N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 290-91, 786 S.E.2d 50, 66 (2016). Articles from the news media may in some limited instances be admitted if offered for something other than the truth of the matter asserted. *See, e.g., State v. Locklear*, 322 N.C. 349, 360, 368 S.E.2d 377, 384 (1988). All regular exceptions to hearsay will apply, and the hearing is likely to include substantial testimony relaying statements against penal interest.

15. In no event, however, will the hearing "dispense with any essential element of a fair trial." *See Humble Oil & Ref. Co. v. Bd. of Aldermen of Town of Chapel Hill*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974). That is, in accordance with the procedures outlined above, (1) parties whose rights are being determined will be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver, the Board will not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and (3) crucial findings of fact that are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" will not stand. *Id.*

16. This administrative hearing may involve information that affects other proceedings that bear on criminal or civil liability. The failure of an individual or entity to make themselves available for interview(s) following the request of the State Board, the failure of an individual or entity to produce all material either requested or subpoenaed by the State Board, and the failure of any individual or entity to attend the hearing pursuant to the terms of the State



---

Board's subpoena may permit the State Board members to draw adverse inferences against those individuals or entities. *See Nantz v. Employment Sec. Comm'n*, 290 N.C. 473, 478, 226 S.E.2d 340, 343 (1976) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

#### Attorneys Not Admitted to the North Carolina State Bar

17. Attorneys not admitted to the North Carolina State Bar who wish to appear at the hearing for candidates for election in the Races should submit applications to appear *pro hac vice* to legal@ncsbe.gov by 5 p.m. on January 6, 2019.

#### Deliberation & Ruling

18. The State Board members will deliberate in open session once the case is submitted, unless it convenes in closed session by majority vote for purposes permitted under G.S. § 143-318.11. The State Board will rule on the matter by vote in open session. A written order prepared by counsel and signed by the Chair will follow the vote, consistent with the regular practice of the State Board.

#### Attendance & Press

19. The hearing shall be open to the public, subject to the facility rules of the State Bar and all applicable occupancy and safety restrictions. Entry will be ensured for the parties, their counsel, witnesses, and for members of the press described in Paragraph 17. Members of the public will be admitted on a first-come basis. Time restrictions may be imposed by the Chair if necessary to accommodate public attendance.

20. All non-credentialed press must gain admittance alongside the public. To obtain press credentials, members of press must contact State Board Public Information Officer Patrick Gannon (Patrick.Gannon@ncsbe.gov), who shall exercise discretion in the issuance of credentials. Between one and three pool cameras will be permitted, within the discretion of P.I.O. Gannon and subject to the facility rules of the State Bar.



---

Maintenance of Order

21. All parties, witnesses, and attendees are hereby placed on notice of the Chair's intent to exercise authority under G.S. § 163A-744 (G.S. § 163-24) to maintain order and to ensure adherence to the State Board's lawful commands:

*The State Board shall possess full power and authority to maintain order, and to enforce obedience to its lawful commands during its sessions, and shall be constituted an inferior court for that purpose. If any person shall refuse to obey the lawful commands of the State Board or its chairman, or by disorderly conduct in its hearing or presence shall interrupt or disturb its proceedings, it may, by an order in writing, signed by its chairman, and attested by its secretary, commit the person so offending to the common jail of the county for a period not exceeding 30 days. Such order shall be executed by any sheriff to whom the same shall be delivered, or if a sheriff shall not be present, or shall refuse to act, by any other person who shall be deputed by the State Board in writing, and the keeper of the jail shall receive the person so committed and safely keep him for such time as shall be mentioned in the commitment: Provided, that any person committed under the provisions of this section shall have the right to post a two hundred dollar (\$200.00) bond with the clerk of the superior court and appeal to the superior court for a trial on the merits of his commitment.*

This the 17th day of December, 2018.

---

Joshua D. Malcolm  
Chair

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18CVS3348

2018 DEC 27 P 4:13

ROY A. COOPER, III, in his official capacity  
as GOVERNOR OF THE STATE OF  
NORTH CAROLINA,

Plaintiff,

vs.

PHILIP E. BERGER, in his official capacity  
as PRESIDENT PRO TEMPORE OF THE  
NORTH CAROLINA SENATE; TIMOTHY  
K. MOORE, in his official capacity as  
SPEAKER OF THE NORTH CAROLINA  
HOUSE OF REPRESENTATIVES; and THE  
STATE OF NORTH CAROLINA,

Defendants.

WAKE COUNTY, N.C.

ORDER

This Cause, coming on before the undersigned duly constituted Three Judge Panel to consider the Emergency Motion of McCready for Congress, filed on the 21<sup>st</sup> day of December 2018, to Intervene in this action and to extend the stay issued by the Court; and the Motion of Mark Harris for Congress, filed on the 30<sup>th</sup> day of November, 2018, to Intervene in this action and to extend the stay issued by the Court. The Court, in its discretion, GRANTS the Motions of both Parties to Intervene in this Action.

