

NORTH CAROLINA

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FORSYTH COUNTY

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FORSYTH COUNTY, C.S.C.

ELISABETH M. MOTSINGER,)
individually and as candidate for)
Board of Education; JOHN K.)
MOTSINGER, individually and on)
behalf of other voters; IRENE)
PHILLIPS, individually and as)
candidate for Board of Education; and)
ROSS K. SMITH, individually and as)
candidate for Board of Education,)

am

Plaintiffs

v.

COMPLAINT
(COMP)

FORSYTH COUNTY BOARD OF)
ELECTIONS; ROBERT COFFMAN,)
in his official capacity as the Director)
of the Forsyth County Board of)
Elections; J. ERIC ELLIOTT, JERRY)
D. JORDAN, LINDA SUTTON, in)
their official capacities as Members of)
the Forsyth County Board of)
Elections; NORTH CAROLINA)
STATE BOARD OF ELECTIONS;)
GARY O. BARTLETT, in his official)
capacity as the Executive Director of)
the North Carolina Board of Elections;)
LARRY LEAKE, Chairman,)
LORRAINE G. SHINN, CHARLES)
WINFREE, GENEVIEVE C. SIMS,)
ROBERT CORDLE, in their official)
capacities as Members of the North)
Carolina Board of Elections,)

Defendants.

The plaintiffs complaining of defendants, state and allege the following:

NATURE OF ACTION

1. This is a declaratory judgment action brought pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and for injunctive relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 65. The plaintiffs as candidates and voters ask the court to declare that, in the three multi-seat races for election to the Winston-Salem/Forsyth County Board of Education, the defendants' election process violates the Constitution of the United States and the North Carolina State Constitution. The election process includes: (a) the defendants' instructions to voters; and (b) its use of multiple voting devices that place a greater burden on some voters to understand the voting process and that their intended vote may have been voided; and (c) its method of counting and voiding votes.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this action pursuant to N.C. Gen. Stat. § 7A-245.
3. Venue is proper in Forsyth County pursuant to N.C. Gen. Stat. § 1-77 and N.C. Gen. Stat. § 1-82. The office of defendants Forsyth County Board of Elections and its executive director are located in Forsyth County; the defendant members of the Forsyth County Board of Elections and the plaintiffs are residents of Forsyth County; and the actions complained of occurred or will occur in Forsyth County.

PARTIES

4. Plaintiff Elisabeth M. Motsinger is a citizen, registered voter in and resident of Forsyth County. She is a Democratic Party candidate for one of the at-large positions in the school board election.
5. Plaintiff John K. Motsinger is a citizen, registered voter in and resident of Forsyth County.
6. Plaintiff Irene Phillips is a citizen, registered voter in and resident of Forsyth County. She is a Democratic Party candidate for one of the at-large positions in the school board election.
7. Plaintiff Ross K. Smith is a citizen, registered voter in and resident of Forsyth County. He is a Democratic Party candidate for one of the District 2 positions in the school board election.
8. Defendant Forsyth County Board of Elections is the county agency responsible for the conduct of elections in Forsyth County, including, under the supervisory authority of the

State Board of Elections, making rules and regulations with respect to the conduct of elections within the county. The Forsyth County Board of Elections has the authority to implement the relief sought by plaintiffs.

9. Defendant Robert Coffman is the Director of the Forsyth County Board of Elections and is responsible for carrying out the directives of the Forsyth County Board of Elections, including the preparation and counting of ballots.

10. Defendants J. Eric Elliott, Jerry D. Jordan, and Linda Sutton are the members constituting the Forsyth County Board of Elections and are responsible for the Forsyth County Board of Elections fulfilling its statutory and constitutional obligations.

11. Defendant North Carolina State Board of Elections is the state agency responsible for the conduct of elections in the state, including the authority to make rules and regulations with respect to the conduct of elections. Defendant State Board has general supervisory authority over county boards of election and county election officials, including the authority to instruct county boards of election as to how to conduct elections. The State Board has the authority to direct the Forsyth County Board of Elections to implement the relief sought by plaintiffs.

12. Defendant Gary Bartlett is the Executive Director of the State Board of Elections and is responsible for carrying out the directives of the State Board and for instructing county election officials on the preparation and counting of ballots.

13. Defendants Larry Leake, Lorraine G. Shinn, Charles Winfree, Genevieve C. Sims, and Robert Cordle are the members constituting the North Carolina State Board of Elections and are responsible for the State Board of Elections fulfilling its statutory and constitutional obligations.

14. The individually named defendants are sued only in their official capacities as directors and members of the Forsyth County Board of Elections and the North Carolina State Board of Elections.

FACTS

15. The Winston-Salem/Forsyth County Board of Education ("School Board") consists of three at-large members, two members from District 1, and four members from District 2.

16. In the November 7, 2006 general election there are three races for membership on the School Board: a race for the three at-large seats; a race for the two District 1 seats; and a race for the four District 2 seats.

