

1 NORTH CAROLINA BEFORE THE
2 COUNTY OF WAKE STATE BOARD OF ELECTIONS

3
4 IN THE MATTER OF: REQUEST TO ASSUME |
5 JURISDICTION OVER CERTAIN PROTESTS |
6 OF ELECTIONS FILED WITH COUNTY |
7 BOARDS OF ELECTIONS |
8 GS 163-182.12 |
9 -----|

7

8 North Carolina Board of Elections
9 Wake County Commons Building
10 4011 Cary Drive
11 Raleigh, North Carolina 27610

12

TUESDAY, NOVEMBER 22, 2016

13

10:00 a.m.

14

15 Pages 1 through 119

16

17 Board members present:

18 Mr. A. Grant Whitney, Jr., Chairman
19 Ms. Rhonda K. Amoroso, Secretary
20 Dr. Maja Kricker
21 Mr. Joshua D. Malcolm
22 Judge James L. Baker

21 Also Present:

22 Ms. Kim Westbrook Strach, Executive Director
23 Mr. Joshua Lawson, General Counsel
24 Ms. Katelyn Love, Special Counsel
25 Mr. Kevin J. Hamilton
26 Mr. Roger Knight
27 Mr. John E. Branch
28 Ms. Allison Riggs

1	T A B L E O F C O N T E N T S	
2	Call to Order	
3	by Chairman A. Grant Whitney, Jr.	3
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5	ASSUME JURISDICTION OVER CERTAIN PROTESTS	
6	OF ELECTIONS FILED WITH COUNTY BOARDS	
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PROCEEDINGS

10:00 a.m.

CHAIRMAN WHITNEY: I am Grant Whitney. I'm
Chairman of the North Carolina State Board of Elections.
I want to thank--I want to thank all the members of the
public and the members of the Board and the staff for being
here.

I am hereby reconvening a meeting of a telephonic
meeting that was held Sunday afternoon. In order to sort
of set up the parameters of what will be discussed today,
we have by coin flip determined the order of the parties
that will speak. I'd like to say that we've received briefs
from the Pat McCrory committee and the North Carolina
Republican Party which is one brief; a second brief from the
Cooper For North Carolina and the North Carolina Democratic
Party; and then a third brief from the Southern Coalition
for Social Justice.

We have set up time frames. So the McCrory
Campaign and the North Carolina Republican Party will have
a 30 minute argument to address the issues that we set up
on Sunday. The Cooper Campaign and the North Carolina
Democratic Party will have 30 minutes. Each of the McCrory
and the Republican Party Campaign will have ten minute
optional rebuttals. The Cooper and the North Carolina
Democratic Party will have a ten minute optional rebuttal,
and the Southern Coalition for Social Justice will be given

1 a 20 minute argument, and we thank them for submitting their
2 brief as well.

3 The members of the public have been informed that
4 they will not be recognized but they were given the
5 opportunity to submit written comments as of the time that
6 this agenda was put together, and 473 people have commented,
7 and we appreciate the interest of the public in what we are
8 about to do.

9 So absent any further issues, I'm going to open
10 the floor to the McCrory Campaign and the North Carolina
11 Republican Party. I'll ask that each person speaking
12 identify themselves for the record and tell us who they
13 represent.

14 ARGUMENT BY N.C. REPUBLICAN PARTY:

15 MR. KNIGHT: Good morning, Mr. Chairman,
16 members of the Board. My name is Roger Knight. I represent
17 the Pat McCrory committee. With me today are John Branch
18 and Brian Levecchi also representing the Pat McCrory
19 Committee, and Mr. Thomas Stark who is the general counsel
20 to the North Carolina Republican Party.

21 I appreciate the opportunity to be present today
22 and address you. Thank you for that opportunity and thank
23 you for your service. With respect to the issues that were
24 designated to be addressed today, there are three, and
25 probably the first and most important one or at least the

1 most interesting one--

2 AUDIENCE MEMBER: Can't hear.

3 MR. KNIGHT: How about now?

4 AUDIENCE MEMBER: Better.

5 MR. CHAIRMAN: Okay. Thank you.

6 MR. KNIGHT: Sorry--is regards to whether
7 or not the protests that have been brought by members of the
8 public with respect to the 2016 general election are
9 properly styled as protests or should have been styled as
10 challenges.

11 Let me begin by saying a protest is not a
12 challenge. They are of course covered by two different
13 statutory regimes. Nowhere in NCGS 163 Article 8 does it
14 say that a challenge is the only remedy for investigating
15 and determining an ineligible vote.

16 This Board and, by extension, the County Boards,
17 has very broad authority over the conduct of elections, and
18 may hear protests under Section 163-182.12 that are not
19 timely filed, initiated by a protester or by the Board, and
20 is still pending in any county, or any other action
21 necessary to assure that an election is determined without
22 taint of fraud or corruption and irregularities that may
23 have changed the result of an election.

24 North Carolina law mandates that the State Board
25 shall investigate when necessary or advisable. The

1 administration of election laws, frauds, and irregularities
2 in elections in any county, municipality, or district.

3 And that's very important. That's the broad
4 oversight authority of this Board and by extension the
5 County Boards to do what is necessary to assure all the
6 citizens, every citizen, that the election was fair and
7 without taint, without corruption, with irregularity.

8 This has been further approved and stated by the
9 courts of this state. In other words, there is case law,
10 and because we are lawyers, we are going to argue some case
11 law.

12 Beginning with Sharpley vs. State Board of
13 Election in 1974, the Court of Appeals stated that the
14 authority of the State Board to conduct the investigation
15 and to enter an order in this case was not dependant upon
16 the filing of a timely protest.

17 The mandatory tone of the statute which directs
18 that the Board shall investigate when necessary or advisable
19 frauds and irregularities in elections makes clear that the
20 Board in appropriate circumstances may take action on its
21 own motion even in absence of any protest.

22 Following that was the most--the case that's most
23 like what the situations that we have today. That is in re:
24 Appeal over Republican Candidates for Election in Clay
25 County, a 1980 Court of Appeals case in North Carolina.

1 And that should resolve this matter. It involved
2 an inquiry by the State Board of Elections into an election
3 in Clay County specifically the processees involved in
4 applying for, receiving, and returning absentee ballots.

5 In that case the State Board of Elections found,
6 just for example, two absentee ballots cast by convicted
7 felons, two absentee ballots cast by minors, several
8 absentee ballots which were improperly acknowledged, several
9 absentee ballots which were improperly witnessed, and one
10 critically ill woman who was carried and supported through
11 the rain into the Board of Elections and then cast a ballot
12 that was improperly witnessed.

13 The Court noted that no challenge or protest was
14 filed in that case, yet the State Board of Elections took
15 the case up on its own inquiry and on its own motion. The
16 illegal ballots were the basis for a new election.

17 That case, the Clay County case, has been cited
18 in seven other cases in North Carolina over the years. It
19 has never been overturned and it has never been superceded.

20 Now, in my distinguished opponent's brief--

21 MR. MALCOLM: Mr. Knight.

22 MR. KNIGHT: Yes, sir.

23 MR. MALCOLM: The case you just cited, what
24 was--was it a matter where the result of that individual
25 being or those individuals being declared ineligible, would

1 it have affected or changed the outcome of the election, or
2 did it?

3 MR. KNIGHT: It did.

4 MR. MALCOLM: By what margin?

5 MR. KNIGHT: There were, I believe--and I'd
6 have to go back and look, but some hundreds of votes that
7 were declared to be ineligible.

8 MR. MALCOLM: So in your brief on Page 3 at
9 the very bottom, you've referenced 182.12, and you state
10 some of what you've just verbally stated, but you qualify
11 all of it in stating the statute, to my knowledge, exactly
12 as it's written, "The taint of fraud or corruption and
13 without irregularities that may have changed the results of
14 the election." Is that a critical component when County
15 Boards and this Board is considering a protest, the latter
16 part of my comment?

17 MR. KNIGHT: Whether it would've changed
18 the results of the election?

19 MR. MALCOLM: Yes.

20 MR. KNIGHT: Is that a critical part? I
21 believe so.

22 MR. MALCOLM: Okay.

23 MR. KNIGHT: But to expand upon that at
24 this point, right now we don't know how many votes statewide
25 that these protests will involve and we don't know the final

1 result of the canvass. We don't know the final result of
2 the count of the provisional ballots. We don't know the
3 final result of the count of the absentee ballots. And so
4 this inquiry should continue and the process should play
5 out.

6 MR. MALCOLM: Yes, sir, and on Page 4 of
7 your brief, the bottom paragraph, the third line down, you
8 quote, starting on the end of the second line, you say,
9 "Some other irregularity," end quote, "namely that large
10 numbers of illegally registered voters were permitted to
11 cast ballots."

12 In your opinion when you use the phrase "large
13 numbers of illegally registered voters," what did you mean
14 by that; what is it you expect this Board to interpret that
15 to mean?

16 MR. KNIGHT: I'm sorry. I couldn't hear
17 the last part.

18 MR. MALCOLM: What--when you say "large
19 number of illegally registered voters," how do you--that's
20 not a quote; that's your words, I assume. How should we
21 interpret the word--the phrase "large numbers"?

22 AUDIENCE MEMBER: Excuse me. We can't hear.

23 MR. KNIGHT: It would be easier to say that
24 large number is more than a few. It would be--a large
25 number would be a number that would impact the election.

1 MR. MALCOLM: It's a number that impacts the
2 results.

3 MR. KNIGHT: Yes, sir.

4 MR. MALCOLM: Is that fair to say?

5 MR. KNIGHT: Yes.

6 MR. MALCOLM: Okay.

7 MR. KNIGHT: The point being right now,
8 too, we don't know exactly. Let's just say this: Let's say
9 that the provisional ballots, the absentee ballots, the
10 other protests bring the election results, and not only in
11 the governor's race but in other races, closer together.
12 So that cumulatively 100 votes, 200 votes, or 50 votes
13 becomes a large number for purposes of impacting the
14 election.

15 MR. MALCOLM: I agree with that. Sorry to
16 interrupt you. You can continue.

17 MR. KNIGHT: The brief of my opponents
18 today make reference to Ms. Strach's testimony in the--in
19 a case in front of--in the federal district court in North
20 Carolina, and at this point I would like to take into
21 account the fact that that case in particular did not deal
22 with a protest. It dealt with same-day voter registration,
23 which is not an issue in this case, and more importantly
24 there was nothing in the case about election protests and
25 neither Ms. Strach nor Judge Schroeder addressed election

1 protests.

2 Furthermore, requiring a challenge to every vote,
3 particularly in the context of the protest raised in this
4 matter is impractical and possibly impossible. In the
5 largest segment of the challenged votes those people who
6 allegedly voted twice, once in this jurisdiction in early
7 voting or in absentee voting and later in another state,
8 there's no way to challenge prior to the election or on
9 election day.

10 There's no way to know that they in fact voted in
11 another state until after the election. So there's no way
12 to challenge those votes prior to election day. That's just
13 an impossibility.

14 It follows that subsequent to the vote, in
15 addition to being illegal, the subsequent vote canceled out
16 the prior votes, and that is a proper subject for this Board
17 to inquire about as a voter irregularity or a tabulation
18 problem with the county votes--County Boards of Election.

19 As for the deceased voters and felons, the
20 statutes allow for a challenge, but while there is a
21 deadline to challenge a single vote if that vote will
22 ultimately affect the result of this Board of Election and
23 the Count Board of Elections has the authority under 163-
24 182.12 to investigate and take action.

25 Those who ask you to limit your authority to

1 review the ineligible votes or ask you to abdicate the
2 responsibility to ensure the results of the election are
3 fair for everyone.

4 To adopt a position that the challenge is the sole
5 remedy is to further abdicate the obligation to completely
6 investigate any irregularity. It will reward fraudulent
7 voters who would get a windfall merely by committing fraud
8 outside the windows for filing a challenge or by preventing
9 discovery of a fraudulent vote until it is too late to
10 challenge.

11 MR. MALCOLM: Mr. Knight.

12 MR. KNIGHT: Yes, sir.

13 MR. MALCOLM: Your comment where you said,
14 "outside the windows to challenge," what do you mean by
15 that? You just said--correct me if I misstate it. You
16 said, "Outside the windows to challenge a voter." Tell me
17 a voter that votes at any time that's outside a challenge
18 window, as it's set forth statutorily.

19 MR. KNIGHT: I can't tell you a voter that
20 votes outside of the challenge window, but I'm just telling
21 you that it's impossible to discover the fraudulent vote or
22 the improper vote or the ineligible vote in some instances
23 during the challenge window. It's impossible.

24 MR. MALCOLM: As it relates to felons is
25 what you're saying

1 MR. KNIGHT: As it relates to people who
2 vote in two jurisdictions?

3 MR. MALCOLM: Okay. Two jurisdictions.
4 What other? Give me another one. Go through that litany
5 of what others. So somebody votes down in Conway, then they
6 come up and vote in Wilmington.

7 MR. KNIGHT: Correct.

8 MR. MALCOLM: Give me the other ones.

9 MR. KNIGHT: I'm not sure I understand your
10 question.

11 MR. MALCOLM: I want him to tell me. Go
12 through the other examples of where they are outside the
13 window, when the challenge statute would not apply. People,
14 obviously during early voting, if they are a same-day
15 registrant, those names are reported daily to the County
16 Boards, and anyone with an interest in who those voters are
17 can gather those names and challenge those people. Is that
18 a true statement?

19 MR. KNIGHT: That's true.

20 MR. MALCOLM: Anyone that shows up on
21 election day, there's a procedure and a statute that allows
22 an individual if you meet the statutory requirements to
23 challenge that voter on election day. Is that true?

24 MR. KNIGHT: That's true.

25 MR. MALCOLM: And those people that show up

1 on election day to vote have already registered to vote, so
2 anyone with an interest in who is properly registered, if
3 they had an interest, would have those lists of names.

4 Would that be true?

5 MR. KNIGHT: That would be true.

6 MR. MALCOLM: So what other instance, other
7 than the out of state example you've given, is there not a
8 window to challenge the voters that you're referring to in
9 the generic sense?

10 MR. KNIGHT: Say an individual votes,
11 registers, and is properly registered, votes, and is later
12 convicted of a felony, say, the day before the election.
13 That makes him ineligible to vote on election day.

14 So that vote--he's already cast the vote. When
15 he cast the vote, the voter was eligible to vote and became
16 ineligible later, so close to the election day that it's
17 impossible to determine.

18 MR. MALCOLM: Okay. What if the gentleman
19 had been convicted three months prior? Does it make a
20 difference to your client whether it's the day before or
21 whether it's three months prior or two days prior?

22 MR. KNIGHT: I think that--and the point
23 I would like to emphasize is that this Board has the
24 authority to cure it regardless of whether it's--

25 MR. MALCOLM: That's not my question, Mr.

1 Knight. I'm asking you, if you don't mind, to draw the line
2 for me in the example that we just went through: You
3 proffered or stated someone that's convicted the day prior
4 and I gave you the example of someone else convicted three
5 months prior.

6 I assume you would agree that individual that's
7 convicted three months prior, that name would've been on--
8 if he's a registered voter, that name would've been on a
9 registered list.

10 People with an interest in finding out if Joshua
11 Malcolm was a convicted felon would have had access to that.
12 So where is the line; where is the line between that three
13 months and one day when the statutory framework that
14 currently exists that you've just mentioned doesn't already
15 provide any avenue to challenge those individuals and those
16 in between?

17 MR. KNIGHT: I don't know where there is
18 a line, Mr. Malcolm.

19 MR. MALCOLM: So are you--so is it--I want
20 to make sure I understand. So you're recommending to this
21 Board that it doesn't matter--as it relates to a felon, it
22 doesn't matter when they're convicted.

23 MR. KNIGHT: That's true.

24 MR. MALCOLM: And that we should ignore the
25 statutory framework as it relates in this discussion to

1 felons; we should ignore the fact that there's a procedure
2 to challenge those felons, and that people don't avail
3 themselves of that opportunity.

4 MR. KNIGHT: I'm saying that in this
5 instance the challenge is not the critical part of it; that
6 there is no requirement for a challenge.

7 MR. MALCOLM: Okay.

8 MS. AMOROSO: Mr. Knight, if I might
9 interrupt here, let's get the facts out on the table here.
10 Tell me the type of issues that we've seen--the
11 irregularities that you're talking. There are a number of
12 categories. Can you please state them for the record. You
13 know, we had dead voters. Could you please state the other
14 categories that are at issue here?

