

STATE OF NORTH CAROLINA
WAKE COUNTY

BEFORE THE STATE BOARD OF ELECTIONS

IN RE: COMPLAINT OF BOB HALL)
REGARDING SURRY COUNTY BOARD)
MEMBER JERRY FORESTIERI)
)

IN RE: COMPLAINT OF BOB HALL)
REGARDING SURRY COUNTY BOARD)
MEMBER TIMOTHY DEHAAN)
)

WRITTEN SUBMISSION OF COMPLAINANT BOB HALL

Faithful execution of the law by election officials is a keystone to our political system. This obligation for faithful service is why, upon assuming their office, county board of elections members swear allegiance to North Carolina’s constitutional powers and authorities, to support the state and federal constitutions, and to well and truly execute the duties of their office.

Surry County Board of Elections Secretary Jerry Forestieri and Member Timothy DeHaan failed to adhere to their oaths of office when, during Surry County’s 2022 general election canvass meeting, they attempted to append to the county’s certification of election results a letter contending that the election laws administered by the State Board of Elections are “illegal” and “illegitimate.” Their motivation for doing so is a personal disagreement with two federal court rulings that they contend undermine North Carolina’s elections. No doubt Secretary Forestieri and Member DeHaan are entitled to their beliefs. But while executing the duties of their offices, they are not entitled to substitute those beliefs for the decisions of the state and federal authorities they swore allegiance to. The State Board of Elections thus has more than “satisfactory cause” to remove Secretary Forestieri and Member DeHaan from office, pursuant to its powers under N.C.

Gen. Stat. § 163-22(c). In the interest of protecting the integrity of our elections and ensuring that county board of elections members honor their oath, the State Board should do so here.

I. Background

On November 18, 2022, the Surry County Board of Elections (the “Board”) conducted its county canvass meeting for the 2022 general election. During this meeting, Board Secretary Jerry Forestieri and Board Member Timothy DeHaan circulated to the Board a letter stating they would “decline to certify these election results as credible.” Hall Aff. Ex. 2 at 2 (the “Canvass Letter”). This letter was signed by Mr. Forestieri and Mr. DeHaan under their respective official titles as Secretary and Member of the Surry County Board of Elections, *id.*, and they indicated in the meeting that they intended to add the letter as a report with the canvass certification. Hall Aff. ¶ 4(c).

In the Canvass Letter, Forestieri and DeHaan admit that the “November 8, 2022 elections in Surry County were conducted in full compliance with applicable laws” with the exception of alleged actions by one election worker unrelated to the complaint in this matter. Hall Aff. Ex. 2 at 1. They further admit “that all other election activities by county staff and voters have shown no irregularities according to law.” *Id.*

Despite these admissions, Forestieri and DeHaan contend in the Canvass Letter that two rulings by U.S. District Judge Loretta C. Biggs have “stripped the election process of the trustworthiness they were designed to protect” and given “Federal protection to felonious voter fraud.” *Id.* They go on to express views that North Carolina’s election laws, as administered by the State Board of Elections, are not “legitimate or Constitutional” and are instead a “grotesque and perverse sham of our real election laws as enacted by our General Assembly.” *Id.* Forestieri and DeHaan state in the Canvass Letter they “cannot . . . call these election results credible and

bow to the perversion of the truth Judge Biggs foists upon us,” due to a belief that Judge Biggs’ rulings are “illegal” and have “perverted our election practice, this most recent election has again failed to show it did not produce false results based on bloated voter registrations and ghost voters pretending to be real citizens of the counties of this great State.” *Id.* The Canvass Letter contains no evidence that any voter fraud occurred or any ineligible individual’s vote was tabulated in Surry County or any other county in North Carolina.

In the canvass meeting, Member DeHaan confirmed that neither he nor Secretary Forestieri were questioning the conduct of Surry County election officials. Hall Aff. ¶¶ 4(b)-(d). Member DeHaan later reiterated that “Jerry [Forestieri] and I are saying that the numbers and the procedures that were done in Surry County are correct according to the law, but that the law is flawed” and thus “rather than having the election prove itself as being true, it cannot prove itself as being true.” Hall Aff. ¶ 4(e).

Later in the meeting, County Board of Elections Director Huff shared advice she received from the State Board of Elections that the Canvass Letter could not be appended to the Board’s canvass certification. Hall Aff. ¶ 4(f). After a brief recess, Forestieri said he would decline to sign the canvass certification and DeHaan said he would. Hall Aff. ¶ 4(g). Director Huff then confirmed that the Canvass Letter would be appended as an attachment to the meeting minutes. Hall Aff. ¶ 4(h). At no point did Forestieri or DeHaan express a desire to disavow or amend the contents of the Canvass Letter, or to remove or cross out their signatures from the Canvass Letter, before it was added to the meeting record.