The Court, having granted the Motions of Harris and McCready to Intervene, now addresses the Motion of all parties to Extend the Stay of the Court. The Court finds as follows:

1. The Court issued its Order declaring the composition of the Bipartisan Board of Elections and Ethics Unconstitutional on October 16, 2018. Recognizing the close proximity to the November elections, the Court Stayed that Order through and including the November elections;
2. On October 22, 2018 the Court extended that stay through and including 11:59 on December 3, 2018 to allow for the certification of the November elections;





3. On December 3, the Court entered an order, sua sponte, extending the stay for the third time, through noon on December 12, 2018. The extension of the Stay was in full recognition of the need for stability and the orderly function of the Board during its work in dealing with the elections which had not been certified, and the integrity of the decisions of the Board, such as not to confuse or negatively impact the confidence of the people in the results of the elections. We still adhere to these principles and public policies;
4. On December 10, 2018, Chairman Joshua Malcom wrote a letter to the Court in response to a request by the Court for an update on the status of the progress of election certification, in which he stated that:
  - a. On November 27, the State Board voted 7-2 in support of a motion ordering an evidentiary hearing on or before December 21, 2018 regarding elections not yet certified.
  - b. That the "Agency staff are working diligently", and that "Should the Panel wish to provide continuity during the remainder of this process, be assured we will endeavor to resolve outstanding matters as quickly as we responsibly can do so."
5. The day after receiving this letter, the Court issued its 4th stay in an Order filed on December 11. Acting in good faith upon the assertion and understanding that the Board was to conduct a hearing on December 21, the stay was extended a week beyond that date, "until 12:00 Noon, Friday December 28, 2018 or until the November 2018 statewide elections are certified, whichever occurs first,";
6. One day after the Court entered its Order extending the stay, Chairman Malcom on December 12, 2018 wrote an unsolicited letter to the Court. At the direction of the Court, the Trial Court Administrator for Wake County inquired of counsel if they desired her to deliver this letter to the Court. Legislative Defendants' counsel consented. To date, however, to our knowledge, all counsel have not yet consented for the Court to receive this unsolicited letter from a non-party to this action. Accordingly, the Court has not received nor reviewed that correspondence. Paragraph 15 of the Joint Motion to Extend the Stay refers to Chairman Malcom's December letter being sent to the Court, implying the court has received and considered the contents of that letter, which is not a correct inferred statement of fact;
7. Paragraph 16 of the Joint Motion states, "Thereafter, on December 17, 2018 (which is 6 days after this court for the 4th time extended the stay, based on the representation that the Board was conducting a Dec. 21 hearing), Chairman Malcom issued an Order of Proceedings for a hearing at 10:00 am on January 11, 2019, and not as previously thought on December 21, 2018." Nowhere in the Joint Motion is there any explanation as to why the hearing was erroneously "thought" to be on December 21, since that is the deadline date expressly



provided for in the motion adopted by the Board on November 27, 2018; and nowhere in the Joint Motion is there any explanation as to why the hearing was continued from December 21, 2018 until January 11, 2019;

8. Paragraph 18 of the Joint Motion states that the January 11 hearing is estimated to take between "one to two" days and that deliberations will begin on the same day the hearing ends. The State Board anticipates a decision regarding certification within a reasonable time following deliberations, determination and written order regarding certification or the need for a new election during the week of January 14.";
9. Paragraph 22 of the Joint Motion states that "It appears that the State Board will be able to certify the remaining contests or establish the need for a new election by January 18, 2019.";
10. It appears to the Court that had the hearing been conducted on December 21, 2018, this same 7 day time frame would have allowed for the Board to render it's decision on certification or the need for a new election by the deadline of the 4th stay, 12:00 Noon on December 28, 2018;
11. The day after the final extension of the Stay was entered, the State Chairman of the Board of Elections and Ethics Enforcement published a discovery and hearing schedule which completely and totally disregarded the timetable established by the extension of the Stay, indicating a complete disregard for an Order of this Court; and
12. The parties have not given even a cursory explanation as to why the hearing was continued from December 28, 2018 until January 11, 2019, let alone one demonstrating compelling reasons and substantial and reasonable justification, for not only the additional time needed, but the total disregard of the previous Order of the Court in extending the Stay;

Based upon the above facts, the Court finds that:

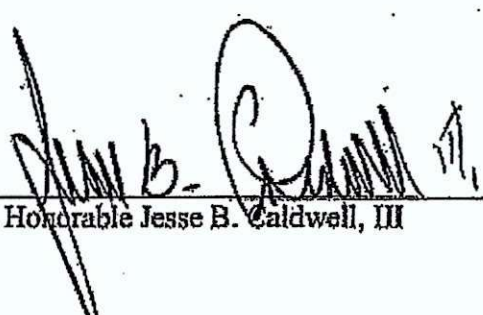
1. The further extension of the Stay in this action is not justified in light of the failure of the Board to comply with the previous Orders of this Court. The Court has no reason to believe that the January timetable proposed by the Board would be followed any more than the other timetables have been;
2. The fact remains that a critical election hangs in the balance, and the voters of the Ninth Congressional District are entitled to have their elected representative in place by the time Congress convenes, or to know why they will not have their representative in place, and further to know with certainty what action is being

taken to insure they are properly represented in the important matters before congress; and

3. This Court does not take lightly its duty to rule on the issues before it, and expects the Orders of this court to be complied with fully, completely and in a timely manner. That has not occurred in this instance.