15 MR. KNIGHT: They include individuals who
16 have voted in two different jurisdictions including North
17 Carolina. Typically, and perhaps exclusively but I can't
18 swear to that, these are people who voted by absentee ballot
19 in North Carolina, and then at some later date voted in
20 another jurisdiction probably on election day.

21 There are one or more interstate compacts that
22 have databases to identify those individuals. It involves
23 there's another instance where there are individuals who
24 voted by absentee ballot and subsequently passed away prior
25 to election day.

1 There are individuals who registered and voted by
2 either absentee ballot or early voting and either were
3 already on the felon list or were subsequently convicted of
4 a felony and were on active--serving an active sentence,
5 serving probation, or serving parole.

6 MS. AMOROSO: And are you concerned about
7 the same-day registration issue; is that an issue for you?
8 Have you checked those? Typically a County Board needs 30
9 days to do the identification process. What do you have?

10 MR. KNIGHT: I think that's an example, and
11 a fine example, of how the timing of this and particularly
12 as the election laws have evolved over time where we have
13 the same-day registration; we have early voting; impacts the
14 challenge statute so that this Board's ultimate authority
15 to ensure that elections are free of irregularities and
16 fraud and taint becomes more and more important as a safety
17 net for just that situation.

18 MS. AMOROSO: Are you aware that a lawsuit
19 was just filed yesterday regarding same-day registration?

20 MR. KNIGHT: I was informed of that this
21 morning. I did not know until 35 minutes ago.

22 MR. MALCOLM: On Page 5 of your brief, the
23 second sentence that's not indented, halfway down, you say,
24 quote, "However, there is precedent for Boards of Election
25 passing upon the legality of individual votes cast."

1 When you use the words "legality of individual
2 votes cast," is it your opinion that challenges or protests,
3 either or or, there has to be an individual showing during
4 the process whether we're talking about a protest as it
5 relates to the particular individual? Or do you think it
6 can just be a large swath, and you can just say any
7 individual that is--here's a list of individuals that I
8 believe from DHHS have died, you know, are deceased and you
9 can just attach those and make that part of one large
10 protest, the same thing with felons? Is that your belief?

11 MR. KNIGHT: You can make it part--

12 (Feedback from microphones on recording.)

13 MR. KNIGHT: I didn't do it. I think you
14 can make it part of a protest, but I think it's part of this
15 Board inquiry with regard to due process. I fully believe
16 that each individual voter, each individual challenged vote,
17 each individual protested vote should be reviewed, and that
18 voter should be given due process before the vote is
19 discounted.

20 MS. AMOROSO: And are you asking this board
21 to exercise our jurisdiction and our authority under 182.12,
22 Mr. Knight?

23 MR. KNIGHT: Yes, ma'am.

24 MS. AMOROSO: Thank you.

25 MR. KNIGHT: We have addressed this

1 situation or at least my contention that the--it's not the
2 time to determine whether the amount of ballots in the
3 protest, either individually or cumulatively, will affect
4 a statewide election or all statewide elections.

5 This is a part of the process and should be--that
6 part--that determination should be made only after the
7 completion of the canvass, completion of the counting of the
8 provisional ballots, and the completion of the counting of
9 the absentee ballots. Then we determine whether or not
10 there's an impact on the election.

11 MR. MALCOLM: So with that statement are you
12 saying that you think that this Board should encourage the
13 counties and almost direct them to hurry up and get on with
14 it and go ahead and canvass, based on the statement that you
15 just made?

16 MR. KNIGHT: I mean I would hate for you
17 to attribute that statement to me particularly. I mean I
18 don't have an interest in--or I don't feel I have the right
19 to tell the county boards to hurry up.

20 MR. MALCOLM: I'm not asking that. Is it
21 your client's interest--is it your client's desire that the
22 100 counties in North Carolina get on with the canvass and
23 canvass the results so they can bring a protest under a
24 different statutory provision if they so desire, because
25 obviously, you know, you can bring a protest after canvass

1 on canvass day.

2 MR. KNIGHT: I think under your authority,
3 under the administrative section in our administrative
4 discussion, that you can direct the County Boards as a part
5 of the canvass to make inquiry, summon people and papers,
6 which is what the statute says, "summon people and papers,"
7 to review the disputed ballots.

8 This is all part of the process. We have a
9 statute which is part of this administrative process and
10 that's one of the questions, is how to handle this; should
11 you handle it under the administrative process under 163-
12 182.5?

13 And 163-182.5 along with Article 15A, which is
14 your authority to review protests, work together. You can
15 simply direct the County Boards--and "simply" may be the
16 wrong way to put it, because none of this is simple, but you
17 can ask the County Boards or direct the County Boards to
18 exercise their authority on the canvass to determine
19 disputed ballots.

20 And that's exactly what we have here are disputed
21 ballots. And they can either hold individual hearings or
22 pass upon the disputed ballots in whatever way.

23 CHAIRMAN WHITNEY: If this were a Panther
24 football game, you'd be getting your two minute warning.

25 MR. MALCOLM: And with that being said I've

1 got three or four critical--on Page 13 you set forth 1, 2,
2 3, 4, 5, if it rolls into the next day--you set forth five
3 bullet points that you state that "Due process protection
4 should be extended to include."

5 The things that you have listed there, I assume
6 you know they're contradictory to 163-182.10. Are you
7 asking this Board to tell County Boards to not follow what's
8 in the statute as it relates to dealing with a protest?

9 For example, you say, "Take reasonable efforts"-
10 -second bullet, "Take reasonable efforts to ensure that all
11 affected parties are provided actual notice of the protest
12 hearing." Are you referring to the preliminary hearing or
13 are you referring to the protest hearing itself?

14 MR. KNIGHT: The protest hearing.

15 MR. MALCOLM: Okay. You state in the third
16 bullet at the end of that, you want us--you expect them to
17 provide a description of the process by which the voter at
18 issue may be heard. So you want them to provide like a go-
19 by?

20 MR. KNIGHT: That seems reasonable, to at
21 least allow the disputed voter to answer the allegations.

22 MR. MALCOLM: But that's not what you say.
23 You don't say "provide them a opportunity." You say "ensure
24 that the notice to affected parties includes a copy of the
25 protest giving rise to the protest and a description of the

1 process." That's not--nothing like that's in the statute.

2 It clearly says, "For the conduct of a hearing,
3 the County Board may allow evidence to be presented. The
4 Chair and the members of the Board shall subpoena. They may
5 receive evidence. The person who made the protest shall be
6 permitted to present allegations and evidence."

7 So I just wanted to make sure when we finish this
8 up today, is it your position that we should adopt those
9 five things that you have listed in your brief on Page 13
10 and 14?

11 CHAIRMAN WHITNEY: I'm going to let him answer
12 that, but time is up, so respond, if you would, please.

13 MR. KNIGHT: Yes.

14 CHAIRMAN WHITNEY: Thank you.

15 MR. KNIGHT: Thank you. Could I ask too
16 that our time for rebuttal be reserved until after the
17 completion of the arguments from the Southern Coalition,
18 please.

19 CHAIRMAN WHITNEY: I have--yeah. Everybody okay
20 with that?

21 MR. KNIGHT: Thank you, sir.

22 CHAIRMAN WHITNEY: Okay. Yeah. Thank you, Mr.
23 Knight. Now, the Cooper campaign and the North Carolina
24 Democratic Party, identify yourself and your team and who
25 you represent.

1 DIRECTOR STRACH: Mr. Chairman, they want to
2 switch the mike out so--

3 CHAIRMAN WHITNEY: Yeah, yeah, okay.

4 (Pause)

5 CHAIRMAN WHITNEY: Identify yourself please.

6 ARGUMENT BY NC DEMOCRATIC PARTY:

7 MR. HAMILTON: Sure. Good morning, Mr.
8 Chairman and members of the Board. My name is Kevin
9 Hamilton, and I appear today on behalf of the Roy Cooper for
10 North Carolina Campaign.

11 AUDIENCE MEMBER: Excuse me. We cannot hear.

12 MR. HAMILTON: My name is--is that better?

13 CHAIRMAN WHITNEY: Okay. For the Cooper
14 Campaign.

15 MR. HAMILTON: My name is Kevin Hamilton.
16 I appear today on behalf of the Roy Cooper for North
17 Carolina Campaign as well as the North Carolina Democratic
18 Party.

19 CHAIRMAN WHITNEY: Could you advise how you are
20 here?

21 MR. HAMILTON: So we filed a motion to appear
22 pro hac vice. Your general counsel has advised that because
23 I'm licensed to practice law out of state, in Washington
24 State, that it's necessary to have the Board approve me to
25 appear in this.

1 Local counsel Eddie Speas is a fully licensed
2 North Carolina lawyer. He signed the--he's agree to appear
3 as local counsel to monitor my activities and make sure I
4 comply with North Carolina law.

5 CHAIRMAN WHITNEY: Also on behalf of both the
6 Cooper Campaign and the North Carolina Democratic Party?

7 MR. HAMILTON: That's correct, Mr. Chairman.

8 AUDIENCE MEMBER: We can't hear you at all.

9 CHAIRMAN WHITNEY: Can't hear me or--

10 AUDIENCE MEMBER: (unintelligible)

11 CHAIRMAN WHITNEY: Is that better?

12 AUDIENCE: Yes.

13 CHAIRMAN WHITNEY: Okay. All right. Any
14 comments?

15 (No response from the Board.)

16 CHAIRMAN WHITNEY: Do we have a motion to--

17 MR. MALCOLM: I make the motion.

18 CHAIRMAN WHITNEY: We have a motion. Do we have
19 a second?

20 DR. KRICKER: Second.

21 CHAIRMAN WHITNEY: Any discussion?

22 (No response from the Board.)

23 CHAIRMAN WHITNEY: All in favor say aye.

24 (Unanimous vote in favor.)

25 CHAIRMAN WHITNEY: Opposed, no.

1 (No response from the Board.)

2 CHAIRMAN WHITNEY: Motion carries. Welcome to
3 North Carolina.

4 MR. HAMILTON: It's an honor to be here, Mr.
5 Chairman, and I appreciate that. Thank you. With me today
6 is Ezra Reese from my office, John Berkon, and Mr. Speas who
7 I mentioned a moment ago.

8 North Carolina's election statutes strike a
9 careful balance among several different competing public
10 policy interests. First, guaranteeing that all eligible
11 voters and votes are counted; second, ensuring that
12 ineligible votes are not counted; and third, allowing
13 election boards to count votes and declare election winners
14 in a timely fashion.

15 And Article 8 of Chapter 163 sets forth the
16 specific procedures by which individual voters may be
17 challenged and their votes retrieved and it plays a critical
18 role in striking this balance. Those procedures allow
19 election officials and voters alike to prevent individuals
20 who are ineligible to vote from casting ballots, but
21 importantly they include due process safeguards to ensure
22 that eligible voters are not inadvertently disenfranchised
23 in the process.

24 They require that challenges be entered by
25 specific statutory deadline contained in the statutes of

1 North Carolina so that the resolution of eligibility issues
2 do not delay the canvassing and certification process.

3 The question before this board is not a new one.
4 The legislature has grappled with these issues and created
5 a really thoughtful and balanced process for challenging,
6 allowing the challenge of voters.

7 Ms. Strach, the State Board's executive director,
8 testified under oath in federal court just last year
9 about--and the federal court relied on her testimony in part
10 in reaching its decision. This is the part of the district
11 court opinion that was not overturned by the Fourth Circuit.

12 And in advance of the 2016 election the State
13 Board advised County Boards that it must count absentee
14 ballots unless they're challenged pursuant to Article 8.

15 Article 8, moreover, is not the only way that the
16 County Boards of Elections can ensure that registration
17 lists contain only appropriate voters. There's a list
18 maintenance procedure set forth in Chapter 7A of the statute
19 that allows for (unintelligible) attention to this vital
20 concern, and not only is that the only vehicle for voters
21 to remedy irregularities in the process; Article 15A allows
22 voters to lodge protests when there's a counting or
23 tabulation issue or other irregularity that casts doubt,
24 legitimate doubt on the outcome of the election.

25 But Article 8 is the sole and exclusive mechanism

1 by which individual voters may be challenged and their
2 ballots retrieved, and I would urge this Board to reiterate
3 that principle clearly articulated in the statute in
4 deciding the issues before it.

5 So the Board asked the parties three questions,
6 and I'd like to take the time to address those three
7 questions, and the first was: May County Boards of
8 Elections retrieve ballots and discount the votes of
9 individuals found to be ineligible though no challenge was
10 timely brought under Article 8 of the North Carolina general
11 statutes?

12 Members of the Board, the answer to this question
13 is not only no; it is clearly no. As a matter of law,
14 County Boards of Elections may not retrieve the ballot, may
15 not discount the votes of an individual unless a timely
16 challenge is brought under Article 8 of the North Carolina
17 general statutes. North Carolina law simply could not be
18 more clear.

19 Article 8 sets forth several specific provisions
20 worth reviewing. First, Article 8 provides that the
21 registration records of each county shall be open to
22 inspection by any registered voter of the state including
23 the chief judge or Boards of Election.

24 So the registration lists are available for
25 everyone, anyone of interest to review. The law imposes a

1 deadline on when challenges may be filed under this
2 procedure. So during this period any voter can look at the
3 list and say, you know, that person is not eligible to vote;
4 they've been convicted of a felony; they're not 18 years of
5 age; they're not a United State citizen, whatever the
6 challenge is. The doors are open.

7 MR. MALCOLM: What if they're--what if they
8 go down to Conway?

9 MR. HAMILTON: I'm sorry?

10 MR. MALCOLM: What if they go down to
11 Conway, South Carolina, which is right south of Robeson
12 County, and they vote, as I talked with Mr. Knight about;
13 they vote down there, and then they come and vote in
14 Pembroke in Robeson County? That wasn't the only
15 registration if it's a fact they voted in South Carolina.
16 So what say you as to the questions that I asked Mr. Knight
17 about that?

18 MR. HAMILTON: That, of course, would be a
19 crime, and it would be prosecutable by the appropriate
20 officials, and this Board certainly could investigate that,
21 but there's no--but that's not--that's not--

22 JUDGE BAKER: But the vote should count if
23 the person votes twice.

24 MR. HAMILTON: There's no evidence that
25 anything like that has happened here. There's no evidence

1 before this board.

2 JUDGE BAKER: We're speaking in hypothetical
3 terms.

4 MR. HAMILTON: Sure. Of course. There's no
5 process under the--a challenge to the process, of course,
6 but you wouldn't be able to do that, and so I don't believe
7 there's a process under North Carolina law to allow that to
8 happen, and there's a reason for that. At some--

9 JUDGE BAKER: I understood your answer,
10 though, is the vote should count if the person votes twice
11 if it's not challenged?

12 CHAIRMAN WHITNEY: One of the briefs suggested
13 that the first vote counts and the second one subjects--in
14 the second state subjects the voter to criminal penalties
15 or whatever, but that--and I'd like to hear a further
16 explanation as to why that we're going to allow a vote to
17 count, and what happens if they voted at the same time? For
18 instance, absentee ballots.

19 MR. HAMILTON: Sure.

20 CHAIRMAN WHITNEY: You mail an absentee ballot,
21 pop them in the--and get them postmarked at the same time.
22 Which one counts? Walk us through that.

23 MR. HAMILTON: First of all, to answer your
24 first question--there's a couple of questions there. On the
25 first point, if the citizen casts the vote in North

1 Carolina, casts that vote first and they're lawfully
2 entitled to cast the ballot, then that ballot should count.

3 If they then cross state lines and go into South
4 Carolina or go into Virginia, cast a ballot there, they've
5 committed a crime, but that doesn't disqualify the ballot
6 that they cast in North Carolina as a North Carolina citizen
7 because they were entitled to cast that ballot.

8 They've just committed an unrelated crime in a
9 different state, and they should be prosecuted for that.
10 That's illegal, but there's nothing in North Carolina law
11 that allows you to disqualify that vote from a citizen who's
12 entitled to cast it.

13 Now, the harder question, I think, Commissioner
14 Malcolm asked, which is what if it's reversed; what if they
15 vote in that state first and then come to this state? And
16 I admit that is an issue that can't be addressed in advance
17 on election day unless you happen to know that the person
18 had cast the ballot there. So it's not a process under the
19 challenge process.

20 But that's not really the question here that
21 you're asking. The question is, you know, may the County
22 Boards of Election retrieve the ballot and discount the
23 ballots of an individual found to be ineligible though no
24 challenge was timely brought.