On November 28, 2022, North Carolina registered voter Bob Hall filed a Complaint against County Board of Elections Secretary Forestieri and Member DeHaan, asking for their removal from office on the basis that their Canvass Letter included “statements that directly conflict with

their oath of office . . . and their responsibility to ‘execute the duties of the office . . . according to the law’ Complaint at 2.

II. Legal Standard

County board of election members are appointed by the State Board of Elections to two-year terms. N.C. Gen. Stat. § 163-30(a). Upon appointment, members take the following oath of office:

“I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States; and that I will well and truly execute the duties of the office of member of the _____ County Board of Elections to the best of my knowledge and ability, according to law; so help me God.”

N.C. Gen. Stat. § 163-30(e).

Among their various duties, county board of elections members are required to meet after every election to “complete the canvass of votes cast and to authenticate the count in every ballot item in the county by determining that the votes have been counted and tabulated correctly.” N.C. Gen. Stat. § 163-182.5(b); *see also* N.C. Gen. Stat. § 163-182.17(c) (“Duties of the County Board of Elections”).

The State Board of Elections has the power to “compel observance of the requirements of the election laws by county boards of elections” and to “hear and act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws imposing duties upon such a board.” N.C. Gen. Stat. § 163-22(c). This includes the power “to remove from office any member of a county board of elections for incompetency, neglect or failure to perform duties, fraud, or for any other satisfactory cause” upon notice and an opportunity to be heard. *Id.*

III. Argument

Since the earliest days of our state and federal republics, we have vested the courts with final authority on the interpretation of statutory and constitutional law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (“This Court is the ultimate interpreter of our State Constitution.” (citing *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787))). The power of the State Board of Elections to “compel observance of the requirements of election laws by county boards of elections,” N.C. Gen. Stat. § 163-22(c), and the obligation of county board members to bear true allegiance to government authorities, to support our federal and state constitutions, and to execute their duties pursuant to those constitutions, N.C. Gen. Stat. § 163-30(e), are critical to ensuring that this fundamental tenet of our government is followed in the administration of elections.

Secretary Forestieri and Member DeHaan failed to uphold their oaths of office while executing the duties of their offices as county board members during the Surry County canvass meeting. Their inflammatory language, as expressed in the Canvass Letter and confirmed during the board meeting, shows an unmistakable failure to support the federal and state constitutions as interpreted by our courts, and to instead substitute their own version of election law in its place. Specifically, they assert personal beliefs that “election law per NCSBE” is “a grotesque and perverse sham of our real election laws as enacted by our General Assembly” and is “illegal.” Hall Aff., Ex. 2 at 1. If Forestieri and DeHaan “don’t view election law per NCSBE as legitimate or Constitutional,” *id.* at 2, then they have disavowed allegiance to the constitutional powers and authorities established by the state of North Carolina in defiance of their sworn oath to do so, and they cannot be entrusted with the duties of administering said election law as a result. Contrary to

the *support* they swore to provide to our state and federal constitutions, they took actions while executing their duties as county board members to directly *undermine* these authorities. Forestieri and DeHaan have thus rejected their oath of office and neglected their duties, and they should be removed.

Forestieri and DeHaan's other inflammatory statements in the Canvass Letter provide additional "satisfactory cause" that independently requires their removal. They assert that "all elections conducted in all counties in NC have a very uncertain validity," that the election process has been "stripped" of its "trustworthiness," and that "this most recent election has again failed to show it did not produce false results." Hall Aff. Ex. 2 at 1-2. These statements, made in their official capacity during a board meeting, directly and irresponsibly undermine public confidence in our elections. Additionally, Forestieri and DeHaan shamefully lodge personal attacks against a sitting United States District Court Judge, the first Black woman to serve on a federal district court in North Carolina. *See* Hall Aff. Ex. 2 at 1- 2. This language is irresponsible for a county elections official and especially objectionable given the disturbing rise in threats and inappropriate communications targeting federal judges.¹ Neither Forestieri nor DeHaan at any point sought to remove or strike out their names from the Canvass Letter or indicate on the record they were disavowing any of its statements. As they directly undermine confidence in our elections and attack our system of government, these statements also warrant Forestieri and DeHaan's removal.