It is Therefore the ruling of the Court that the Motion to further Extend the Stay of the Courts October 16, 2018 Order is DENIED. The Stay will dissolve at Noon on December 28, 2018:


SO ORDERED, this the 27<sup>th</sup> day of December, 2018.



The Honorable Jesse B. Caldwell, III



The Honorable L. Todd Burke



The Honorable Jeffery B. Foster



## Majmundar, Amar

---

**From:** John Branch <JBranch@shanahanmcdougal.com>  
**Sent:** Wednesday, December 19, 2018 10:18 AM  
**To:** 'Martin Warf'; Myers, Kellie Z.; Lawson, Joshua; Peters, Alec; Jim Phillips; Eric M. David; Daniel F. E. Smith; Noah Huffstetler; Cooper, Bettye D.; Bernier, James; Love, Katelyn  
**Cc:** Nate Pencook  
**Subject:** RE: Correspondence from Chairman Joshua Malcolm

Ms. Meyers,

I hope you are doing well. While the Harris Committee is not a party to the litigation at this time, given our pending Motions I thought it would be best to inform you that the Harris Committee believes that the stay should be extended until the State Board has formally decided on whether the 9<sup>th</sup> Congressional District election should be certified or a new election ordered.

Best regards,

John Branch

**John E. Branch III | Partner**



**SHANAHAN McDOUGAL, PLLC**

128 E. Hargett Street | Third Floor  
Raleigh, NC 27601

**Phone:** (919) 856-9494

**Email:** [jbranch@shanahanmcdougal.com](mailto:jbranch@shanahanmcdougal.com)

Please see the IRS Circular 230 Notice and the Confidentiality Notice below before reading this email.

**PRIVILEGED AND CONFIDENTIAL:** This electronic message and any attachments are confidential property of the sender. The information is intended only for the use of the person to whom it was addressed. Any other interception, copying, accessing, or disclosure of this message is prohibited. The sender takes no responsibility for any unauthorized reliance on this message. If you have received this message in error, please immediately notify the sender and purge the message you received. Do not forward this message without permission.

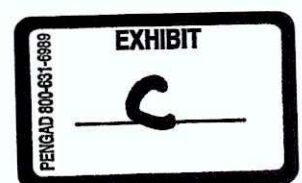
**From:** Martin Warf [mailto:martin.warf@nelsonmullins.com]

**Sent:** Wednesday, December 19, 2018 9:56 AM

**To:** Myers, Kellie Z.; Lawson, Joshua; Peters, Alec; Jim Phillips; Eric M. David; Daniel F. E. Smith; Noah Huffstetler; Cooper, Bettye D.; Bernier, James; Love, Katelyn

**Cc:** Nate Pencook; John Branch

**Subject:** RE: Correspondence from Chairman Joshua Malcolm



Kellie,

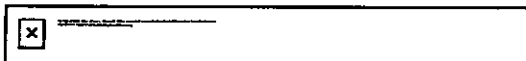
Defendants Berger and Moore have no objection to Chairman Malcolm's letter being shared with the panel, but appreciate the opportunity we were given to review it before it is sent to the Court. Further, we would request that the Court extend its present stay through January 31, 2018. Both parties will be happy to follow the Court's direction if formal motions, responses, or hearings are requested, but welcome the less formal method of letter or email correspondence as "status updates" to inform the Court of our respective positions.

Chairman Malcolm's December 12 correspondence indicates that a hearing on the investigation into the Congressional District 9 race may occur in between when the December 28, 2018 stay expires and January 31, 2019, the effective date of proposed legislation that amends the current organization of elections, ethics, and lobbying laws. Given publicly available information, it appears the investigation referenced in Chairman Malcolm's December 10, 2018 letter is still ongoing and, in fact, a public hearing with the Board will occur on January 11, 2019. Chairman Malcolm notes in his December 12 correspondence that operating without a continuation of the stay beyond December 28, 2018, and before any new law took effect, would have the Board operating on an "uncertain status, governed by prior law but without legal structure for the unmerging of the agencies or appointment of a board," and could "undermine[ ] ongoing activities and erod[e] public confidence." The Court's December 11, 2018 Order already expresses a desire to address the concerns of allowing an orderly resolution to the 2018 election cycle and protecting confidence in the election. It would appear now, however, that extending the stay of this Court's order beyond December 28, 2018, is needed to achieve those goals.