25 MR. MALCOLM: That is sort of the question.

1 I mean we're meeting here today with all of you all to give
2 some direction to 100 counties. So what is it you propose
3 that we write--that Kim Strach write in her numbered memo
4 related to this matter, related to the exact scenario that
5 we just set forth?

6 JUDGE BAKER: Or even more complicated if
7 it's not a different state, if it's a different county, then
8 we're both in North Carolina, and surely you wouldn't argue
9 with both of those votes should count, and they can't be
10 challenged on the day. Would that not then be a protest?

11 And the reason that I say is because I certainly
12 agree that under 163-85 and 87, I think there are definite
13 time limits for challenging individual voters, has to be,
14 and that's good.

15 But there are going to be situations in which
16 elections are held, unfortunately, we don't have millions
17 of people and every single person being an honest person.
18 We can't assume that. We'd be very naive to do so. There
19 must be a method then in order to--I will use the word
20 "challenge" voters who might try to vote twice or they might
21 vote illegally or do something, and it's not discovered
22 until after election day. Is that not when we move then to
23 the protest category?

24 MR. HAMILTON: Well, the issue here--I mean
25 now you're talking about a residency challenge which can be

1 brought within the time frame. Someone who's on a
2 registration list in two different counties in North
3 Carolina, that information is available, and that kind of
4 protest, absolutely.

5 JUDGE BAKER: To save time, forget my
6 example then. I'm just talking about when there's a problem
7 with a voter who one way or another attempts to vote twice
8 or attempts to vote illegally, and it can't be discovered
9 until after election day.

10 There has to be a method for someone to be able-
11 -for an interested party to be able to challenge that voter
12 even though the word "challenge" is used with set time
13 limits. Do we not then move to the category involving
14 protest in the procedures that we've outlined?

15 MR. HAMILTON: If--if under Article 15
16 there's a sufficient number that would cast legitimate
17 doubt, then--

18 JUDGE BAKER: To change an election.

19 MR. HAMILTON: --then there may be, but
20 not--see, the problem is, and I think that the questions
21 that Commissioner Malcolm was asking earlier about due
22 process rights, you know, when you're talking about
23 individual voters, they have a right to be heard on this,
24 and the problem is you're in the middle of the canvass.

25 So the whole points, I think, that the

1 legislature--the whole purpose of the legislative process
2 to set this deadline wasn't to restrict this Board or
3 somehow impair the fact finding function and make sure that
4 only legitimate votes are cast. It's no ensure that we make
5 that determination in as many cases as possible in advance.

6
7 And if we can't and if it casts legitimate doubt
8 on the election, then we can take it as an election protest.
9 But otherwise, we have to get on with the election. We have
10 to have the Board certify the election results during the
11 canvass because there are strict deadlines in that.

12 And there's lots of process under this challenge
13 procedure. You're allowed to file specific challenges up
14 to 25 days before the date of the election on all of these
15 grounds. The person's not a resident of the state of North
16 Carolina. They're not a resident in the county, that
17 they're not a resident in the precinct, that they're not 18
18 years of age, that they've been adjudged guilty of a felony,
19 that they're dead.

20 JUDGE BAKER: I know 163-85.

21 MR. HAMILTON: In addition, on election day,
22 you can challenge that, and voters who cast a ballot by
23 absentee ballot can be challenged when the ballot arrives,
24 and those deadlines have all long gone past, November 15,
25 for domestic voters, November 18 for overseas voters.

1 CHAIRMAN WHITNEY: Excuse me. Who does 163-85A
2 apply to? I think he's going to read it. If not, I'll be
3 glad to read it to you.

4 MR. HAMILTON: Yes, please.

5 CHAIRMAN WHITNEY: It said--you gave us, and I
6 appreciate very much your--in your italics, you must have
7 made--maybe made after--may not be made after the 25th day
8 before the (unintelligible). The first sentence in 163-85A
9 says, "Any registered voter of the county may challenge the
10 right of any person to register or remain registered or vote
11 in any such county."

12 Why--if it applies to registered voters, why do
13 you think that applies to a County Board or the State Board?

14 MR. HAMILTON: Well, first of all, the
15 members of the County Board and the State Board are
16 registered voters. The purpose of the statute is to
17 allow--

18 CHAIRMAN WHITNEY: But we have independent
19 parties.

20 MR. HAMILTON: Of course.

21 CHAIRMAN WHITNEY: Not just as citizens; we have
22 much more authority than that.

23 MR. HAMILTON: And responsibility.

24 CHAIRMAN WHITNEY: I understand our
25 responsibility.

1 MR. HAMILTON: The--but the purpose of the
2 deadline is to establish--we went through all these in
3 opposing counsel's brief, the questions about due process,
4 what sort of notice, what sort of hearing, all of that.
5 Those are to protect the voters of the state of North
6 Carolina whose ability to cast a vote has been challenged,
7 to allow them an opportunity to be heard.

8 The same due process concerns apply whether it's
9 a registered voter who's applying and challenging an
10 individual voter or a member of the Board of Elections, and
11 so the answer to your question is that provision applies to
12 any specific--voter specific challenge, and it's precisely
13 because of the due process concerns.

14 If you allow the members of this or any of the
15 County Boards to challenge, then you've really just
16 nullified the state statutory scheme for imposing deadlines
17 and making--ensuring that there is appropriate due process
18 concerns.

19 So I would--you know, as I mentioned before,
20 Executive Director Strach testified in federal district
21 court that same-day registration ballots are retrievable
22 because they're absentee ballots, but the law doesn't allow
23 them to be retrieved unless they are challenged. That was
24 her testimony.

25 And then on redirect she was asked again and she

1 confirmed that an absentee ballot would count unless the
2 voter was challenged on election day, and I quote, "and if
3 that voter is not challenged on election day, that ballot
4 would count," close quote.

5 That's Ms. Strach's testimony under oath, and
6 Judge Schroeder--and we--I won't read the language, but
7 relied specifically on that testimony in the federal
8 decision on April 25th in the North Carolina State NAACP
9 vs. McCrory.

10 DR. KRICKER: Excuse me, Mr. Hamilton. In
11 the case where voters are given the wrong ballot style, in
12 those cases would you say that we cannot retrieve those
13 ballots?

14 MR. HAMILTON: If a voter was given the wrong
15 ballot style.

16 DR. KRICKER: Well, I'm talking about an
17 error on the part of the Board wherein a large number of
18 voters are given the wrong ballot style.

19 MR. HAMILTON: Sure.

20 JUDGE BAKER: Excuse me. The wrong races
21 on it or something?

22 DR. KRICKER: Essentially.

23 MR. HAMILTON: As I understand your question,
24 they're in a county and they're given the wrong ballot style
25 allowing them to vote in elections that they're not entitled

1 to vote in.

2 DR. KRICKER: Exactly.

3 MR. HAMILTON: In that situation, if there
4 were a sufficient number to cast doubt on the--legitimate
5 doubt on the outcome of the election, then that would be an
6 appropriate irregularity to consider under a protest.

7 That's the kind of thing, but that's not a
8 challenge to an individual voter's qualification. For those
9 sorts of challenges, you can't just staple a list drawn from
10 some commercially available and unreliable website and
11 challenge all those voters en masse.

12 That's just a complete evasion and ignoring of the
13 statutory scheme that North Carolina has embraced, and I
14 think that's the problem that we have here. If you look at
15 the argument that's been presented in front of you, you
16 look, page through the brief, there's almost no discussion
17 of the statute.

18 There's no discussion of what was the legislature
19 trying to do. What's the purpose of this? What are the
20 deadlines? And instead there's a--there's some citations
21 of various cases and then sort of this let's just make up
22 the rules that seem fair to me, or that might seem fair to
23 you, but that's not your role, with all due respect.

24 The legislature has thought about this and set up
25 a procedure. Certain kinds of challenges can be brought

1 pursuant to the challenge process in Article 8. Others can
2 be brought as a protest.

3 But they're very different things and you can't
4 just style individual challenges as a protest and ignore the
5 legislative scheme. That's not consistent with the plain
6 language of the statute; it's not consistent with the way
7 that we interpret statutes to render the specific provisions
8 of Article 8 as surplusage.

9 And it's not consistent with the way that
10 elections are administrated across the country. We pointed
11 out in the brief the cases from Minnesota, Louisiana,
12 Delaware, all cases in which the courts have said, gee,
13 here's a ballot that probably shouldn't have been counted,
14 but the challenge was made untimely.

15 Bell v. Gannaway, for example, in Minnesota, the
16 court held that--

17 CHAIRMAN WHITNEY: Where is that in your brief?

18 MR. HAMILTON: Which page?

19 (Pause)

20 MR. HAMILTON: Bell v. Gannaway is cited on
21 Page 6 of our brief.

22 CHAIRMAN WHITNEY: Thank you, Counselor.

23 MR. HAMILTON: And there they said that the
24 failure of an absentee voter to properly execute his
25 affidavit of residence and eligibility would require that

1 the ballot be rejected if timely challenge is made.

2 But because there was no timely challenge, the
3 court was compelled to hold that the contestant's challenge
4 to this absentee ballot came too late where the ballot had
5 been deposited into the ballot box and commingled with all
6 the others.

7 The same rule is applied under New York law; the
8 court may not entertain a challenge to absentee ballots
9 where no protester objections have been made to them on
10 election day, and Louisiana and Delaware have the same rule.

11 In the few minutes I have remaining, let me
12 address the second and third questions. The second question
13 was whether the basis for a determination of ineligibility
14 may be brought as a protest of election under Article 15A,
15 and I think that again North Carolina law directly addresses
16 the issue and forecloses this end run around the challenge
17 procedures built into Article 8 for many of the same reasons
18 we've been discussing, that Article 8 built in a series of
19 due process protections for the voters, allows time for the
20 voters to be heard and for the County Boards or this Board
21 to address these factual issues in a way that allows a
22 deliberative process and doesn't interfere with a timely
23 canvass of the election.

24 So many of these challenges, if style be
25 considered as a protest under Article 15A, would be untimely

1 in any event. The statute 182.9(b)(4)(a) requires that
2 protests be filed with the County Boards of Election before
3 the beginning of the County Board of Election's canvass if
4 it concerns the manner in which the votes are counted or the
5 results tabulated.

6 And many of the County Boards here have already
7 begun their canvass, so I think that this Board should take
8 the opportunity to make it clear; if you've begun the
9 canvass and then a protest was filed, it's untimely.

10 Second, even for protests filed in a timely
11 manner, a protest must be dismissed unless there is
12 substantial evidence of any violation, irregularity, or
13 misconduct sufficient to cast doubt on the results of the
14 election. That's 163-182.10(d)(2)(c).

15 To allow a protest to proceed, the Board would
16 need to find substantial evidence to meet this standard
17 that's sufficient to cast doubt. Read together, these
18 provisions may be clear that a protest must be dismissed
19 unless the facts alleged could change the result of the
20 election.

21 And here it's just--it's not close. At most,
22 taking together all these protests that have flooded the
23 counties add up to a few hundred--a few hundred votes. The
24 current margin according to this Board's website is well
25 over 6,000 vote margin.

1 MS. AMOROSO: Sir, that's just in the
2 governor's race. There are other possibly county or state
3 races that may be a closer margin. Is that correct?

4 MR. HAMILTON: As I understand it, there's
5 another race; I can't quote the exact total. I think it's
6 more like 3,000 vote margin. But it's still well outside
7 the--even if every one of these allegedly illegal votes was
8 actually found to be illegal and even if every one of them
9 went for the losing candidate, it still wouldn't cast doubt
10 on the outcome of the election. There's not enough here.

11 So it's fine. I'm not suggesting to the court
12 that the Board shouldn't address these issues. They
13 certainly should, but not at this point and not in holding
14 up the canvass of this election.

15 CHAIRMAN WHITNEY: How many of the protests or
16 whatever we're calling these things were actually filed
17 after the, quote, beginning of the County Board of Elections
18 canvass meeting? Not the process but the--that would've
19 been on the 18th. How many--

20 MR. HAMILTON: You know, I'm sorry to say
21 that I can't answer the question. I don't even think your
22 staff can answer the question because some of the counties
23 haven't sent the protest to this Board, and I don't
24 understand quite the reason why you don't get notice of the
25 protests directly. So we've been--

1 MR. MALCOLM: We don't understand that
2 either because they're supposed to report it within 24
3 hours.

4 MR. HAMILTON: That's correct.

5 MR. MALCOLM: So everybody out there, listen
6 to this. County Boards are supposed to report it within 24
7 hours. Mr. Knight certainly knows.

8 Mr. Knight, would it be fair to say that you know
9 how many protests have been filed on behalf of the
10 Republican party?

11 MR. KNIGHT: I believe it's 52.

12 MR. MALCOLM: You believe it's 52? Can you
13 tell us how many--can you answer--do you know how many of
14 those, Mr. Chairman's question, how many of those were filed
15 in a timely manner?

16 MR. KNIGHT: No, sir. These were all
17 individual protests and some of them--I now realize that
18 some of them--help me--

19 AUDIENCE: Can't hear you.

20 MR. KNIGHT: No, sir, I don't.

21 MR. MALCOLM: He said, no, he doesn't know.

22 AUDIENCE: Use the microphone.

23 CHAIRMAN WHITNEY: Does your mike have a little
24 green thing to turn it on?

25 AUDIENCE: Can't hear.

1 CHAIRMAN WHITNEY: Does your microphone have a
2 green button?

3 MR. KNIGHT: The microphone does not have
4 a green button.

5 CHAIRMAN WHITNEY: Does it have any kind of
6 button? Mine has a button to turn it to green when it's
7 turned on. IT, can we--

8 MR. KNIGHT: I can answer his question.

9 CHAIRMAN WHITNEY: Well, we can hear you now.
10 Can everybody hear him now?

11 AUDIENCE: (unintelligible crosstalk)

12 CHAIRMAN WHITNEY: Okay. All right. Proceed,
13 Counselor.

14 MR. LAWSON: Chairman, he has about three
15 minutes.

16 CHAIRMAN WHITNEY: Okay. Three minutes,
17 Counselor.

18 MR. HAMILTON: The third question that the
19 Board asked was what procedural protection should be
20 followed to ensure due process if these protests were to be
21 considered?

22 And the easy answer here is North Carolina has
23 already addressed and already built in a process to address
24 the deceased voters and the voters appear on a list of
25 deceased persons provided by the Department of Health and

1 Human Services to the State Board of Education (sic). They
2 can be removed from the registration lists. County Boards
3 may also remove individuals identified as deceased by
4 assigned statement of a relative.

5 Felons or--active felons or those voting out of
6 state or voters accused of being dead who are not on those
7 lists, North Carolina has a statutory system to allow due
8 process to the individuals to be heard before they're
9 removed. But there's a process to go through to clean the
10 list and do list maintenance.

11 There's no process for considering such challenges
12 as a protest of the election after the fact and for good
13 reason. At some point you have to have finality on an
14 election.

15 There was a list that was apparently generated by
16 a staff member in the Board of Elections office on its own
17 initiative. That's a helpful exercise when done in advance
18 of an election so that you can challenge voters and remove
19 them from the list when there's still time to provide
20 appropriate notice, but it can't be used now at this point.

21 Moreover, the information submitted in support of
22 many of these protests have upon investigation proved to be
23 untrustworthy which demonstrates the need for this very
24 procedural protection.

25 MR. MALCOLM: Mr. Hamilton, that statement

1 you just--the statement you've just made, the fact that some
2 Boards, approximately five or six, I guess depending on who
3 you ask--seems like we don't always know--if a majority of
4 them have been dismissed at the county level, does that lead
5 you to believe that the process in the statutory framework
6 is working as it's been interpreted by at least those
7 counties?

8 MR. HAMILTON: Well, I think the process, the
9 correct outcome for these individual challenges filed as
10 protests is to dismiss them. So to the extent that the
11 County Boards have dismissed them, absolutely; the process
12 is working because the County Boards have read the statute,
13 understand the structure, and view these as untimely
14 individual challenges and dismissed them.

15 And that's appropriate, so respectfully I would
16 submit that the Board should conclude that County Boards of
17 Elections may not retrieve ballots and discount the votes
18 of individuals if no challenge is timely brought under
19 Article 8, and would encourage the Board to provide
20 appropriate consistent guidance to the County Boards of
21 Election. Thank you so much.