17. Voters are entitled to vote for three candidates in the race for the at-large seats. Plaintiffs Elisabeth Motsinger and Irene Phillips are the two Democratic Party candidates running for the three at-large positions. There are three Republican Party candidates and one unaffiliated candidate running for the same positions.

18. Voters who choose to cast a straight-ticket vote for the Democratic Party candidates are entitled to cast one additional vote in the at-large race.

19. Voters are entitled to vote for two candidates in the race for the District 1 seats. There is one Republican Party candidate running for the two District 1 positions. There are two Democratic Party candidates running for the same position.

20. Voters who choose to cast a straight-ticket vote for the Republican Party candidates are entitled to cast one additional vote in District 1.

21. Voters are entitled to vote for four candidates in the race for the District 2 seats. Plaintiff Ross Smith is one of the two Democratic Party candidates running for the four District 2 positions. There are four Republican Party candidates running for the same position.

22. Voters who choose to cast a straight-ticket vote for the Democratic Party candidates are entitled to cast two additional votes in District 2 race.

23. Based upon defendants' election rules, if a straight party voter exercises the right to cast the total number of votes to which the voter is entitled, by additionally voting for an unaffiliated candidate or a candidate of the other party, that voter's original vote for his or her Party's candidate(s) will be voided, even though counting those votes would not result in an overvote.

24. The defendants' rules for counting votes, which void a voter's straight party vote even though the completed ballot does not contain an overvote, violate the voter's right to have the ballot counted as marked and intended by the voter.

25. The instructions contained on the sample ballot and on all actual ballots state in part:

In any multi-seat race where a party oval is completed and you vote for candidates of another party, you must also fill in the oval next to the name of any candidate you choose of the party for which you filled in the oval to assure your

vote will count.

(emphasis added). A Sample ballot attached and incorporated herein as Exhibit 1 to this complaint.

26. The above instruction is directed to a voter who marks the party oval for one party and then exercises the right to cast the total number of votes to which the voter is entitled, by additionally voting for a candidate of the other party.

27. The above instruction is not directed to and does not assist a voter that marks the party oval for one party and then exercises the right to cast the total number of votes to which the voter is entitled by additionally voting for an unaffiliated candidate.

28. The instructions contained on the ballot place a greater burden, to insure that their vote is counted correctly, on voters who vote a straight party ticket and then exercise their right to vote for a candidate of the other party than the burden placed on voters not exercising their right to vote for all possible candidates in a multi-seat race or not voting a straight ticket.

29. The instructions and defendants' rules for counting votes place an onerous and undue burden on voters who initially select to vote a straight party ticket because it requires that they vote twice for the same candidate in order to ensure that their vote is counted.

30. The instructions contained on the ballot place a greater burden, to insure that their vote is counted correctly, on voters who vote a straight party ticket and then exercise their right to vote for an unaffiliated candidate than the burden placed on all other voters.

31. The instructions and defendants' rules for counting votes place a even greater and more onerous burden on a voter who votes a straight party ticket and then votes for an unaffiliated candidate, because that voter does not receive any instructions regarding the consequence of voting for an unaffiliated candidate, but still must vote twice for the same candidate in order to ensure that their vote is counted.

32. The Forsyth County Board of Elections has elected to use more than one vote counting device for the November 7, 2006 general election. Upon information and belief, most voters will cast ballots using a paper ballot. The paper ballot will be counted using an optical scanner.

33. Other voters will vote electronically using the iVotronic DRE touchscreen system. The iVotronic DRE touchscreen system places a large visible check mark by each candidate for whom the voter votes. A voter marking the party oval will see a check mark next to each

candidate running in affiliation with that party. If such a voter exercises the right to vote for additional candidates in a multi-seat race, the check marks next to the party affiliated candidates disappear on the screen. This visual clue may alert the voter that the voter's intended votes are not going to be counted.

34. There is no similar alert for individuals that vote using a paper ballot or by any method other than the iVotronic DRE touchscreen system.

35. The burden to have their votes counted as intended and cast is significantly more onerous on voters, who vote a straight party ticket and then exercise the right to vote for additional candidates in a multi-seat race, using any voting device other than the iVotronic DRE touchscreen system.

36. The use of different voting devices places a more onerous burden, to have their votes properly counted, on voters in a multi-seat race that are not provided visual clues that votes that they initially cast and intended to be counted have been voided.

37. In these multi-seat School Board races, a voter who votes a straight party ticket and then votes for an unaffiliated candidate or a candidate of another party without creating an overvote has made his or her intent clear.

38. There is no rational basis or compelling state interest to void the initial vote for the party affiliated candidate simply because the voter exercised the constitutional right to use all the votes allotted.

FIRST CLAIM FOR RELIEF
(Constitutional Right to Equal Protection)

39. The allegations of the above paragraphs are realleged and incorporated by reference.

40. Article I, Section 19 of the North Carolina Constitution and the Constitution of the United States, Fourteenth Amendment, guarantee the equal protection of the laws to all citizens.

41. The right to vote is a fundamental political right that is at the heart of our democracy. The fundamental nature of the right to vote lies in the equal weight accorded to each vote and the equal treatment accorded each voter.