Chairman Malcolm believes a stay through certification of elections or final order by the agency is advised. Counsel for Defendants has conferred with counsel for Plaintiff Governor Cooper and believes counsel for Governor Cooper to support an extension of the stay to approximately 24-48 hours beyond the decision of the Board either certifying the Congressional District 9 race or requiring a new election. Counsel for Defendants believe that an extension of the present stay is warranted and could end on January 31, 2019. New legislation may take effect that day. And even if that legislation does not become law, the parties, the Board, and the Court would have time to address the need for any further stay beyond January 31, 2019, before that date but after both the upcoming holidays and the pending January 11, 2019 public hearing.

As always, undersigned counsel welcomes Plaintiff's counsel addressing any points I might have misstated.

Respectfully,  
Martin Warf



D. MARTIN WARF PARTNER  
martin.warf@nelsonmullins.com

GLENLAKE ONE | SUITE 200  
4140 PARKLAKE AVENUE | RALEIGH, NC 27612  
T 919.329.3881 F 919.329.3799  
NELSONMULLINS.COM VCARD VIEW BIO

**From:** Myers, Kellie Z. [mailto:[Kellie.Z.Myers@nccourts.org](mailto:Kellie.Z.Myers@nccourts.org)]  
**Sent:** Thursday, December 13, 2018 3:05 PM  
**To:** Lawson, Joshua <[joshua.lawson@ncsbe.gov](mailto:joshua.lawson@ncsbe.gov)>; Peters, Alec <[apeters@ncdoj.gov](mailto:apeters@ncdoj.gov)>; Jim Phillips <[jphillips@brookspierce.com](mailto:jphillips@brookspierce.com)>; Eric M. David <[EDAVID@brookspierce.com](mailto:EDAVID@brookspierce.com)>; Martin Warf <[martin.warf@nelsonmullins.com](mailto:martin.warf@nelsonmullins.com)>; Daniel F. E. Smith <[DSMITH@brookspierce.com](mailto:DSMITH@brookspierce.com)>; Noah Huffstetler <[noah.huffstetler@nelsonmullins.com](mailto:noah.huffstetler@nelsonmullins.com)>; Cooper, Bettye D. <[Bettye.D.Cooper@nccourts.org](mailto:Bettye.D.Cooper@nccourts.org)>; Bernier, James <[jbernier@ncdoj.gov](mailto:jbernier@ncdoj.gov)>; Love, Katelyn <[Katelyn.Love@ncsbe.gov](mailto:Katelyn.Love@ncsbe.gov)>  
**Cc:** Nate Pencook <[NPencook@shanahanmcdougal.com](mailto:NPencook@shanahanmcdougal.com)>  
**Subject:** RE: Correspondence from Chairman Joshua Malcolm

Mr. Malcolm (via email to Josh Lawson),

I am in receipt of your December 12, 2018 correspondence regarding the above-referenced case, submitted to me by Mr. Lawson via email, for delivery to Judge Caldwell, Judge Burke, and Judge Foster. The Court's order extending its stay "through and including 12:00 Noon, Friday December 28, 2018 or at the time the November 2018 statewide elections are certified, whichever shall occur first" was filed on December 11, 2018. After entry of the December 11, 2018, this Court did not request additional information from the State Board of Elections and Ethics Enforcement; therefore, *the judges have not reviewed or considered your December 12, 2018 correspondence.*

If the parties, through counsel, request and consent to the delivery of your correspondence to Judge Caldwell, Judge Burke, and Judge Foster, I will forward a copy to the Court; however, the stay "shall be lifted in its entirety on Friday, December 28, 2018 at 12:01 p.m."

Best regards,  
Kellie Myers



Kellie Z. Myers  
Trial Court Administrator  
10<sup>th</sup> Judicial District  
North Carolina Judicial Branch  
PO Box 1916, Raleigh, NC 27602  
O 919-792-4780  
*Justice for all*  
[www.nccourts.gov/WakeTCA](http://www.nccourts.gov/WakeTCA)  
*Justice for all*



**From:** Lawson, Joshua [mailto:[joshua.lawson@ncsbe.gov](mailto:joshua.lawson@ncsbe.gov)]  
**Sent:** Wednesday, December 12, 2018 7:17 PM  
**To:** Peters, Alec <[apeters@ncdoj.gov](mailto:apeters@ncdoj.gov)>; Jim Phillips <[jphillips@brookspierce.com](mailto:jphillips@brookspierce.com)>; Eric M. David <[EDAVID@brookspierce.com](mailto:EDAVID@brookspierce.com)>; Martin Warf <[martin.warf@nelsonmullins.com](mailto:martin.warf@nelsonmullins.com)>; Daniel F. E. Smith <[DSMITH@brookspierce.com](mailto:DSMITH@brookspierce.com)>; Noah Huffstetler <[noah.huffstetler@nelsonmullins.com](mailto:noah.huffstetler@nelsonmullins.com)>; Cooper, Bettye D. <[Bettye.D.Cooper@nccourts.org](mailto:Bettye.D.Cooper@nccourts.org)>; Bernier, James <[jbernier@ncdoj.gov](mailto:jbernier@ncdoj.gov)>; Love, Katelyn <[Katelyn.Love@ncsbe.gov](mailto:Katelyn.Love@ncsbe.gov)>  
**Cc:** Nate Pencook <[NPencook@shanahanmcdougal.com](mailto:NPencook@shanahanmcdougal.com)>; Myers, Kellie Z. <[Kellie.Z.Myers@nccourts.org](mailto:Kellie.Z.Myers@nccourts.org)>  
**Subject:** Correspondence from Chairman Joshua Malcolm

Counsel:



Attached, please find a letter (with enclosure) from State Board Chairman Joshua Malcolm.