22 CHAIRMAN WHITNEY: Thank you, Counselor.

23 Let's kind of not comment in the audience, please.
24 No applause and no boos.

25 We have a choice now. Under the amended agenda,

1 the Cooper and Democratic Party are entitled to a ten-minute
2 rebuttal. If you'd like to go after the Southern Coalition,
3 I'll leave that up to you, Counselor.

4 MR. HAMILTON: I have nothing to say in
5 rebuttal to my own argument, so perhaps it makes sense--

6 CHAIRMAN WHITNEY: Well, I'm just trying to go
7 by the--

8 MR. HAMILTON: No, no. I appreciate that.
9 I appreciate that, Mr. Chairman, and I think it would be
10 appropriate for us to--

11 CHAIRMAN WHITNEY: I do too. I just wanted--

12 MR. HAMILTON: Thank you.

13 CHAIRMAN WHITNEY: I just want to change the
14 order with you all being okay with that.

15 Okay. Could the counsel for Southern Coalition
16 of Social Justice come up and you have 20 minutes.

17 ARGUMENT BY SOUTHERN COALITION FOR SOCIAL JUSTICE:

18 MS. RIGGS: Good morning. My name is
19 Allison Riggs. I'm a senior voting rights attorney with the
20 Southern Coalition for Social Justice in Durham. We
21 appreciate the Board's consideration of our memo and
22 granting of our motion to be heard here.

23 Briefly, because I don't want to repeat what I've
24 detailed in the memo submitted yesterday, there's just a few
25 points that I want to address. Specifically with respect

1 to the second two questions posed by this Board, should this
2 Board give guidance to the counties that they may under the
3 protest statute or their canvass authority consider some of
4 these challenges that have been posed.

5 We wanted to raise a very real concern we have
6 that such activity would violate the National Voter
7 Registration Act which prohibits systematic list maintenance
8 activity in the 90 days prior to an election.

9 While we are after the election, I think the
10 statute would certainly encompass that that time after the
11 election and before the certification of the canvass; that
12 is doing systematic list maintenance after votes have been
13 cast but before the election has been certified would fall
14 under the prohibition imposed by the National Voter
15 Registration Act.

16 MR. MALCOLM: As it relates to which
17 category of voters? Are you taking about the dead, the
18 felons, or the people that vote in two states? Which or
19 all of them?

20 MS. RIGGS: All of them. And let me
21 explain why. Because what is--prohibited list maintenance
22 is anything that is not individualized and rigorously
23 examined on a one by one basis.

24 So when you have situations where either
25 challengers or the IT Department of the State Board of

1 Elections doing database matching to try to determine
2 eligibility of voters, this is a systemic process of list
3 maintenance.

4 So looking at--within the 90 days or after the
5 election but before the canvass, doing matching to try and
6 identify voters who have died on a systematic basis would
7 be prohibited by the Act.

8 If I come up to a county board and say "My
9 neighbor who I know passed away after voting," that would
10 not be a systematic effort, but the challengers are not
11 doing that. They are--with respect to the felon list, the
12 alleged felon list, they are doing database manage--database
13 matching that is rife with error.

14 With respect to this alleged double state voting,
15 they are doing database matching that is, again, rife with
16 error, and there are two court cases that I think this Board
17 should look at to understand why this is problematic under
18 the NVRA.

19 The first is--both are cited in my brief. The
20 Arcia, or Arcia (alternate pronunciation), case from Florida
21 where the Eleventh Circuit in 2014 said the state's attempts
22 to remove ineligible non-citizen voters before the election
23 violated the NVRA. Regardless of the fact that these voters
24 may have been ineligible, the data was not certain enough
25 and the time was too short to identify errors.

1 The Eleventh Circuit said "Congress decided that
2 in such a situation the risk of disenfranchising an eligible
3 voter outweighs catching a voter who was ineligible."
4 That's Congress's determination on the relative balancing.

5 Likewise, Judge Biggs in the Middle District
6 recently said that private parties can, through challenges,
7 start initiating what amounts to county or state list
8 maintenance. In that case these were pre-election
9 challenges; that they were mass in number within the 90 days
10 and not based on any individualized understanding or
11 rigorous inquiry.

12 I'd also like to address something that came up;
13 I think it was Mr. Malcolm mentioned in the meeting on
14 Sunday. What do we do, the County, the State Board, what
15 do we do when this information falls in our laps?

16 And for example, the Burris Analysis, and this is
17 what I think is important to understand here. This
18 information that may be falling in your lap is not neutral,
19 it is not uniform, and it's not nondiscriminatory.

20 The information brought by the protestors is
21 largely inaccurate. It appears to be targeting--I think
22 the felony claim appears to be targeting African-American
23 voters. The vast majority of those challenged are African-
24 American. Many of them are wrong and are people with
25 misdemeanors or people who are just the wrong people, but

1 to take those discriminatory protests and then rubber stamp
2 them by saying "I'm going to consider these because these
3 are what fell into my lap," is going to lead you down a road
4 where you're going to be more likely to violate the Voting
5 Rights Act.

6 The other thing to keep in mind too is that if we
7 go down this road where these protests, these untimely
8 challenges, file those protests where there is no
9 possibility that they affect the outcome of the election,
10 if we allow these to proceed, I think it's opening a
11 floodgate that's going to be very difficult to manage
12 election administration.

13 So, for example, it opens the door for groups to
14 start challenging every possibly inappropriate, at least
15 borderline, denial of a provisional ballot, the discounting
16 of a provisional ballot, even if it doesn't change the
17 election outcome because we could say, "Well, we just
18 haven't found enough of them yet to change the outcome of
19 an election," and so it never ends.

20 The County Boards would be able to--will be
21 drowning in these protests and will never be able to have
22 orderly election administration.

23 MR. MALCOLM: Ms. Riggs, I'm looking at 52
24 USC 20507.

25 AUDIENCE: Can't hear you.

1 MR. MALCOLM: So help--make sure I'm clear
2 about what you're saying because when I look at paren A,
3 paren 3, it clearly says, "Provided that the name of the
4 registrant may not be removed from the original list"--

5 AUDIENCE: Can't hear you.

6 MR. MALCOLM: --"except," in B, "as provided
7 by State law, by reason of criminal conviction, or mental
8 incapacity." So if I go on to read over in paren 4, it
9 talks about the death of a registrant.

10 If I go on to read 5(b), it clear--in plain
11 meaning--plain reading, it says, "Any state program or
12 activity to protect the integrity of the electoral process
13 by ensuring the maintenance of an accurate and current
14 voter," and it says, as you stated, "it shall be uniform,"
15 but the way I read this in totality, when it talks about the
16 90 days prior, it's specifically not including death and
17 felons. Are you saying I'm misreading that?

18 MS. RIGGS: I think it means it still
19 can't be systematically. It means that they can be
20 individually removed. So this is the same issue that the
21 Eleventh Circuit grappled with, and Florida State law
22 allowed for the removal of voters who were ineligible
23 because they lacked citizenship status.

24 These are voters who can one by one be removed,
25 but they cannot be systematically removed, particularly in

1 a non-uniform way.

2 MR. MALCOLM: Do you know how many felons
3 have been protested or--we're using these words
4 interchangeably--challenge, protest. How many County Boards
5 in this state have taken up felon matters? Do you know the
6 answer to that?

7 MS. RIGGS: How many County Boards in this
8 state? So there were about 47 or 50 total felon challenges,
9 and I believe most of them have been dealt with already.

10 MR. MALCOLM: And how have they been dealt
11 with?

12 MS. RIGGS: So in Wake County there were
13 three. Two were clearly the wrong people, juniors and
14 seniors mixed up, and one was not. Guilford was--over half
15 of them were people who were actually only convicted of a
16 misdemeanor, also African-American.

17 So they are looking at these, and they are finding
18 them completely, almost completely lacking.

19 MR. MALCOLM: So would that lead a
20 reasonable person to believe that they're doing an
21 individual analysis and that they're doing what they're
22 supposed to be doing?

23 MS. RIGGS: I think the County Boards so
24 far as doing an individualized analysis, but I don't believe
25 the challenges being brought are being brought on an

1 individual basis, and that's part of the problem.

2 If you look to Judge Biggs's opinion in the NVRA
3 case, the basis of the--the initiation of the list
4 maintenance procedure really needs to be individualized, but
5 I do think it's important at this point to say that the
6 County Boards are doing a good job so far, and North
7 Carolina is the envy of the country when it comes to
8 election administration.

9 There is absolutely no evidence of systemic voter
10 fraud, and we do an enormous disservice to the hundreds, if
11 not thousands, of North Carolinians who work tirelessly as
12 election workers when we elevate spurious claims like this
13 and imply that they in any way cast doubt on the election
14 that we have just conducted.

15 The County Boards are in large part doing the
16 right things, dismissing these protests, but whatever this
17 Board does from this point on, the single most important
18 concern that needs to be dealt with is the Board ensuring
19 that due process rights of every North Carolinian are
20 safeguarded.

21 And so if you don't dismiss--instruct the counties
22 to dismiss these as untimely challenges, you must, must,
23 must, in emphatic terms, explain to the County Boards that
24 every voter whose ballot is at dispute needs to be afforded
25 the right to come and defend him or herself, to face his or

1 her challenger, and explain to them the very high standard
2 of proof required to discount a constitutionally protected
3 ballot cast.

4 MS. AMOROSO: How would you have us, Ms.
5 Riggs, handle these absentee ballot mill allegations?

6 Five--or four or five counties, there's an
7 allegation of absentee ballot mills, this handwriting issue.
8 Can you comment on this please?

9 MR. RIGGS: I can because the counties are
10 dealing with these well. Last night Greene County
11 unanimously dismissed allegations that there was an absentee
12 mill going on. They pulled the voter registration forms and
13 the absentee envelope and the Board went through each and
14 every one, exact math. These are specious claims. They are
15 not well researched. They are unfounded.

16 The counties are in control of this, and they're
17 untimely to begin with, but I think we have to have some
18 faith in the fact that the counties are recognizing that
19 these are bad claims, and this Board should just urge the
20 counties to finish what they're doing, finalize their
21 canvas, and get this election certified.

22 MR. MALCOLM: Get on with it.

23 MS. RIGGS: Get on with it. Anyone have
24 any more questions? I'd be happy to ask (sic) them.

25 Otherwise, I've taken up enough of your time. Thank you.

1 CHAIRMAN WHITNEY: Thank you. Well, I guess that
2 brings it back to--we have a ten minute optional rebuttal
3 for the McCrory campaign and the North Carolina Republican
4 Party. And you are?

5 MR. BRANCH: John Branch, here on behalf
6 of the McCrory committee. Wake County Bar, so--

7 AUDIENCE: Can't hear you again.

8 MR. BRANCH: --I do not need to be admitted
9 pro hac.

10 CHAIRMAN WHITNEY: If you could get closer to the
11 mike.

12 REBUTTAL BY N.C. REPUBLICAN PARTY:

13 MR. BRANCH: Honorable Board Members, I
14 want to make a couple of points in response to the arguments
15 by the Cooper campaign and the Southern Coalition for Social
16 Justice. Although I have heard the phrase "politics makes
17 strange bedfellows," I don't think I ever expected to hear
18 the SCSJ argue in favor of voter list maintenance, although
19 there are first times for everything.

20 The argument that the Cooper campaign and the SCSJ
21 are making to you is that no protest and no challenge to
22 ballots for which irregularities are found after the
23 election occurred--occurs can be brought. Their argument
24 is essentially due process is actually no process for the
25 irregularities that have been found here.

1 That is not within the duties and responsibilities
2 of the State Board and the County Boards of Election that's
3 been delegated to you by the legislature. The statute
4 provides that the North Carolina State Board of Elections,
5 quote, "shall investigate when necessary or advisable the
6 administration of election laws, frauds and irregularities
7 in elections in any county and municipality in special
8 districts." This is General Statute 163-22.

9 There is no timing restriction on this Board's
10 authority to make such investigations. Now, the Cooper
11 campaign and the SCSJ's position is essentially that because
12 the protests at issue were not brought under the Article 8
13 challenge framework, they are untimely and should be
14 dismissed.

15 What I would submit to this Board is that it has
16 a responsibility to look into the allegations that have been
17 raised by these protests and determine whether or not the
18 allegations are true, whether they have merit, and whether
19 they warrant any remedy that the County Boards determine is
20 appropriate in this circumstance.

21 MR. MALCOLM: Mr. Branch.

22 JUDGE BAKER: Mr. Branch.

23 MR. MALCOLM: I'm sorry, Judge.

24 JUDGE BAKER: By what statutory authority,
25 Article 15A?

1 MR. BRANCH: We--I'm looking primarily
2 right now, Judge, at 163-22. Essentially our position is
3 that the State Board has plenary power over this process and
4 has been delegated the authority and the duty to regulate
5 elections in the state of North Carolina and abdicating that
6 duty in the face of indications of possible irregularities
7 in some of the voting that has occurred in this election,
8 we believe, would be irresponsible.

9 MR. MALCOLM: Are you alleging that this
10 Board has done that, sir?

11 MR. BRANCH: What I'm saying--

12 MR. MALCOLM: Yes or no, are you alleging
13 that this Board--

14 MR. BRANCH: The Board has not made a
15 decision yet, sir.

16 MR. MALCOLM: Okay. Are you alleging that
17 any County Boards have not properly followed--the hearings
18 that have been held, are you alleging that those have been
19 occurring improperly?

20 MR. BRANCH: I don't know if the hearings
21 have been occurring improperly. There have been some
22 counties that have dismissed for lack of probable cause some
23 of the protests.

24 What I am saying is that this Board has a
25 responsibility to investigate the allegations that have been

1 raised. Now, Ms. Riggs made a great point about Greene
2 County. Greene County received a protest, according to her,
3 over the absentee ballots. Its Board members went in and
4 reviewed the signatures on a ballot by ballot basis,
5 determined that there was no fraud there, and dismissed the
6 protest. That is what should happen on a county by county
7 basis.

8 The County Boards, as determined by the State
9 Board in the hearing on Sunday night, should act as fact
10 finder with regard to the issues that have been raised in
11 each of these protests, and dismissing the protests before
12 the counties get to act in that fashion would be
13 inappropriate and I believe would undermine the public's
14 faith in the regulation and conduct of elections in this
15 state.

16 MR. MALCOLM: What do you mean by that, sir?
17 What do you mean "dismiss"? Tell me what you just meant by
18 that.

19 MR. BRANCH: Ms. Riggs' point with regard
20 to these protests is that the protests should be dismissed
21 writ large because they aren't done timely; ignore the
22 issues that have been raised, dismiss the protests, and just
23 certify the vote as it is.

24 MR. MALCOLM: Are you representing to us now
25 that you believe that has been occurring? If you are, tell

1 me which counties.

2 MR. BRANCH: No. No, no, no. We are here
3 today to discuss the State Board's--the process by which the
4 State Board will consider these protests. Our position is
5 that the protests should be considered on their merits and
6 not dismissed on technical procedural grounds, and that
7 there is statutory authority that has been delegated to this
8 board that allows it to exercise jurisdiction and require
9 the County Boards to investigate these issues on the merits.

10 JUDGE BAKER: And that is my question. If
11 we relied on 163-22, that does deal with the authority given
12 to the State Board, correct?

13 MR. BRANCH: That's correct.

14 JUDGE BAKER: And there certainly would be
15 arguments that would be made that it would be extremely
16 difficult for the State Board to conduct factual hearings
17 of alleged irregularities in 52 to who knows how many
18 eventual counties.

19 Do you contend that we have the authority to have
20 the County Boards conduct factual hearings for the State
21 Board under our authority under 163-22?

22 MR. BRANCH: Yes, I believe that the County
23 Boards have that authority and that responsibility under the
24 protest framework. Now, remember, the Cooper campaign and
25 the SCSJ's position is that all these protests should be

1 dismissed as untimely; they should not be heard at all. All
2 the McCrory campaign solution is, is that these protests
3 need to be heard on the merits. An investigation needs to
4 be done by the County Board.

5 I think there is an inherent challenge--Ms. Riggs
6 is right. The individuals that are bringing the protests
7 don't necessarily have the right tools and ability to
8 determine on their own whether or not the challenged issue
9 in the protest is valid.