42. The constitutions of the United States and North Carolina protect the rights of voters to have their votes count as cast. The defendants' rules for counting votes, which void a

voter's straight party vote even though the completed ballot does not contain an overvote, violate the voters' right to have their votes counted as marked and intended by the voter.

43. The right of citizens to vote, to have their votes counted as cast, and to have their votes counted equally is constitutionally protected from arbitrary or disparate treatment. Any infringement of these constitutionally protected rights is subject to strict scrutiny and must further a compelling state interest.

44. The defendants' imposition, by their counting rules, of a preference against the straight party candidate, when the voter has indicated no such preference and there is no need to determine the intent of the voter because there is no overvote, is an arbitrary subversion of the electoral process that serves no compelling state interest.

45. Defendants, in electing to employ diverse methods of voting, may not place an onerous burden on voters' exercise of their right to vote. When a greater burden is placed upon the voter depending upon the method of voting employed in his or her voting place, there must be a rational basis for the imposition of that burden.

46. The burden to have their votes counted as intended and cast is significantly more onerous on voters, who vote a straight party ticket and then exercises the right to vote for additional candidates in a multi-seat race, using any voting device other than the iVotronic DRE touchscreen system. There is no rational basis or compelling state interest for the imposition of that burden.

47. Defendants, in determining counting rules, may not place an onerous burden on voters' exercise of their right to vote because the voter marks the party oval and then exercises the right to cast the additional votes to which the voter is entitled. When a greater burden is placed upon the voter depending upon the method of voting employed by the voter, there must be a rational basis for the imposition of that burden. There is no rational basis or compelling state interest for the imposition of that burden.

48. In these multi-seat School Board races, a voter who votes a straight party ticket and then votes for an unaffiliated candidate or a candidate of another party without creating an overvote has made his or her intent clear. There is no rational basis or compelling state interest to void the initial vote for the party affiliated candidate simply because the voter exercised the constitutional right to use all the votes allotted.

**SECOND CLAIM FOR RELIEF
(Constitutional Right to Due Process)**

49. The allegations of the above paragraphs are realleged and incorporated by reference.

50. Article I, Section 19 of the North Carolina Constitution and the Constitution of the United States, Fourteenth Amendment, guarantee that no citizen shall be denied life, liberty or property without due process of law.

51. When the election process reaches the point of patent and fundamental unfairness, the due process clause is violated.

52. Prior to the November 7, 2006 general election, plaintiffs informed defendants of defendants' erroneous and confusing ballot instructions, of the different burdens placed on voters to correctly ensure that their votes were properly counted, and of the patent and fundamental unfairness of failing to count votes properly cast, when there was no overvote and no need to determine the intent of the voter.

53. Defendants willfully refused to remedy or correct the substantial violations of a fair, free and democratic election process.

**THIRD CLAIM FOR RELIEF
(Constitutional Right to Vote for All Offices)**

54. The allegations of the above paragraphs are realleged and incorporated by reference.

55. Article VI, Section 1 of the North Carolina Constitution provides that all eligible voters shall be entitled to vote at any election.

56. The actions of defendants, when considered as a whole, violate the rights of plaintiffs and the voters of Forsyth County to vote effectively at any election, as provided in Article VI, Section 1. Due to the unnecessary and unreasonable voiding of votes cast, voters exercising their right to vote by first marking a party oval and then voting for other candidates for whom they are entitled to vote, are deprived the opportunity to vote for candidates of their party.

**FOURTH CLAIM FOR RELIEF
(Constitutional Right to Free Elections)**

57. The allegations of the above paragraphs are realleged and incorporated by reference.

58. Article I, Section 10 of the North Carolina Constitution provides that: "All elections shall be free." This section establishes a constitutional right of citizens to organize political parties, campaign freely and have votes counted as cast and intended by the voter.

59. The actions of defendants, when considered as a whole, violate the rights of plaintiffs and the voters of Forsyth County to free elections as provided in Article I, Section 10.

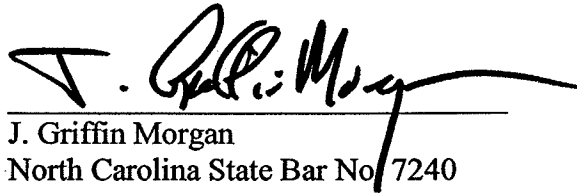
PRAYER FOR RELIEF

WHEREFORE, plaintiffs request the following relief:

- (1) Declare unconstitutional the defendants' election processes and rules that void properly cast ballots in a multi-seat race when there is no overvote.
- (2) Enjoin defendants, in the multi-seat School Board races, to count the votes for party affiliated candidates when a voter: (1) marks a party oval; (2) exercises the right to vote for additional candidates not affiliated with that party; and (3) the exercise of that right does not create an overvote.
- (3) Pay to the plaintiffs the costs of this action, including reasonable attorneys' fees; and
- (4) Order such other and further relief as may be appropriate or necessary.

Plaintiff hereby demands a trial by jury on all issues presented herein.

This the 3rd day of November, 2006.



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