Sincerely,

Josh Lawson | General Counsel  
o: 919-715-9194 | f: 919-715-0135



E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.



## Supreme Court of North Carolina

Fax: (919) 831-5720  
Web: <http://www.nccourts.org>

J. BRYAN BOYD, Clerk  
Justice Building, 2 E. Morgan Street  
Raleigh, NC 27601  
(919) 831-5700

Mailing Address:  
P. O. Box 2170  
Raleigh, NC 27602

From N.C. Court of Appeals  
( 17-694 P17-101 P17-412 )  
From Wake  
( 16CVS15636 17CVS5084 )

20 July 2017

Mr. Daniel F.E. Smith  
Attorney at Law  
BROOKS PIERCE MCLENDON HUMPHREY & LEONARD, LLP  
2000 Renaissance Plaza  
230 North Elm Street  
Greensboro, NC 27401

**RE: Cooper v Berger, et al. - 52PA17-2**

Dear Mr. Smith:

Plaintiff-Petitioner Governor Roy A. Cooper, III's Motion for Temporary Stay is dismissed as moot. Plaintiff-Petitioner Governor Roy A. Cooper, III's Petition for Writ of Supersedeas is decided as follows:

Under the authority granted to this Court pursuant to Article IV, Sections 1 and 12 of the North Carolina Constitution, and for the purpose of preserving the status quo during the expedited consideration of this case by the Court, the Court orders that:

1. The status quo as of the date of this order is to be maintained. Therefore, until further order of this Court, the parties are prohibited from taking further action regarding the unimplemented portions of the act that establishes a new "Bipartisan State Board of Elections and Ethics Enforcement." Act of Apr. 11, 2017, ch. 6, 2017 N.C. Sess. Laws \_\_\_\_ (the Act). Likewise, the parties should not seek further enforcement of the order entered on 1 June 2017 by the three judge panel convened pursuant to N.C.G.S. 1-267.1.

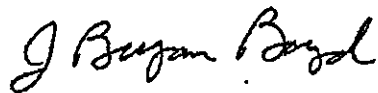
2. During the consideration of this case by this Court, the parties have no duty to take action to implement further the provisions of the Act providing for the establishment, qualification, or organization of the Bipartisan State Board of Elections and Ethics Enforcement and, furthermore, may not proceed in any manner to make any appointments to, or to provide for, the reestablishment, re-qualification, re-organization, or re-constitution of the former North Carolina State Board of Elections or the North Carolina State Ethics Commission.

3. The parties may petition the Court for the purpose of obtaining any modifications to this order that they deem necessary to preserve the status quo and to ensure the orderly and lawful conducting of local and other elections during the consideration of this case by this Court.

"Motion Spec Order by order of the Court in conference, this the 20th of July 2017."

s/ Morgan, J.  
For the Court





J. Bryan Boyd  
Clerk, Supreme Court of North Carolina

M. C. Hackney  
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. D. Martin Warf, Attorney at Law, For Berger, Philip E. - (By Email)

Mr. Noah H. Huffstetler, III, Attorney at Law, For Berger, Philip E. - (By Email)

Ms. Candace S. Friel, Attorney at Law, For Berger, Philip E. - (By Email)

Mr. Jim W. Phillips, Jr., Attorney at Law, For Cooper, Roy A. (III) - (By Email)

Mr. Eric M. David, Attorney at Law, For Cooper, Roy A. (III) - (By Email)

Mr. Daniel F.E. Smith, Attorney at Law, For Cooper, Roy A. (III) - (By Email)

Mr. Grayson Kelley, Chief Deputy - (By Email)

Mr. Alexander McC. Peters, Special Deputy Attorney General - (By Email)

West Publishing - (By Email)

Lexis-Nexis - (By Email)

FILED

STATE OF NORTH CAROLINA  
2017 DEC 14 PM 1:23  
WAKE COUNTY  
WAKE CO., C.S.C.

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
17 CVS 15132

<sup>BY</sup>  
SAMUEL F. FURGIUELE, JR. )  
MARSHALL C. ASHCRAFT, and )  
CONSTANCE J. ULMER )

Petitioner,

v.

THE NORTH CAROLINA STATE  
BOARD OF ELECTIONS & ETHICS  
ENFORCEMENT,

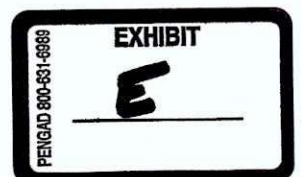
Respondent.