10 That responsibility, we believe, resides in the
11 State Board and the County Boards of Election. If these
12 issues come up and there is probable cause to believe that
13 there is an issue, an investigation needs to be done with
14 regard to whether the issue is valid, and you know--

15 MR. MALCOLM: I'd like to ask you about
16 that, Mr. Branch, if I could. On Page 14 of the brief that
17 you all submitted, about five lines up from the bottom,
18 starting in the middle of that paragraph, middle of that
19 sentence, it says, in paren 2, "Scheduling the preliminary
20 consideration meeting called for under NC 182--163-192, to
21 occur as soon as the County Board of Elections staff has
22 concluded their investigation of the protest and all
23 relevant information from the State Board of Elections has
24 been received."

25 Just like I asked Mr. Knight, show me where in the

1 statute, sir, it says that a County Board, when they receive
2 a protest, because it doesn't say it and want you--maybe I'm
3 missing it--

4 MR. BRANCH: Mr. Malcolm, I can answer--

5 MR. MALCOLM: Let me finish. Let me finish.
6 Show me where, just based on the four corners of a protest
7 being submitted, that the County Boards are supposed to go
8 out and investigation that before the preliminary hearing.

9 MR. BRANCH: That is part of the
10 responsibility that has been delegated to the State Board,
11 and we would argue by virtue of that, to the County Boards
12 and their administration of the electoral process in North
13 Carolina.

14 MR. MALCOLM: That's not what it says.

15 MR. BRANCH: Can I give you an example?

16 MR. MALCOLM: Sure.

17 MR. BRANCH: Felon voting example from the
18 last board meeting where the State Board staffer identified
19 339 individuals who may be subject--may have voted while
20 inappropriately on felony status.

21 My understanding is that the number of protests
22 that were filed on felon voters was less than half of that.
23 The issue with regard to the felon voters is the State Board
24 of Elections has a far greater amount of data available to
25 it that allows it to determine the veracity of these issues,

1 and so what we would think is appropriate is that the Board
2 of Elections investigates whether or not these issues that
3 have been raised via the protest process have merit.

4 CHAIRMAN WHITNEY: You've got one minute left.

5 MR. BRANCH: If they don't have merit,
6 dismiss it. If they do have merit, then there's the
7 question of the remedy which, you know, we'll stand on our
8 brief on with regard to whether or not the ballot should be
9 pulled.

10 I have one final point I want to make, and then
11 if there's any other questions. The outcome of these
12 protests absolutely could affect the outcome of this
13 election. It is unclear--the investigation has not been
14 done on a number of them.

15 It is unclear how many ballots are actually
16 involved in the--with regard to the protests that have been
17 raised, and we understand that the same-day--there has been
18 a same-day registration protest filed as well.

19 And so to the extent that the Cooper campaign and
20 the SCSJ is contending that the Board shouldn't look into
21 any of these protests solely on the grounds that the protest
22 would not overturn this election, we would submit that that
23 is inappropriate. Thank you for your time.

24 DR. KRICKER: I have a question. Would you
25 find a difference between an irregularity and a challenge?

1 And if so, would you describe what irregularity has
2 occurred.

3 MR. BRANCH: Are you--okay. I believe that
4 you're asking this question with regard to all of the
5 protests that have been raised?

6 DR. KRICKER: Yes.

7 MR. BRANCH: Rather than parsing category
8 protest by category protest, I think we would say that the
9 State Board has the plenary authority under Article 163
10 regardless of whether you want to part hairs--is it a
11 challenge; is it an irregularity--regardless of the issue,
12 the State Board has the authority to investigate the
13 issue, and we believe that it should evaluate the merits of
14 it so that every legal vote gets counted. Thank you.

15 CHAIRMAN WHITNEY: The Cooper campaign and the
16 North Carolina Democratic Party, you have ten minutes.

17 REBUTTAL BY THE N.C. DEMOCRATIC PARTY:

18 MR. HAMILTON: Thank you, Mr. Chairman. I'd
19 like to just make a couple of points. First, I didn't want
20 to overlook the fact that there is a numbered memo 2016-09
21 directing County Boards that absentee ballots should be
22 counted unless they're challenged pursuant to Article 8.

23 It explains the process. It says that on the day
24 of the county canvass the County Board must hear a challenge
25 to an absentee ballot that was properly challenged on the

1 day of the primary or election and a challenge to an
2 absentee ballot that was timely mailed by election day and
3 received by the County Board after election day and was
4 properly challenged no later than the time set by the
5 statute. And then of course it also indicates that notice
6 must be provided to the challenged voters.

7 I point out this numbered memo because the memo
8 doesn't even contemplate that challenges could be brought
9 after the statutory deadline under the provision governing
10 election protests, and for good reason. Those challenges
11 are precluded by the plain language of the statute.

12 Second, if this Board were to say that voters,
13 campaigns, citizens of the state can ignore the provisions
14 and deadlines of Chapter 8 and instead repackage individual
15 challenges to voters as protests, you will open the
16 floodgates. You will not only be disregarding the process
17 created by the North Carolina legislature to manage this
18 process, afford a fair opportunity to challenge prior to the
19 day of the election, and protests to be filed where they'll
20 change the outcome after the election, but if you break down
21 this barrier and allow things to be repackaged, then you're
22 going to see a flood of these things happening every time.

23 Why would you take--why bother challenging
24 anything in advance of the election? Why don't you just
25 wait and see if it's going to make a difference, and if it's

1 a close enough election, then we're going to be encouraging
2 people to start filing these sorts of post hoc processes.

3 And this is not my judgment. This is the judgment
4 of the North Carolina legislature. This is not the way we
5 run an election in this state or, candidly, in almost any
6 state. You set up a process by which people, if they have
7 an objection to a specific voter, they articulate the
8 objection. They give that person a due process right to
9 defend themselves, and then you rule on it in advance.

10 Now, after the date of the election, sure, if
11 there's an irregularity, this Board and the County Boards
12 of Election have plenty of authority and, I believe,
13 responsibility to investigate irregularities. But unless,
14 under Article 15, unless it's going to change the outcome
15 of the election, then you can't view it as a protest, and
16 the reason--and there's a good reason for that, because if
17 it's not going to change the outcome of the election, then
18 let's get on with it. Let's finish this election and then
19 let's address whatever issues that we need to address,
20 prosecute an individual who may have cast an improper ballot
21 if there's grounds to do so, clean up our registration list
22 to make sure that the next time we do this we don't have the
23 same with these individuals.

24 Now, Mr. Branch mentioned a moment ago that he
25 thought that we were making the point that no protest or

1 challenge could be raised after the election, and that's
2 just not so. If the result--if there's a challenge to an
3 irregularity that would change the result of the election,
4 then of course you can bring it under Article 15. That's
5 the whole point of it.

6 There is no obligation--I believe one of the
7 questions from the Board pointed this out. There's no
8 obligation for the County Boards of Election or their staff
9 in the middle of the canvass simply because somebody files
10 a piece of paper saying they protest or raise a question
11 without any evidence, that we're then supposed to stop the
12 canvass and go launch an independent investigation to try
13 and find evidence for an unsupported allegation. That's not
14 the way the process works.

15 The statute says, the very first step on receiving
16 a protest is a probable cause hearing. A probable cause
17 hearing is an opportunity for the protester, the protester,
18 not the staff of the County Elections Board, to come forward
19 with evidence, evidence, testimony, documents, and show the
20 Board this is not just a piece of paper; this is not just
21 a guess or a hypothetical, but there's actual evidence and
22 there's probable cause to believe that this protest not only
23 is supported by the facts but also would change the outcome
24 of the election.

25 If they can't show that, the process ends there.

1 And it's not--the filing of the paper doesn't somehow impose
2 an obligation on the Board or its staff.

3 Finally, I would say enforcing the law as written
4 as adopted by the North Carolina legislature is a far cry
5 from undermining public confidence and public faith in the
6 outcome of our election system.

7 People in this building work hard to ensure that
8 elections are fair and the process is appropriate, and it
9 does them a disservice to call into question the
10 administration of elections in this great state. Filing
11 dozens of alleged protests in violation of the statutory
12 framework, targeting African-American communities with some
13 of the allegations, and walking in with utterly no evidence
14 to support those claims, that's what undermines public
15 confidence in elections, and it does a disservice to the
16 statutory structure of North Carolina law and it does a
17 disservice to the people of this great state.

18 MR. MALCOLM: But do you think--do you think
19 that people, after they see that news report about X number
20 of protests being filed, when they read the news article two
21 days later where X county voted unanimously to dismiss the
22 protests, isn't that the way it's supposed to work?

23 MR. HAMILTON: That is exactly the way it's
24 supposed to work, Your Honor, and I hope that the citizens
25 of North Carolina, when they wake up and they look at the

1 newspaper and read that, understand that the process is
2 working, and that the County Boards of Elections are dealing
3 with these unsupported issues appropriately. Thank you, Mr.
4 Chairman.

5 CHAIRMAN WHITNEY: Thank you, Counsel. Counselor
6 Riggs, do you want to--you only used nine minutes, and you
7 were supposed to get to talk last, so if nobody has an
8 objection, I'm going to give you a couple of minutes if
9 you'd like.

10 STATEMENT BY SOUTHERN COALITION FOR SOCIAL JUSTICE:

11 MS. RIGGS: I'd most like to use any extra
12 time to answer any other questions you all may have about
13 what's been happening, but I don't want to waste your time
14 with--I tried to submit a very thorough brief to this Board
15 yesterday, and I appreciate your timeliness.

16 I mean certainly Mr. Branch said some things that
17 didn't really reflect what I said, and I think you all
18 probably caught that, but list maintenance, systematic list
19 maintenance procedures are appropriate and they need to
20 happen 90 days before an election and they certainly can't
21 happen after an election, before an election is certified.
22 I think we can all agree on that.

23 And with respect to any issues regarding other
24 lawsuits that have been raised here, these are issues that
25 have been litigated and are outside the scope of what this

1 board needs to do, which is encourage the County Boards to
2 finish the job in front of them, do your job, and get this
3 election certified.

4 CHAIRMAN WHITNEY: Thank you, Counselor. Okay,
5 I would think it's a good time for any of the members of the
6 board to address any questions they have to counsel for the
7 respective parties and organizations that are speaking, so
8 opening up the floor to the Board to ask those questions to
9 our guests here.

10 QUESTIONS BY THE BOARD:

11 DR. KRICKER: I do have a question. In 163-
12 182.12 the authority of the State Board of Elections on the
13 protests, and it says that we may intervene and take
14 jurisdiction over protests or take any other action
15 necessary to determine that an election is without taint or
16 fraud or corruption and without irregularities that may have
17 changed the result of an election.

18 And then it refers to where a known group of
19 voters cast votes that were lost beyond retrieval for where
20 a known group of voters was given an incorrect ballot style.
21 So I believe that they're explaining irregularities as a
22 systemic error on the part of either the State or County
23 Boards. And I would appreciate both the McCrory campaign
24 counsel first and then the Cooper campaign counsel speak to
25 that issue.

1 MR. KNIGHT: With respect, Dr. Kricker.

2 CHAIRMAN WHITNEY: Is that mike working, folks?
3 Can you all hear?

4 AUDIENCE: (unintelligible)

5 CHAIRMAN WHITNEY: Okay. Go ahead, Counselor.

6 MR. KNIGHT: With respect, Dr. Kricker, I
7 believe that the sentence that you referred to does not
8 necessarily refer specifically to irregularities. It refers
9 to ordering new elections. An irregularity doesn't
10 necessarily have to be a ballot style problem. It doesn't
11 have to be a lost ballot problem.

12 An irregularity can be--is broad enough, and it
13 appears in I believe in more than one place in the statutes
14 respecting the conduct of elections; that it is a umbrella,
15 if you will, for the State Board to act to make sure that
16 the elections are fairly conducted, accurately counted, and
17 finally certified.

18 DR. KRICKER: I was simply--I think those
19 were simply examples. What I'm talking about is is that I'm
20 asking would you agree that an irregularity would be a
21 systemic error in the conducting of the election?

22 MR. KNIGHT: No, Dr. Kricker, I would not
23 agree. I believe it would be any issue that would affect the
24 outcome of the election, whether it be corruption, fraud,
25 mistake, error. It could be a person who votes and then

1 passes away, which is not really an intentional fraud, but
2 that's something that happens. I mean it can be any one of
3 those that would affect the outcome of the election. And
4 that's what we're trying to determine here is whether these
5 would affect the outcome of the election.

6 MR. HAMILTON: The statute that you cite,
7 the, first of all, most important language--and I think I
8 heard opposing counsel say this--and without irregularities
9 that may have changed the result of the election. That's
10 the critical part.

11 If you're talking about protests, that's an
12 essential element to show that whatever the irregularity
13 might have been, it had to be such that it would change the
14 effect of the election.

15 Irregularities, I agree that giving the wrong
16 ballot style, that's an irregularity. Not counting votes,
17 that's an irregularity. Maybe the polling place shut down
18 when it should have been open. Maybe unsecured ballots,
19 like in the Clay County case. Those are all examples of
20 irregularities.

21 And the fact of the matter is in every election
22 every conducted in ever state in this union, there are
23 irregularities that happen. We rely on citizens, our
24 mothers, our fathers, our grandfathers, citizen volunteers
25 who staff many of our election places, and they sometimes

1 make mistakes, and the fact of the matter is most of the
2 time it just doesn't matter.

3 And if you have a challenge on election day or
4 pursuant to Article 8 and you're raising on of these
5 irregularities, then it has to be a big deal. It has to be
6 enough to change the results of the election.

7 And in an instance like this where even if you
8 took all of these that have been filed and added them all
9 up, they wouldn't change the result of the election. It's
10 improper to use this process.

11 JUDGE BAKER: Mr. Hamilton, you have stated
12 on several occasions--and I certainly agree with you--about
13 the necessity that protests considered by the State Board
14 would be monumental enough to change the outcome of an
15 election. That is, just as you quoted, clearly stated in
16 163-182.12.

17 Is there other statute authority for that that you
18 know of or is that where you're getting it? And it's not
19 a trick question or anything. I'm just wondering if there's
20 some other place or if that in 163-182.12, is that where you
21 get the authority that it needs to be sufficient to change
22 the outcome of an election?

23 MR. HAMILTON: I think so. I'm going to
24 consult somebody who's better than me.

25 JUDGE BAKER: Well, before you consult, let

1 me follow up with my next question--

2 MR. HAMILTON: Sure.

3 JUDGE BAKER: --because I was going to ask
4 then, that particular statute does talk about the authority
5 of the State Board of Elections, then there's another
6 statute for consideration of protests by County Boards.

7 That's just a couple of statutes back at 163-
8 182.10, and I don't see that language in that statute, and
9 maybe I just overlooked it, but I wonder if County Boards
10 then you would contend are also limited in considering
11 protests that would only have the chance of changing an
12 election like that State Board.

13 MR. HAMILTON: That one I can answer. In
14 that statute the County Board--this is 182.10. The County
15 Boards have to make findings of fact, and they have to
16 decide whether it is sufficient to change the result of the
17 election. And you can see in 182.10, sub D, sub 2,
18 conclusions of law, and then sub C, D, and E.

19 So first, under sub C, the protest should be
20 dismissed because there's not substantial evidence of any
21 violation, irregularity, or misconduct. If they were to
22 make this conclusion, the whole thing's dismissed.

23 JUDGE BAKER: Right.

24 MR. HAMILTON: Sub D is there is substantial
25 evidence to believe that violations have occurred in light

1 of the fact of the outcome, but the Board is unable to
2 finally determine the effect because the election was a
3 multi-county election. If the Board makes this conclusion,
4 it shall order the protest and the County Board's decision
5 be sent to the State Board for action.

6 And then C says, "If there is substantial evidence
7 to believe that a violation of election law or other
8 irregularity or misconduct did occur and was sufficiently
9 serious to cast doubt on the apparent results of the
10 election, if the County Board makes this conclusion, it may
11 order any one of the following."

12 JUDGE BAKER: And that's great, and I'm
13 aware of that statute. So the point I'm making then is when
14 you have an election where millions of votes were cast and
15 the difference is just a few thousand, how can a County
16 possible know then when it acts if it's going to be
17 sufficient to change the outcome of an election, that
18 individual county, when there are similar protests being
19 filed all over the state?

20 So the contention that it should not be considered
21 unless it can change the outcome of the election, wouldn't
22 it just about have to be considered by the County then in
23 a statewide election when you have an election with a margin
24 that close? Because they won't know what's going to happen
25 in other counties, right?

1 MR. HAMILTON: Well, except that we know that
2 all the protests added together add up the a few hundred
3 votes. That's not an unknown fact. That's something the
4 McCrory campaign has admitted.

5 JUDGE BAKER: You heard them say it a few
6 minutes ago though, emphatically say that all the protests
7 could make a difference in the election. I take it you
8 totally disagree with that.

9 MR. HAMILTON: Well, I heard the conclusion.
10 What I didn't hear is "and here's a list; here they are."
11 I mean the vote total, last I heard, was over 8,000 vote
12 margin. So here's a list of 9,333. You know, he doesn't
13 have that.

14 You know, if you add all of them together, they're
15 going to--they end up somewhere around--between two and
16 three hundred challenges. That's not enough, when the
17 margin is 8,000, to even come close, and I think the County
18 Boards of Elections know that.

19 MR. MALCOLM: So with that being said, would
20 it be wise for this Board to instruct the County Boards to
21 do exactly what they've been doing, to make the
22 determination in accordance with the statute that we're
23 referring to under the conclusion of law and because
24 hearings--we're talking about statewide elections really.
25 Would it be appropriate for us to instruct the County Boards

1 that should they find a valid protest, that they should
2 automatically default to D because we're really dealing with
3 statewide elections here?

4 MR. HAMILTON: Well, I think what this Board
5 should do, and I think the purpose of the meeting here today
6 was to address these three issues and provide some guidance
7 of what is our structure. So, sure, I think instructing the
8 Counties with respect to what is a challenge and what is a
9 protest.

10 MR. MALCOLM: That's not my question.

11 MR. HAMILTON: I know it's not, but I'm--and
12 I'm getting to your--the point is, when you give the
13 guidance, I think that's part of the guidance. Part of the
14 guidance, of course, is what is a protest.

15 So I think you have to guide the County Boards on
16 both sides of this: What's an appropriate challenge, what's
17 an appropriate protest, and under the provision that we've
18 just been talking about, when do you resolve those sorts of
19 protests if you make that kind of a finding and send it to
20 this Board?

21 MR. MALCOLM: And that's my exact point.
22 Maybe the two tables here can agree on at least one thing
23 today; that D is the money--that's the money maker because
24 we're really arguing about statewide elections.

25 And that would address what I'm hearing is their

1 concern because they're saying it's a whole lot of people.
2 You guys are saying it's a whole lot of not a lot of people,
3 and so because we're going to constantly chase that, we're
4 going to be chasing out tail on, well, the number is this;
5 the number is that. We won't know the number until 100
6 counties, if there are 100 or 52, whatever that number is,
7 until they finally take these matters up and push those
8 forward.

9 MR. HAMILTON: Well, respectfully, the first
10 thing the County Boards have to do is decide what is before
11 us, a challenge or a protest. If it's a challenge, was it
12 timely brought? If not, it should be dismissed. If--
13 otherwise, if it's is a protest, does it meet the
14 requirements of law?

15 I think--I'm certain that all the lawyers in the
16 room would agree that North Carolina law should be followed.
17 And that's what we'd ask the Board to instruct the County
18 Boards to do. Thank you.

19 CHAIRMAN WHITNEY: Thank you, Counselor. Any
20 other questions from Board members?

21 DR. KRICKER: Not for counsel. Should I
22 reserve questions for the staff?

23 CHAIRMAN WHITNEY: I'm fine with you asking those
24 questions now. We're here to--

25 MR. MALCOLM: Do we want to do that before

1 a bathroom break or after?

2 CHAIRMAN WHITNEY: Well, I--

3 DR. KRICKER: Yeah.

4 CHAIRMAN WHITNEY: I was going to say we can have
5 a bathroom break or we can have lunch, or what would you all
6 like to do?

7 DR. KRICKER: Break and then come back.

8 CHAIRMAN WHITNEY: Okay. So, all right, it's
9 11:48. Maybe five minutes after 12:00. Okay? Thanks. Be
10 back at 12:05.

11 (Whereupon, a brief recess was taken
12 from 11:48 a.m. to 12:06 p.m.)

13 CHAIRMAN WHITNEY: I want to thank each of the
14 parties and other organizations that spoke for their fine
15 presentation and their--

16 AUDIENCE: Can't hear you.

17 CHAIRMAN WHITNEY: Sorry. I had to turn on my
18 green button. I want to thank the parties, their counsel,
19 for their presentations this morning, each of them, and
20 their incredibly well prepared briefs on such short notice.
21 It's been a great help for each of the Board members; I know
22 it's been a big help for me. We appreciate that.

23 Dr. Kricker was the last person that was speaking,
24 and I'd like to give her the floor. I think she was going
25 to ask some questions of the staff, but I've asked counsel

1 to stay here till the end of this because we will likely
2 have several more questions from counsel. Right now Dr.
3 Kricker, have at it.

4 DR. KRICKER: Well, first, Mr. Knight, I
5 believe, had some comments about my previous question, and
6 I'll give him a minute or two to answer that.

7 MR. KNIGHT: Dr. Kricker, if I could, I'd
8 like to defer to my colleague Brian Livecchi, who has
9 information.

10 CHAIRMAN WHITNEY: We're trying to get a little
11 more heat in here, folks. Some of you are cold. Proceed.

12 MR. LIVECCHI: Dr. Kricker, I just--I draw
13 your attention to Page 7 of our brief, there at the bottom
14 where it talks about 163-182.13, which is the authority that
15 the State Board of Elections has to order a new election on
16 various grounds in response to a protest.

17 So if the State Board were to determine, based on
18 a protest, that there were irregularities sufficient to call
19 into question the doubts of the election--or, I'm sorry, the
20 outcome of the election, one of the remedies available to
21 the State Board is to order a new election.

22 And on that first ground that the State Board
23 would have to cite to make such an order--and this is in
24 (a) (1) of 182.13--one of those grounds is that ineligible
25 voters sufficient in number to change the outcome of the

1 election were allowed to vote. And it's not possible when
2 the State Board examines the official ballots to determine
3 how those ineligible voters voted and to correct the totals.

4 So as to the argument of what is an irregularity,
5 it's certainly contemplated by 182.13, that an irregularity
6 could simply be that ineligible voters were permitted to
7 vote in numbers that could affect the outcome.

8 The statute provision immediately following that,
9 in (a)(2), is that eligible voters sufficient in number to
10 change the outcome of the election were improperly prevented
11 from voting. So either of those cases would be an
12 irregularity which would permit the State Board to step in
13 and offer a remedy.

14 It's also instructed on the argument that the
15 State Board has no authority to retrieve ballots that they
16 have found to be cast by ineligible voters. This cuts
17 straight to the heart of that argument and really renders
18 it meritless when right here in 163-182.13 it gives the
19 State Board the authority to remove ineligible and
20 improperly cast ballots from the vote totals.

21 So as to what an irregularity is, I think our
22 position would be that ineligible voters voting would be an
23 irregularity, even would form the basis of a protest, and
24 frankly, it's very hard to determine whether those ballots
25 cast, whether those voters were eligible or ineligible in

1 time to make a challenge under Article 8.

2 And I hope that answers your question, Dr.
3 Kricker. We'd certainly be happy to respond to any
4 additional questions.

5 MR. MALCOLM: But Mr. Livecchi, that
6 presumes--your statements presume that they're
7 nonretrievable, but we know in the state at least 50 percent
8 of the ballots are retrievable.

9 MR. LIVECCHI: Exactly the point, Mr.
10 Malcolm, yes. And if they are retrievable, the State Board
11 should act on its inherent and plenary authority to remove
12 those ineligible ballots from the vote totals. Exactly my
13 point.

14 MR. MALCOLM: If the number comes to us--
15 let's makes sure we're in agreement here. If the number
16 comes to us after all these counties deal with their
17 protests, if 4,000 individual ballots come to us, and I'll
18 just hypothetically say at least for one race, if the margin
19 of victory or the margins between number 1 and number 2 is
20 hypothetically 10,000, then you would agree the Board would
21 not have any authority to exercise its--the authority to
22 order a new election because it's not mathematically
23 possible, correct?

24 MR. LIVECCHI: Absolutely, but I think that
25 it's incumbent upon the State Board in exercising that

1 authority to look at the totality of all of the protests in
2 making that determination; otherwise, you could have, you
3 know, ten ballots counted in this county, and they say,
4 well, that's not enough to affect the outcome of the
5 election, and 10,000 in this county, but cumulatively those
6 could affect the outcome of some of these very, very close,
7 tight races.

8 MR. MALCOLM: Sure, which is going to
9 Paragraph (d), agreed? I thought we had brokered, like the
10 Geneva peace talks, you're going to agree Paragraph D was
11 one thing both sides could agree on, right?

12 MR. LIVECCHI: Yes, sir. We won't know until
13 all of this is resolved.

14 MR. MALCOLM: Till all votes are resolved.

15 JUDGE BAKER: Mr. Livecchi, do you contend
16 that, sir--obviously you did; I guess I should say
17 "finding," that the number of protests already filed could
18 change the outcome of, say, the governor's race?

19 MR. LIVECCHI: I have not yet had the
20 opportunity to read the protest that was apparently filed
21 last night that deals with the same-day voter registration
22 voters and the mail verification process.

23 Certainly well over 90,000 same-day registration
24 ballots cast, that could have an effect. We won't know what
25 that is until the Board considers that protest.

1 JUDGE BAKER: And so the reason I ask is
2 the people on your side of the aisle have said somewhat
3 emphatically that all the protests could make a difference,
4 and it's just coming strongly from the other side that even
5 if all the protests were allowed, it would not make a
6 difference. So that's--

7 MR. LIVECCHI: And I think that the point
8 there is well taken, that I think that the folks on the
9 other side of the aisle are referring only to the protests
10 that the people represented at this table have made. There
11 are numerous other protests that once resolved could affect
12 the outcome.

13 DR. KRICKER: I have now a question for our
14 legal staff, and that is, is there a differentiation made
15 between--legally, between a challenge and a protest, or a
16 challenge and an irregularity?

17 JUDGE BAKER: That is a key question.

18 MR. LAWSON: Yes, Dr. Kricker, and I can
19 give you a little bit of an overview of the way that the
20 agency has viewed the varying of these statutes and why
21 (unintelligible) one-sided (unintelligible) the other side.

22 So Article 8 is in our view the exclusive means
23 by which an individual's vote can be challenged. Article
24 15A prescribes a process by which individuals can contest
25 an election, so challenging a voter versus contesting an

1 election.

2 When you try to contest an election using a
3 protest, we have considered it important that a protest
4 properly allege and present evidence to support that there
5 is a breakdown in the administration of an election.

6 That breakdown may be due to office failures,
7 implementation problems, even individualized fraud if it is
8 in fact outcome determinative, and the outcome determinative
9 piece is key. (unintelligible) The outcome determinative
10 (unintelligible). The outcome determinative piece for us
11 is critical. What we see is that can be--you can use--is
12 this on?

13 (Pause)

14 MR. LAWSON: What you see is that
15 individual challenge like proceedings are enlisted as
16 support, as evidence for a broader claim, that there was a
17 breakdown in elections administration.

18 So you could, for instance, bring a protest that
19 included a list of 100 felons in a particular county, and
20 your claim is not that those individuals are unqualified in
21 that the end remedy is to remove those votes; instead you're
22 claiming in a protest context would be that there is a
23 breakdown in the fundamental responsibilities in carrying
24 out of election statutes.

25 So in resolving that protest, it would not be the

1 same remedy as resolving a challenge. You would pull those
2 ballots only if it became necessary to resolve the matter
3 and (unintelligible) election before if it was affecting a
4 particular race, so much so that it was outcome
5 determinative.

6 So what would end up happening, in general you
7 would have (unintelligible) in answer to your question,
8 between a challenge and a protest even if some of the same
9 facts would be brought up in both, but in one context the
10 remedy is the removal of an individual from the voter rolls
11 or--and their ability to cast a ballot in a particular
12 election and timely file before that election, but in the
13 other context, it's evidence of something more broadly
14 systemically wrong with the administration of the election,
15 that particular election, and you would only pull those
16 ballots as a last resort like we have in the election
17 statute to avoid the ultimately disruptive activity of a new
18 election entirely.

19 MR. MALCOLM: So, Mr. Lawson, based on what
20 you just described, we would agree or you would agree that
21 the comments from--the comments by counsel, that regardless
22 of whatever process that we follow, those individual voters
23 would still be entitled and we should be instructive to our
24 County Boards to ensure that they're receiving all aspects
25 of due process to ensure that they are having an opportunity

1 to be heard, face their accusers, and face the data that
2 supposedly has shown that they're a felon or that they're
3 dead, correct? It wouldn't be a decision of the County
4 Boards. We'd just be making that decision and not following
5 some semblance of due process; is that correct?

6 MR. LAWSON: Due process would always be
7 required whether a challenge avenue or in the protest
8 avenue.

9 MR. MALCOLM: Do we have reason to believe
10 as things stand now that this Board needs to issue clear
11 guidance to the 100 counties as it relates to those, as it
12 relates to that aspect or anything related to what you just
13 described?

14 MR. LAWSON: Yes, as discussed at the
15 meeting on Sunday, the recommendation of staff was to
16 establish some fair legal parameters and that Boards of
17 Elections currently hearing cases in which these legal
18 positions are important would then (unintelligible).

19 We currently have anecdotal and other types of
20 information indicating that in some counties some protests
21 are being dismissed because the County Board is saying, "We
22 were going to take those folks out anyway." In some of them
23 a successful protest has resulted in the removal of the
24 ballot and the adjustment of the canvass totals while in
25 others it has not.

1 We believe that consistency on this is extremely
2 vital to the proper administration of elections.

3 MR. MALCOLM: Looking into your main point,
4 once we get them to play by the same rules, the crux of this
5 whole thing is the numbers have got to come to us, and then
6 if we see the gap that Mr. Livecchi and I were discussing
7 earlier, that would be the trigger as to whether there needs
8 to be additional action taken, correct, instructive action
9 from the State Board?

10 MR. LAWSON: I think the ultimate number
11 would have to come to you. I think that could be a scenario
12 for which it would be proper for a County Board to remove
13 votes. If a race within its jurisdiction entirely, the
14 outcome in that race is thrown off.

15 DR. KRICKER: What are the requirements for
16 list maintenance and how close to an election can list
17 maintenance be carried out?

18 MR. LAWSON: I'm sorry, are you asking me?
19 25 days, in general, for list maintenance. We have a 90 day
20 NVRA requirement that a federal election--elections or
21 federal contest involved, you have to have a period of 90
22 days for carrying out list maintenance.

23 We have never read that far to include felonies
24 or those who are deceased. As Mr. Malcolm pointed out in
25 his cross-examination of the Southern Coalition for Social

1 Justice, we see there being a carve-out for those types of
2 situations expressly in the case of felons.

3 MS. LOVE: I would add that the list
4 maintenance process for felons is very specific under 82.14
5 sub C, sub 3. There's a requirement that the person be
6 given written notice and be provided a 30 day period to
7 respond. If they do not respond in that period, then their
8 registration record is removed. So that is the requirement
9 for list maintenance. There is no such requirement under
10 sub B for deceased voters.

11 DR. KRICKER: So for someone who is a dead
12 voter, they--

13 MR. MALCOLM: Purportedly.

14 DR. KRICKER: --they have no due process.
15 I mean we are talking about situations that have arisen;
16 certainly they've arisen in my county, where errors have
17 been made because of name suffixes, and I think that's
18 pretty much county-wise. Errors have been made in terms of
19 entering the wrong voter when a voter comes to vote who has
20 the identical name. Is there no resource for a dead voter?

21 MR. LAWSON: There is. The statute, as we
22 understand it, has been relevant to the legislature; that
23 the families do have to mail in the name of their recently
24 deceased loved one. That's been a problem; once you even
25 actually got to talk about that, but it's crafted.

1 There is the opportunity to vote provisionally,
2 of course, and you are correct that at times an individual
3 whose name is very similar or identical to an individual
4 with DHHS had become deceased would show up and would vote
5 a provisional ballot. In the process of research,
6 (unintelligible) that individual, it would be discovered
7 that there was some error and it would be pulled.

8 The process, as we followed it, does afford a
9 remedy such that any type of problem with the due process
10 would be mitigated through the regular validation process.

11 MS. LOVE: Under protest context, the
12 notice requirement play out in 22.10 would still apply
13 regarding notifying the individual whose vote is being
14 contested. So notice under that would need to be sent to
15 the allegedly deceased voter.