ORDER ISSUING WRIT OF MANDAMUS

THIS CAUSE was heard by the undersigned Senior Resident Superior Court Judge at the 12 December 2017 Civil Session of Wake County Superior Court on the 8 December 2017 Petition for Writ of Mandamus submitted by Samuel F. Furgiuele, Jr., Marshall C. Ashcraft, and Constance J. Ulmer (collectively, the "Petitioners"). After reviewing the petition, the record, and all other filings submitted by Petitioners and by the North Carolina State Board of Elections & Ethics Enforcement ("Respondent" or "State Board"), and after considering the arguments of counsel for both parties, and noting the unique circumstances of this case, it appears to the Court that Petitioners are entitled to immediate entry of a Writ of Mandamus.

FINDINGS OF FACT

I. On December 8, 2017, Petitioners, three prevailing candidates for election to the Boone Town Council, filed a Petition for Writ of Mandamus and Motion for Expedited Hearing under N.C. Gen. Stat. §§ 163-22 and 163-182.14. Petitioners sought to compel the State Board to direct, through its executive director, that the Watauga County Board of Elections ("Watauga Board") immediately issue certificates of election to Petitioners pursuant to N.C. Gen. Stat. § 163-182.15(a).



2. Elections in North Carolina are conducted under the general supervision of gubernatorial appointees to the State Board, who oversee an executive director and agency staff located in Raleigh. The State Board also appoints members of county boards of elections, who administer elections across the state. See N.C. Gen. Stat. § 163-22.

3. Since June 1, 2017, the State Board has lacked seated members due to ongoing proceedings in *Cooper v. Berger, et al.*, 17 CVS 5084 (now on appeal as 52 PA 17-2), though elections operations have continued under statute and as provided under special orders entered by the Supreme Court.

4. The Watauga Board administered an election for the Town of Boone that included voting by mail, early voting at designated one-stop locations, and voting on Election Day (November 7, 2017). Early voting in Watauga County was conducted in accord with a one-stop implementation plan established by the Superior Court of Wake County on October 13, 2017 in *Anderson v. State Bd. Of Elections and Ethics Enforcement*, 17-CVS-12072. The plan included an early voting site at the Appalachian State University (ASU) campus.

5. Following the election, the Watauga Board canvassed results in a meeting held November 17, 2017, as provided by Gen. Stat. § 163-182.5. Canvassed results confirmed that Petitioners received the most votes in their respective contests.

6. On November 16, 2017, Anne-Marie Yates, a registered voter in Watauga County, timely filed an election protest with the Watauga Board under N.C. Gen. Stat. § 163-182.9, seeking "[t]o nullify the 2017 Town of Boone Municipal Elections and hold a new election" on the basis that insufficient notice was given regarding the mandated one-stop site on ASU's campus. The Watauga Board found that there was no probable cause of an irregularity and unanimously dismissed Ms. Yates' protest by a written order filed November 21, 2017. On the same date, Ms. Yates, through counsel, filed a Notice of Appeal with the Watauga Board and purported to file an Election Protest Appeal with the State Board. Counsel for the State Board immediately notified Ms. Yates' counsel, Nathan Miller, that, in the absence of a seated State Board, proper appeal lies with the Superior Court of Wake County. The letter also indicated applicable deadlines. Mr.



Miller subsequently disputed the same and contended his client was entitled to a ruling by seated members of the State Board before any subsequent proceeding, and, following receipt of filings in the instant case, he indicated to Respondent that he considered his client to be a necessary party in this action but filed no motions and did not appear.

### CONCLUSIONS OF LAW

7. In the absence of appointed and sworn members of the State Board, decisions of the county boards of elections on election protests under Article 15A of Chapter 163 of the General Statutes are final and lack any additional administrative process. Appeal from any such decision lies with the Superior Court in Wake County within the deadline specified in N.C. Gen. Stat. § 163-182.14(b). All applicable deadlines governing Ms. Yates' protest have run, and no appeal is now pending.

8. Under the unique and narrow circumstance of a vacant State Board, the agency's inability to resolve petitions and act on other statutorily mandated matters are effectively denials from which review by this Court may be sought. The Court has inherent authority to supply necessary relief to parties whose legal rights are affected by a vacant State Board and to preserve the uniform and orderly operation of elections administration.

9. The deadline for delay of issuance of certifications of election in N.C. Gen. Stat. § 163-182.15(a) has expired. The Watauga Board has not issued certificates of election to the Petitioners and must now do so in the absence of a pending protest and lacking any stay entered by the Superior Court in Wake County, N.C. Gen. Stat. §§ 163-182.15(a), 163-182.15(a)(2), and 163-182.15(a)(3).

10. Mandamus is proper in this case. Petitioners have established a clear legal right to the immediate issuance of certificates of election under the present circumstances, and the State Board, though vacant, is obligated to effectuate the administration of elections in conformity with law. Mandamus directed at the vacant State Board is appropriate and may be executed by the agency's executive director.