16 JUDGE BAKER: What address is used for a
17 deceased voter, out of curiosity?

18 MR. LAWSON: We always use a residential
19 address for purposes of--

20 JUDGE BAKER: Sure.

21 MR. LAWSON: Recently, in 2014, between
22 Harris and Tillis, Mr. Harris's father passed away. It was
23 challenged timely. He had voted an absentee ballot. That
24 was--it never came up to the State Board. It was handled
25 at the county level. His ballot was pulled and subsequently

1 (unintelligible) Speaker Tillis proposed legislation, it
2 passed unanimously in the House, that would have allowed
3 those ballots to count. It never made the committee and
4 (unintelligible) county boards. So I don't know how we
5 treat those situations.

6 CHAIRMAN WHITNEY: Other questions of the staff
7 or counsel, anybody? And I think we need to talk among--
8 have some discussion among the Board about where we go with
9 this. I've got a couple of notes, actually three notes
10 here, that I feel are pertinent; others may not.

11 The first is that nobody has been able to advise
12 that the protests were filed after the canvassing meeting
13 began. Secondly, GS 163-85(a) appears to apply to, quote,
14 registered voters, end quote, and does not appear to meet
15 the limited authority of the County or State Boards.

16 And finally, more globally, this process appears
17 to be working and that the County Boards are addressing the
18 protests on an individual basis. Due process would require
19 each affected voter the opportunity to be heard.

20 I'll just throw those thoughts out and invite my
21 fellow Board members to say what they think.

22 DR. KRICKER: I have some thoughts on this,
23 and I think it's critical that we differentiate between a
24 systemic error on the part of the State or County Board of
25 Elections which may be identified by ineligible voters

1 voting and voter challenges because we need to avoid a
2 situation where every time there's a close vote, then the
3 losing candidate goes through the list and manages to find
4 potentially ineligible voters to get a redo, and also to
5 avoid taking citizens off of the voting registration lists
6 or pulling their ballots without due process.

7 So I really think that we need to identify what
8 was the systemic error and the potential correction for that
9 as well as to allow voters who are involved in the protest
10 to have due process.

11 One of my concerns in regards to potential lists
12 of felons, I think that often people who may have been
13 charged with a felony but not have had a final judgment on
14 a felony may have clear difficulties in contesting their
15 removing.

16 I think that in the interest of fairness that we
17 have to make sure that any lists going to the counties in
18 this regard are accurate, that they do not include
19 misdemeanors, that they absolutely contain a final judgment
20 of conviction of a felony, and also with regard to the
21 voters who are deceased--

22 AUDIENCE MEMBER: Talk into the microphone.

23 DR. KRICKER: And with regard to voters who
24 are deceased, that again we need to be sure that when we
25 investigate it, that enough effort is put into the initial

1 identification of these, that they actually identify the
2 voter correctly. And I think our procedures have to speak
3 to that.

4 MS. AMOROSO: So, Dr. Kricker, are you okay
5 with the Burris List, as we're calling it, the current
6 Burris List, that that go to every county for consistency
7 regarding the felons?

8 DR. KRICKER: One of the things, again, I'm
9 concerned with is I would want a report from Mr. Burris
10 concerning the list and how the list was made up, how final
11 judgment of conviction of a felony was established.

12 I am concerned if people who were only convicted
13 of misdemeanors are showing up on that list, it suggests
14 that there's a real potential problem here.

15 MS. AMOROSO: It's my understanding that the
16 felon lists are sent every month, every month to the County,
17 correct? Each county gets the list. So the list, whatever,
18 the list that we have is probably pretty accurate. Would
19 you say that's correct, Director Strach?

20 JUDGE BAKER: That's a part of the statute
21 the 163-82.14 subsection C.

22 DIRECTOR STRACH: The information comes from the
23 Department of Corrections, the felony list, and that is made
24 available to the counties by taking--trying to match
25 potential voters, and then that gets provided to the

1 counties, and it's their job to research that list and make
2 a determination if the person on the felon list is actually
3 a registered voter in their county, and then to send notice
4 to that individual if they believe that person is a
5 registered voter and give that person, that voter an
6 opportunity to respond to that.

7 MR. MALCOLM: And I think that's critical,
8 Dr. Kricker. I'm going to disagree. I think it's critical
9 what she just said. It's not our--the State Board doesn't
10 do that. The State Board doesn't take that list and do all
11 the things that Director Strach just described.

12 Robeson, Pasquotank, Watauga, it's their
13 responsibility to do what they're charged to do, what they
14 should've been doing, which is an issue for another day,
15 what they should've been doing all along. If it's true that
16 these things are (unintelligible) and that starts--ensures
17 the statutory protections from those people being
18 misidentified and all those things.

19 So I agree with what you're saying, Rhonda,
20 that--I mean we've got the list. I'm not going to hold on
21 to the--the names are voting, and they want to charge the
22 people that are responsible for doing this which are all
23 those directors that work for Kim and all those boards that
24 work for us, to do what they're supposed to be doing, and
25 then that process--we know the process is there, and we know

1 that Lawson or Katelyn have told us that those folks would
2 be assured of the protections they're supposed to get.

3 If I'm hearing things right, it sounds as if--and
4 Lawson, correct me if I'm wrong--we have a concern in the
5 abundance of safety, being cautious, we're going to be
6 assured that we remind them that they can't use that on its
7 face as a basis for removing names, correct? Even under--
8 even if it's outside technically the challenge in the
9 statute, if it's being--I mean obviously we're going to
10 perhaps do it today or tomorrow which is outside the
11 challenge time frame. We're still going to follow what
12 you've said; it's still going to follow those protections.

13 MR. LAWSON: We will remind counties to
14 follow the process of what they do with a list like that.
15 I think it's part of what the Board is here to decide. If,
16 after production of a list, protests are filed based on that
17 list, what is the next step?

18 MR. MALCOLM: We know that the Southern
19 Coalition in her brief, which I thought was pretty well
20 written, it reminded us in bold print to ensure they get all
21 the protections of the law. So that's what--and I assume
22 everybody here has--maybe (unintelligible)--everybody here
23 is going to agree that everybody gets the protection of law
24 and they're not adjudicated as being on some list when they
25 shouldn't be.

1 So I think maybe it's for you to craft it. Maybe
2 it's already started here. Have you got a suggestion about
3 what this Board needs to do instruction-wise to the counties
4 as it relates to felon lists?

5 MR. LAWSON: Several. What I've heard so
6 far and only gauging the folks who have spoken rather than
7 where everybody on the Board is, but if you have a situation
8 in which there is a protest, right, then you would proceed
9 to hear that protest.

10 At the end of that, you would make some
11 determination. If it affected a race within your
12 jurisdiction, you have a certain amount of leeway. If it
13 is unknown whether it affected a statewide race, we're under
14 an obligation to get that up before us.

15 But if in your question you're asking whether they
16 should proceed to notify the individuals, weigh the evidence
17 before them, and appropriately act as if a regular protest
18 had been filed--

19 MR. MALCOLM: Do you have a reason to
20 believe that in Robeson County this week--would it be
21 possible that in my home county that they've taken a name
22 off some felony list and have not given that person notice
23 and removed that name?

24 MR. LAWSON: I don't personally, but it
25 might be known by other staff.

1 MS. AMOROSO: I must commend you; you're not
2 on the list this time, Robeson--

3 (laughter)

4 MR. MALCOLM: Not on that list.

5 MS. AMOROSO: For example, in my county we
6 have, I believe, one or two protests for the felons.

7 AUDIENCE: We cannot hear you.

8 MS. AMOROSO: One came back yes; one came
9 back no. But now we need to let the counties know now how
10 much time do they have to complete this process. What's the
11 next step? Were those folks ineligible that came up on the
12 felon list that are in the middle of a protest? How much
13 time are we talking about?

14 For example, with the same-day registrations,
15 that's a 30 day process. Are we going to collapse the time
16 frame? We are here to give guidance to the counties because
17 I think it's imperative that it be applied consistently
18 across all 100 counties.

19 Right now we have about 54 protests that we have
20 coming from the McCrory camp. There may be more, and there
21 will be more after that lawsuit was just filed, as we said,
22 yesterday on SDRs.

23 So there may be a plethora of additional protests,
24 or the challenges, protests, challenges, so we need to
25 really know now what we're going to tell the counties to do.

1 That's what we're here for. So--

2 MR. MALCOLM: Yeah, Josh.

3 MR. LAWSON: Any conclusions from where you
4 all stand on the law. It is the Board's decision that an
5 individual, their ballot, their vote can be either
6 administratively or through a protest or through the
7 canvassing process, there are broader descriptions for
8 ensuring that votes are done correctly. Can it be that
9 those ballots, votes are deducted even if there's no
10 challenge timely brought under Article 8?

11 MR. MALCOLM: I think before we answer, can
12 we just talk a minute historically of what this Board has
13 done? Would it be a true statement to say that this Board
14 has not allowed itself to order new elections solely based
15 on what may be argued on voter challenges? Is that--based
16 on your review of our past decisions, Josh, would that be
17 a correct statement?

18 MR. LAWSON: Based on my review, yes.

19 MR. MALCOLM: So for example, earlier this
20 year in Robeson County, in January, or the other four
21 counties where we--I think we ordered five new elections.
22 It wasn't solely--and I'll speak to Robeson because it's
23 already printed on my mind. In that case, this Board
24 ordered a new election because there were serious questions
25 about the administration of the election, in addition to

1 allegations or claims that were made about individual
2 voters. So--

3 MR. LAWSON: The argument that the parties
4 have to do with the qualifications of the individual voters.
5 But you're right; the motion and order by the Board brought
6 in additional irregularities we had been investigating.

7 I would note that to the extent if it's at all
8 helpful to you, (unintelligible), who was with the Board
9 many years before I was and (unintelligible) in my
10 possession.

11 CHAIRMAN WHITNEY: Well, I think Rhonda had asked
12 you what you think the process ought to be. Is that
13 correct?

14 MS. AMOROSO: I think so. You know, yeah.
15 You know, time frame. Can we set it?

16 MR. LAWSON: You're asking me what the
17 process ought to be?

18 CHAIRMAN WHITNEY: Well, yeah, in answering
19 Rhonda's question--if you want to restate your question.

20 MS. AMOROSO: Just the counties need the
21 guidance as to--right now some of them are sitting there
22 with illegible--ineligible--whatever.

23 AUDIENCE: Will you please talk into the
24 mike, please. Thank you.

25 MS. AMOROSO: Right now we have a number of

1 counties where there are ineligible voters that have been
2 found because they were on the felon list. That's one item.
3 So now, because we need due process to happen, if it's under
4 a protest or outside of the protest, in the challenge
5 section, which is a catch-all, we need to figure out a time
6 frame on this. How many--a week, 48 hours? How long is it
7 going to take to notify, send the notice out to the alleged
8 felon or whatever and get it back?

9 I know letters do go out and they do come back and
10 they're opened up at the county meetings. I've seen that
11 done. That's on the felon issue.

12 MR. LAWSON: So is the question how many
13 days for mail we should allow?

14 MS. AMOROSO: Right.

15 MR. LAWSON: The statute doesn't give
16 direct guidance on that as to protests, in my view. The
17 parties may argue differently.

18 If you provide an actual notice, it's given.
19 That's one way to make it a little bit shorter, but the
20 reality is that to compress the time frame I think would
21 mean that if you have notice something out with very few
22 days, say like three or under a week, it would be important
23 that the individual not appearing would in no way count
24 against that (unintelligible), and I think notice should be
25 under a week.

1 But I think that separate and apart from that, the
2 basic allegation of the protest needs to not be that these
3 individuals are simply not qualified; the ultimate remedy
4 for removal of the ballot really needs to be something
5 fundamentally happened to the election such that there's a
6 cloud over it.

7 I guess in making that allegation, they could use
8 proof by saying there are many, many other individuals who
9 shouldn't have cast ballots, and that somehow shows you that
10 Board was doing its job, (a) that something--a perpetration
11 of fraud was occurring, and (b) the Board--that there was
12 some type of administrative breakdown which an individual
13 who is deceased was allowed to vote.

14 But you fundamentally change the orientation of
15 what these protests are by saying, okay, have you really
16 alleged that this election is under a cloud in relation to
17 this particular county? Have you alleged that it's under
18 a cloud in aggregate to the state?

19 And you're right that they don't know for sure how
20 much that drop might affect the broader bucket of the
21 statewide results. It would be important for them to
22 continue having those hearings and to make determinations
23 about these individuals and send up to you all the results
24 of those determinations, but I don't think that it
25 necessarily would have to hold up the rest of the process.

1 MR. MALCOLM: That's the key question and
2 that's what we need to--that's the money maker right there.
3 So there are five individuals in Robeson County that are
4 purportedly on the felony list. Is it your recommendations
5 to this Board that Robeson County can proceed in doing
6 everything that they normally do with canvassing the
7 election which sounds to me somewhat similar to what we did
8 during the most recent election, Ms. Strach, when we had to
9 go back to counties and tell them to correct the canvass
10 totals. Didn't we have to do that?

11 DIRECTOR STRACH: We did that in March, yes.

12 MR. MALCOLM: Does that make sense, Mr.
13 Lawson? I mean that would put us in a good position so that
14 the ball can be advanced, and if somebody--pointing at you
15 as an example. Do you really think that those five
16 individuals or anyone else thinks that those five
17 individuals are felons; they're going to get their time, and
18 the felon purportedly is going to get his or her option to
19 face their accuser? But the process gets to move forward.

20 I assume that there wouldn't be an objection from
21 you, Mr. Knight, about the process proceeding and holding
22 up everything else for one or two people or a few people
23 especially because those numbers are going to come to us at
24 the State Board, as we talked about in Paragraph D, and if
25 we see a number that's larger than the vote count,

1 regardless of what other state--which state-wide election,
2 not just the governor's race, then we would know that we've
3 got to yield until we get that issue resolved at the state
4 level. Would you agree with that, Mr. Knight?

5 MR. KNIGHT: Yes, Mr. Malcolm, I would
6 agree.

7 MR. LAWSON: There's only one class of
8 protests that holds up canvass, and that's the tabulation
9 of votes. So for the four or five out there that have to
10 do with the actual tabulation, that could hold up, but if
11 the allegation is, as both sides have suggested, that
12 there's some type of cloud or irregularity affecting the
13 outcome of the election, then those of course could continue
14 to get processed through the system without holding up
15 timely canvass, and you all would have to resolve it.

16 CHAIRMAN WHITNEY: Okay. Well, I think we've
17 asked a lot of questions, but we have three issues that we
18 need to resolve. Do I need a motion?

19 AUDIENCE: Could you use your mike?

20 CHAIRMAN WHITNEY: Do I need a motion about each
21 issue one at a time and then we vote?

22 MR. MALCOLM: Or should we give you ten
23 minutes to pen something out based on everything you've
24 heard from us?

25 CHAIRMAN WHITNEY: Well, I--

1 MR. MALCOLM: I'm just--I'm just--I mean if
2 we want to get it--

3 MR. LAWSON: We're willing to draft--can
4 you give me some preliminary sense, if you think that what
5 we have decided in the last ten minutes or so would reflect
6 the will of the Board, or if it doesn't, we can reflect at
7 least two or three different types of solutions.

8 CHAIRMAN WHITNEY: Well, I think we've had a lot
9 of people come in here to (unintelligible), kind of
10 consensus. I think when we get down to number 3, that may
11 be where we need to pen something.

12 So I would say, does somebody want to make a
13 motion on issue number 1, whether we say the answer to that
14 is yes or no?

15 JUDGE BAKER: Mr. Chairman, I'll go ahead
16 and state my opinion on issue number 1.

17 CHAIRMAN WHITNEY: Okay.

18 JUDGE BAKER: We set out issue number 1 as
19 whether as a matter of law County Boards of Election may
20 retrieve the ballot and discount the votes of an individual
21 found to be ineligible though no challenge was timely
22 brought under Article 8 of the North Carolina General
23 Statutes, and we have heard the arguments of the parties
24 before us. The Republican and Cooper--excuse me, McCrory
25 campaign have argued to this effect, the question should be

1 answered yes, and I think the Cooper campaign and the
2 Southern Coalition have argued that the answer should be no.

3 I think without trying to just go down to
4 semantics, we have to look at how that issue is really
5 interpreted. If we look at the last phrase, "Though no
6 challenge was timely brought under Article 8," I think the
7 answer to the question has to be no if we're going to count
8 this as a challenge under Article 8 because it can't be
9 denied. I certainly wouldn't argue that there are definite
10 time limitations for a challenge to be brought.

11 However, if it's--if the--if a protest is brought,
12 then a different set of rules apply under Article 15A. As
13 we have been saying, to differentiate between a voter
14 challenge and a protest, you can't just bundle up a few
15 challenges and then call it a protest to get around the
16 statute requirements under Article 8. That can't be
17 allowed.

18 But by the same token, just as I was asking Mr.
19 Hamilton, there has to be a way to--I said "challenge" about
20 meeting Article 8's definition of "challenge." There has
21 to be a way to examine voter situations that were not known
22 at the time which can have an outcome on the election, not
23 knowing under the time limitations of Article 8.

24 So in a broad sense, then the answer to issue 1
25 I think has to be, yes, there is a method in the law to

1 retrieve a ballot and discount the votes of an individual
2 found to be ineligible though no challenge was timely
3 brought under Article 8, and that is because it's allowed
4 under Article 15A as a protest.

5 We have asked our counsel the difference really
6 between a challenge of a protest, and although a protest may
7 come down to names and votes, the protest is not just a
8 challenge of individual voters that should have been done
9 beforehand. A protest is when there has been a breakdown
10 in the conduct of an election that would be outcome
11 determinative.

12 And the individual claims can be used then to
13 support that. And examples would be where there has been
14 a problem with the conduct of an election by a local board,
15 when there has been an actual systemic attempt of fraud or
16 the widespread use of, say, absentee ballots or something
17 like that.

18 Now, each one of those is going to be a vote, and
19 each one of those can be said to be an individual, but just
20 because the individuals add up to a lot of names does not
21 mean then that they all had to be done by a challenge. We
22 didn't even know about them before the election. So there
23 has to be a method of reviewing the conduct of an election
24 if it appears that would be outcome determinable.

25 And as you get to a narrower and narrower voter

1 result between the winner and the loser of an election, each
2 one of those individual challenges becomes more and more
3 important and more and more outcome determinable.

4 So you have to then say that individual voters
5 casting a ballot can be reviewed under Article 15A when it's
6 done as a protest. And I think that's what we need to do
7 is to carefully then advise the local boards of the
8 difference between a challenge and a protest, give them
9 definite advice and legal guidance on that, and then let
10 them proceed.

11 CHAIRMAN WHITNEY: Would you like to make that
12 in the form of a motion?

13 JUDGE BAKER: So moved.

14 (Laughter)

15 CHAIRMAN WHITNEY: So we have a motion. Do we
16 have a second?

17 MS. AMOROSO: Second. I'll second that
18 motion.

19 CHAIRMAN WHITNEY: Okay. Now, Mr. Malcolm.

20 MR. MALCOLM: So, Judge, I think you and I
21 agree, but I can't vote for it the way you've--my
22 suggestion, as my suggestion to the Board went up. I can't
23 vote for it the way it is, so the answer to that question
24 is no. The answer to that question is no.

25 JUDGE BAKER: Depending on how you interpret

1 the question, that's correct. You do want to say that the
2 question is limiting it. Under Article 8, then just like
3 I said, it has to be no.

4 So if you look--say that, well, of course there
5 is a way that individual votes can be taken or retrieved if
6 it meets the requirements of Article 15A, then we can--the
7 answer's yes.

8 MR. MALCOLM: Would you agree that that gets
9 us to that magical Paragraph D, that that's really the only
10 way? It's 82.10(d)(2)(d) which is where--I mean it gets us
11 back to this irregularity or misconduct occurring.

12 I agree that that can be a component of that,
13 Judge. I just want to make--I think it's very important
14 that we make clear to the County Boards and should someone
15 not like our decision today, that this is really about the
16 protest and, you know, the issue to deal with the voter,
17 like we did down in Robeson County.

18 JUDGE BAKER: Yes, sir. To my knowledge,
19 163-182.10(d) subsection 2, as a, b, c, d, e, and they're
20 easily broken down, "the required findings of a local board.
21 So that's the statutory finding that a local board must make
22 in determining a protest.

23 And I'll ask Counsel. That's all I know of. Is
24 there anything else? I mean I think that's a limitation,
25 that statute.

1 MR. LAWSON: Yes, in the event that it
2 affected a local contest, that would determine there in that
3 instance it may appropriate to (unintelligible)

4 JUDGE BAKER: Right. Subsection (d)(2)(d)
5 addresses the issue then when you have contest that's
6 broader than the county. So that county can't say whether
7 it's outcome determinable because it--like a state-wide
8 contest, one from Madison County is not going to know
9 whether that affected the outcome of the statewide election.

10 MS. AMOROSO: Then that gets sent back to
11 us pursuant to that section.

12 JUDGE BAKER: Yes.

13 CHAIRMAN WHITNEY: Have you amended your motion
14 in accordance with this--

15 AUDIENCE: We cannot hear what you're
16 saying.

17 CHAIRMAN WHITNEY: Have you amended your motion
18 pursuant to your conversation with Mr. Malcolm?

19 JUDGE BAKER: I didn't amend my motion.
20 Actually I almost facetiously said "so moved" after speaking
21 about five minutes. I'll move--perhaps I should more
22 carefully state my motion.

23 CHAIRMAN WHITNEY: Okay.

24 MR. LAWSON: So motion's withdrawn,
25 correct?

1 JUDGE BAKER: I will withdraw my motion and
2 make a new motion--

3 CHAIRMAN WHITNEY: Thank you.

4 JUDGE BAKER: --which will be the same thing
5 except stated a little bit more clearly. And I do apologize
6 for earlier to say "so moved" after speaking so long. I
7 meant to actually be funny, and I apologize.

8 CHAIRMAN WHITNEY: We have a record of all this.

9 JUDGE BAKER: I move that the County Boards
10 of Election be advised that they may retrieve a ballot and
11 discount the vote of an individual found to be ineligible
12 though no challenge was timely brought under Article 8 of
13 the NC General Statutes if such--and I don't want to use the
14 word "challenge" because then that's the Article 8--if such
15 issue is raised pursuant to Article 15A of--validly raised
16 pursuant to Article 15A of the North Carolina General
17 Statutes.

18 MR. MALCOLM: Related to an irregularity or
19 misconduct of the election.

20 JUDGE BAKER: Yes, related to an
21 irregularity or misconduct of the election.

22 MR. LAWSON: And so in the event that
23 individual or a county has already approved a set of ballots
24 that are now being disputed, they would not pull those
25 unless it was outcome determinative at the county level and

1 they would not pull those because they don't know if it's
2 outcome determinative at the state level. So staff could
3 put together a process by which they would supplement their
4 canvass results with, in abstract, supplement in which they
5 would identify that there are three, four in this county,
6 that if the Board was to find an aggregate effect, those
7 could then be recanvassed and the totals adjusted.

8 JUDGE BAKER: Yes. I don't need to state
9 that in my motion though because you've merely state the
10 law, and certainly my motion is not intended in any way to
11 be contrary to the law.

12 CHAIRMAN WHITNEY: It looks to me like your
13 motion addresses 1 and 2. It is--would it be appropriate
14 to append something to your motion about 3, about due
15 process or would that be a matter in a second motion?

16 JUDGE BAKER: If my motion does not pass,
17 then we don't even need to address the second and third.

18 CHAIRMAN WHITNEY: Okay. All right.

19 MR. MALCOLM: I think your motion might pass
20 if you want to just get one point.

21 CHAIRMAN WHITNEY: Would that include 3?

22 MR. MALCOLM: Yes, I mean--

23 JUDGE BAKER: I've not been very good at
24 predicting elections lately.

25 (Laughter)

1 MR. MALCOLM: Mr. Lawson, what do you
2 suggest that we ensure we capture that third question that
3 has been asked for?

4 MR. LAWSON: That's necessary due process.
5 I think that what you would indicate particularly is that
6 unless there is--it can be outside protest that has to do
7 with ballot tabulation, processing, technical side, they
8 would proceed to canvass. That would not affect due process
9 rights as we could preserve the abilities of this Board and
10 of theirs to review individuals.

11 So we could specify an actual notice or without
12 a notice, less than a week, being provided to any individual
13 who's the subject of a protest. We could specify that if
14 the Board has already approved, like I indicated, approved
15 the ballot of an individual whose ballot is now in dispute,
16 then they should not even if the individual's eligibility
17 is found to be lacking, they should not as a preliminary
18 matter pull that ballot except in the case that it affects
19 the contest. (unintelligible) their lead, those ballots
20 have not yet been approved, and they found the individual
21 was not eligible, they would not approve that, but either
22 way, in the abstract it's provided to the state, and on
23 which the state's canvass is based, they would create an
24 addendum that would indicate those proceedings, and we would
25 know precisely how many individuals and we could do that

1 (unintelligible).

2 MR. MALCOLM: Judge.

3 JUDGE BAKER: Yes.

4 MR. MALCOLM: Do you want me to just second
5 your motion the way you've got it?

6 CHAIRMAN WHITNEY: Yeah, let's--

7 MR. MALCOLM: I second it his motion.

8 CHAIRMAN WHITNEY: Let's talk about that later.
9 You lost me on that one.

10 MR. MALCOLM: I second his motion.

11 CHAIRMAN WHITNEY: Okay. Good. We have a
12 motion; we have a second. All in favor of the judge's
13 motion say aye.

14 (Unanimous vote in favor.)

15 CHAIRMAN WHITNEY: Opposed, no.

16 (No response)

17 CHAIRMAN WHITNEY: Okay. Motion in the camp
18 carries unanimously.

19 Now let's talk about due process.

20 DR. KRICKER: Well, I think before we talk
21 about due process, can we--would it make sense to advise
22 Boards about the difference between a protest and a
23 challenge and that they need to find that some type of
24 systemic error or administrative error or fraud occurred?

25 MR. MALCOLM: I thought--correct me if I'm

1 wrong, but I think by the judge declaring that we include
2 the specific terms of irregularity or misconduct, does that
3 not capture those things?

4 DR. KRICKER: Well, I'm just--when we're
5 talking about procedures--

6 MR. MALCOLM: Misconduct and irregularity,
7 the county not doing what it's supposed to do from a
8 systemic point of view.

9 DR. KRICKER: Well, I think that we may need
10 to explain that to the counties. All I'm suggesting is that
11 we do that and make it very clear.

12 JUDGE BAKER: And I agree. I think counsel
13 stated it fairly well, and putting down in writing a little
14 caution it would even be better.

15 CHAIRMAN WHITNEY: Yeah, I think we can send them
16 something. Keep it brief, but you know, reiterate all of
17 our concerns about due process being followed, and I think
18 that--

19 AUDIENCE: (unintelligible)

20 CHAIRMAN WHITNEY: Sorry?

21 (No response)

22 CHAIRMAN WHITNEY: Okay. I think that's
23 something that Josh and Kim can put together. Will that
24 work for you?

25 MR. LAWSON: Certainly. Follow the process

1 providing there's an order circulated, I would indicate to
2 staff we can just submit it, an issue (unintelligible).

3 CHAIRMAN WHITNEY: All right. Does somebody want
4 to make a motion that the staff do that?

5 DR. KRICKER: Yes.

6 CHAIRMAN WHITNEY: Second.

7 DR. KRICKER: Would staff please draft an
8 order that would go out to the counties in view of--

9 CHAIRMAN WHITNEY: An order or memorandum?

10 MR. LAWSON: So we have a case of
11 controversy requires an order considering these questions
12 that you would settle today to decide.

13 CHAIRMAN WHITNEY: I'm just talking about this
14 piece of paper or electronic image, and she's talking about
15 is that an order or a memorandum. Okay.

16 DR. KRICKER: So that staff draft an order
17 reviewable by the State Board of Elections delineating the
18 procedures followed to afford a necessary due process while
19 ensuring the finding, an accurate, authenticate
20 (unintelligible) election results, and also to provide for
21 sufficient explanation to the Boards of the difference
22 between protests and challenges as well so that all counties
23 will be proceeding uniformly. Can I get a second?

24 JUDGE BAKER: Second.

25 CHAIRMAN WHITNEY: Okay. Any comments here?

1 (No response)

2 CHAIRMAN WHITNEY: Then all in favor of the
3 motion say aye.

4 (Unanimous vote in favor.)

5 CHAIRMAN WHITNEY: Opposed, no.

6 (No response)

7 CHAIRMAN WHITNEY: Motion carries unanimously.
8 Okay. Great. Do you have any idea when we ought to have
9 a draft of that?

10 MR. LAWSON: This afternoon.

11 CHAIRMAN WHITNEY: Oh, okay. All right. Does
12 that mean we are not adjourned until that motion is ready
13 or--

14 MR. LAWSON: (unintelligible)

15 CHAIRMAN WHITNEY: So we do adjourn and then we
16 reconvene when you've got it.

17 MR. LAWSON: You wouldn't have to because
18 the Board's already authorized to issue to the Boards.

19 CHAIRMAN WHITNEY: Oh, okay. So all we do is get
20 to look at it.

21 MR. LAWSON: That's right.

22 CHAIRMAN WHITNEY: Okay. So just send it to each
23 of us when it's ready. Okay.

24 MS. AMOROSO: I have a general question.
25 Now, what happens to the county canvasses as scheduled and

1 the state canvass?

2 AUDIENCE: Can't hear you.

3 MS. AMOROSO: Is it working? No. All
4 right.

5 (Pause)

6 MS. AMOROSO: Thank you. I'd just like
7 clarification on the schedule now for the county canvasses
8 and the state canvass. All the dates now are going to be
9 changed.

10 AUDIENCE: No.

11 MS. AMOROSO: No? State canvass is
12 scheduled for next Tuesday.

13 MR. LAWSON: So it's the interpretation of
14 our staff that proposed--there's a possibility of a
15 statewide recount. It would be impossible to determine
16 whether a request is ripe for a recount till the last county
17 that's included in the proces because every county has
18 canvass.

19 And so the totaling of the deadline for the
20 request for a recount would come after the last county has
21 canvassed. They have until noon the next business day--or
22 two business days, I'm sorry, after the last county has
23 canvassed.

24 We know of scheduled county canvasses that,
25 through no fault of their own, will put us back past the

1 29th day, so it very well--high likelihood that if the
2 canvass request is passed, to take place before a canvass,
3 they would need to proceed.

4 MR. MALCOLM: But the bottom line is they're
5 off and running. Nothing we've done today is going to
6 prevent them from continuing to do their work.

7 MR. LAWSON: No. To the extent that we've
8 adopted the indication that they should proceed to canvass
9 unless they have an outstanding protest regarding the actual
10 tabulation, technical procedures, I think clarifies it.

11 MS. AMOROSO: All right, and this could be
12 further complicated by the litigation that was filed
13 yesterday regarding same day registration. So we're still
14 acting. We're not out of the woods, as it were.

15 MR. LAWSON: It's been filed, so
16 (unintelligible)

17 MR. MALCOLM: We might (unintelligible)
18 this afternoon.

19 MS. AMOROSO: It complicates things is what
20 I'm saying. It's not an easy answer.

21 MR. MALCOLM: Nice seeing you, Mr. Howard.

22 CHAIRMAN WHITNEY: Hearing all that, I would
23 entertain a motion to adjourn.

24 MR. MALCOLM: So moved.

25 JUDGE BAKER: Second.

1 CHAIRMAN WHITNEY: All in favor say aye.

2 (Unanimous vote in favor.)

3 CHAIRMAN WHITNEY: Opposed no.

4 (No response)

5 CHAIRMAN WHITNEY: Thank you everybody.

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(Whereupon, the proceedings

10

concluded at 1:10 p.m.)

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1 STATE OF NORTH CAROLINA

2 COUNTY OF ALAMANCE

3

4 C E R T I F I C A T E

5

6 I, G. Lynn Bodenheimer, Certified Verbatim
7 Reporter and Notary Public, do hereby certify that I was
8 present and served as court reporter for the proceedings
9 held on November 22, 2016, before the State Board of
10 Elections; that said proceedings were reported by me and
11 transcribed by me personally; and that the foregoing
12 one hundred and eighteen pages constitute a true and
13 accurate transcription of the proceedings.

14 I do further certify that the persons were present
15 as stated.

16 I do further certify that I am not of counsel for
17 or in the employment of either of the parties to this
18 action, nor am I interested in the results of this action.

19 In witness whereof, I have hereunto subscribed my
20 name this 7th day of December, 2016.

21

22

23

24

25

G. LYNN BODENHEIMER
Certified Verbatim Reporter/
Notary Public No. 19942140002

My Commission Expires:
August 3, 2019