IT IS THEREFORE ORDERED that:

1. The Petition for Writ of Mandamus is GRANTED.
2. The State Board of Elections & Ethics Enforcement, by and through its executive director, shall direct the Watauga Board of Elections immediately to issue certificates of elections to the prevailing candidates for Boone Town Council.

This the 14<sup>th</sup> day of December, 2017.

  
Paul C. Ridgeway  
Senior Resident Superior Court Judge

00433901

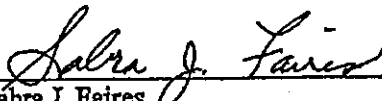
**CERTIFICATE OF SERVICE**

The undersigned attorney for Petitioners hereby certifies that on this day the foregoing **Order Issuing Writ of Mandamus** was served upon the North Carolina State Board of Elections & Ethics Enforcement by hand delivery and by email at the addresses below.

Mr. Josh Lawson  
General Counsel  
State Board of Elections & Ethics Enforcement  
Third Floor, Dobbs Building  
430 N. Salisbury St.  
Raleigh NC 27611  
[joshua.lawson@ncsbe.gov](mailto:joshua.lawson@ncsbe.gov)

James Bernier  
NC Department of Justice  
114 W. Edenton Street  
Raleigh, NC 27603  
[jbernier@ncdoj.gov](mailto:jbernier@ncdoj.gov)

This the 15<sup>th</sup> day of December, 2017.

  
Sabra J. Faires





# NORTH CAROLINA

## State Board of Elections & Ethics Enforcement

Mailing Address:  
P.O. Box 27255  
Raleigh, NC 27611

(919) 814-0755  
Fax: (919) 715-0135

November 21, 2017

**Re: Notice affecting appeals from decisions of county boards of elections on election protests brought under Article 15A of Chapter 163 of the N.C. General Statutes and Chapter 2 of Title 8 of the N.C. Administrative Code.**

Since June 1, 2017, the State Board of Elections & Ethics Enforcement ("State Board") and all county boards of elections have operated under the authority of S.L. 2017-06, which dissolved the former State Board of Elections and established a new State Board to which appointments have not been made. A legal challenge to the statute is currently proceeding before the Supreme Court of North Carolina, and the State Board Office does not expect the Governor to appoint members until the Court rules. These exceedingly unique circumstances affect election protest appeals following the November Municipal Election. Accordingly, State Board staff have prepared this Notice for distribution to all parties who intend to appeal a decision of the county board of elections.

County boards of elections are first to consider election protests brought within that county,<sup>1</sup> and the protest may be dismissed after the board's preliminary consideration or may proceed to a full hearing and an order on the merits.<sup>2</sup> A party may appeal from a dismissal of their protest at the preliminary consideration phase or from a final decision by the county board made after a full hearing. In either case, an appealing party must give written notice of their appeal to the county board within 24 hours after the board files its written decision at the board's office.<sup>3</sup> The county board must then compile transcripts and all other record materials within seven days of its receipt of the notice of appeal.<sup>4</sup>

Ordinarily, protest appeals proceed from county boards to the State Board,<sup>5</sup> using the required form,<sup>6</sup> and submitted no later than the fifth day after the county board filed its decision.<sup>7</sup> Until members of the State Board are appointed and sworn, however, no additional administrative process is available for parties to an election protest, and it is the position of the State Board Office that decisions of the county board should be considered "final" under G.S. § 182.14(a), and any appeal would lie with the Superior Court of Wake County.

<sup>1</sup> G.S. § 163-182.10

<sup>2</sup> *Id.*

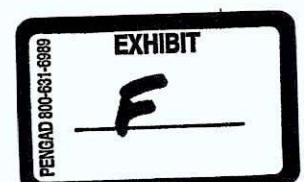
<sup>3</sup> G.S. § 163-182.11(a). Weekends and holidays are excluded under 08 NCAC 2.0112.

<sup>4</sup> 08 NCAC 2.0111(d)(3).

<sup>5</sup> G.S. § 163-182.11.

<sup>6</sup> 08 NCAC 2.0112.

<sup>7</sup> G.S. § 163-182.11(a) (a different deadline governs primary election protests).



Accordingly, appellants are encouraged to proceed as directed under G.S. § 182.14(a), the N.C. Rules of Civil Procedure, and the Local Rules of Wake County Superior Court. All candidates in the protested contest, the county board of elections, and the State Board Office should be served copies of documents filed with the Superior Court of Wake County. The State Board's attorneys cannot counsel the parties, and we encourage the parties to secure counsel familiar with proceedings before the Superior Court. The appropriate service contact for the State Board is as follows:

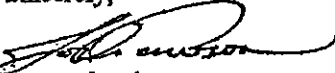
Josh Lawson  
General Counsel  
State Board of Elections & Ethics Enforcement  
Dobbs Building, Third Floor  
430 N. Salisbury Street  
Raleigh, N.C. 27603  
Legal@NCSBE.gov

The State Board Office intends to work where appropriate to ensure proceedings are not unduly impeded under these exceedingly unique circumstances.

County boards of elections may not order new elections under state law, but would ordinarily forward a meritorious protest along with the county board's decision to the State Board,<sup>8</sup> which is authorized to order new elections.<sup>9</sup> While no members are seated on the State Board, the State Board Office believes it remains appropriate for a county board to forward its request for a new election to the State Board Office, understanding that the State Board Office may seek review by the Superior Court in Wake County. Parties to a protest in which the county board has requested a new election may proceed as usual to notice an appeal and file timely in the Superior Court of Wake County under G.S. § 182.14(a), notwithstanding the county board's submission to the State Board Office.

County boards of elections are instructed to provide this Notice to all parties to protests in which a final decision has been issued. As a reminder, county boards may not issue the certificate of election affected by an election protest that has been appealed,<sup>10</sup> and current occupants would hold over in the office.<sup>11</sup>

Sincerely,



Josh Lawson  
General Counsel  
State Board of Elections & Ethics Enforcement

---

<sup>8</sup> G.S. § 163-182.10(d)(2)(e).

<sup>9</sup> G.S. § 163-182.12.

<sup>10</sup> G.S. § 163-182.15(a).

<sup>11</sup> G.S. § 160A-62



# Congress of the United States

## House of Representatives

### COMMITTEE ON HOUSE ADMINISTRATION

1309 Longworth House Office Building

Washington, D.C. 20515-6157

(202) 225-2061

<https://cha.house.gov>

January 11, 2019

Kimberly Strach  
Executive Director  
North Carolina State Board of Elections  
430 N. Salisbury St., Third floor  
Raleigh, N.C. 27603-5918

Dear North Carolina State Board of Elections:

Article I, Section 5, clause 1 of the United States Constitution empowers the United States House of Representatives to "be the Judge of the Elections, Returns, and Qualifications of its own Members." Generally, House precedent lends a great deal of deference to state certification with a presumption of regularity. However, a certificate is not ultimately determinative of the House's course of action as the House is the final arbiter of who is the rightful claimant to its seats.

Further, Article I, Section 2, clause 4 of the Constitution provides that "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." The U.S. House, upon declaring such vacancy, would notify the state's executive authority of the vacancy, compelling the governor to issue a writ.

Pursuant to Clause 1(k) of House Rule X, the Committee on House Administration (hereafter "this Committee") has jurisdiction over the following: "Election of the President, Vice President, Members, Senators, Delegates, or the Resident Commissioner; corrupt practices; contested elections; credentials and qualifications; and Federal elections generally."

In light of these several authorities, this Committee now writes the Board regarding the election in North Carolina's Ninth Congressional District, which remains unresolved as of this writing. It is the Committee's understanding that the State Board of Elections has been conducting a thorough investigation of this matter since its inception. This letter acknowledges the work of the State Board's investigators to date. Additionally, however, the Committee is acutely aware of its responsibilities and rights concerning the eventual seating of House Members in disputed or vacant seats. It is within the realm of possibility that the House may become involved in the determination of the rightful claimant to the seat for North Carolina's Ninth Congressional District and may, under stated authority, proceed to investigate the matter on its own. For the House to appropriately determine the rightful claimant to the Ninth District's seat, it is likely that the House and this Committee will need to examine some or all of the material currently in your possession regarding the North Carolina Ninth District's candidates, election, procedure, and aftermath. Accordingly, it is of the utmost importance that the Board and all parties handling such evidence preserve and protect said material for future inspection by the House, this Committee, and its designated agents.



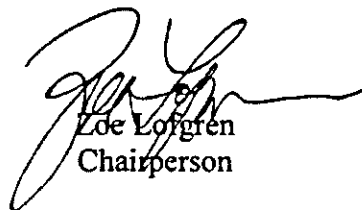
This Committee, on behalf of the House, therefore requests that you preserve, in original form, all documents and records received pursuant to subpoenas issued by the State Board of Election and any other records or documents transmitted to your office by law enforcement, other prosecutorial entities or any interested parties regarding this investigation and the resolution of this matter. This includes but is not limited to all notes, transcripts, recordings or any other materials internally produced, procured, or secured from outside sources regarding any entities involved in or peripheral to the investigation and resolution of North Carolina's Ninth Congressional District's House seat.

The Committee further requests detail from the Board on your procedures and methods of preservation of evidence and materials related to or arising out of this investigation, and information on best practices as articulated and implemented by the Board regarding preservation.

Failing to preserve the materials herein described would undermine the United States Constitution, the authority of this House and this Committee, and would deprive the people of the North Carolina's Ninth District their Constitutionally-protected representation in Congress, which all citizens expect and deserve.

This Committee anticipates your prompt response, compliance, and appreciates your efforts to preserve and protect democracy.

Sincerely,



Zoe Lofgren  
Chairperson