Finally, Forestieri and DeHaan's efforts to substitute their personal interpretation of applicable law while executing their official duties present further risks to our state election systems. This is most apparent by the actions of Forestieri in refusing to certify the canvass results

¹ Sarah N. Lynch, "U.S. judges faced over 4,500 threats in 2021 amid rising extremism," Reuters (Feb. 15, 2022), <https://www.reuters.com/world/us/us-judges-faced-over-4500-threats-2021-amid-rising-extremism-official-2022-02-14/>.

without any legal basis for doings so. County board members are required to “complete the canvass of votes cast and to authenticate the count in every ballot item in the county by determining that the votes have been counted and tabulated correctly.” N.C. Gen. Stat. § 163-182.5(b). In both the Canvass Letter and during the canvass meeting, Forestieri and DeHaan admit that Surry County’s votes were counted and tabulated correctly, *See, e.g.*, Hall Aff. ¶¶ 4(b), 4(e), Ex. 2 at 1. They do not present any evidence of fraudulent or ineligible votes being tabulated in the final canvass results. By his own admission, Forestieri determined the votes in Surry County to have been counted and tabulated correctly, and thus he failed to execute well and truly his duty to complete the canvass of votes as required by law when he voted against certification.

It is further worth noting that Forestieri’s reasons for not signing the canvass certification, and DeHaan’s reasons for signing and submitting the Canvass Letter, are based upon a gross misrepresentation of two court decisions and, as a result, current election law: a state (not federal) court decision from September 2021 enjoined the enforcement of North Carolina’s most recent Voter ID law before a federal court postponed a hearing on the law, and the 2018 federal court order on voter challenges enjoined a limited set of systematic pre-election removals pursuant to federal law, not all voter challenges as the Canvass Letter asserts. *See* Hall Aff., Ex. 3 (Coalition letter at 2). This mischaracterization of North Carolina election law and these court decisions in the Canvass Letter shows a lack of competence, and is dangerous election misinformation that directly undermines the public confidence in North Carolina election laws, particularly when this misinformation is presented under the color of official action and during the course of Forestieri and DeHaan executing their official duties.

Importantly, Forestieri and DeHaan’s removal from office would fully comport with

applicable free speech protections under both federal and state law.² Even assuming the Canvass Letter qualified as protected First Amendment activity, “[i]t is settled . . . that an appointed public official can be removed for engaging in otherwise protected First Amendment activity if ‘political affiliation is an appropriate requirement for the effective performance of the public office involved.’” *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023) (quoting *Hobler v. Brueher*, 325 F.3d 1145, 1154 (9th Cir. 2003)).

Moreover, even assuming Forestieri and DeHaan were afforded the broader protections given to government employees, as opposed to appointed officials, the Supreme Court has squarely “reject[ed] . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.” *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). For the First Amendment to preclude removal here, Forestieri and DeHaan would have to establish that (i) they were “speaking as a citizen upon a matter of public concern” rather than “as an employee about a matter of personal interest,” and (ii) their interest in speaking upon this matter “outweighed the government’s interest in providing effective and efficient services to the public.” *Bland v. Roberts*, 730 F.3d 368 at 373-74.

As to the first point, Forestieri and DeHaan chose to sign the Canvass Letter with their official titles and to present the letter during the Board’s canvass meeting. The meeting recording indicates they intended to have the Canvass Letter appended to the Board’s canvass certification and thus made a part of the official canvass record. This context stands in stark contrast to the many other ways they might have expressed their concerns as private citizens, including almost

² “The standards for free speech retaliation claims under the state constitution are the same as those for free speech claims under the federal constitution.” *Hunter v. Town of Mocksville*, No. 12CV333, 2013 U.S. Dist. LEXIS 150765, 2013 WL 5726316, at *11 (M.D.N.C. Oct. 21, 2013) (citing *Evans v. Cowan*, 132 N.C. App. 1, 510 S.E.2d 170 (1999), and *Lenzer v. Flahelly*, 106 N.C. App. 496, 418 S.E.2d 276 (1992)).

any other forum (e.g., social media, news interview, private event) where they could disclaim speaking in their official capacities. In other words, in choice of words, timing, and manner of their actions, Forestieri and DeHaan indicated an intent to speak in their official capacities during the execution of their official duties, and not as private citizens, when presenting the Canvass Letter.

As to the second point, the government's interest in providing effective and efficient services to the public—assuring compliance with election laws and protecting public confidence in our state's elections—far outweighs any interest Forestieri and DeHaan may have in attacking the credibility of statewide election results and calling the State Board's administration of election law "illegal, "perverted" and not "Constitutional" while executing their official duties. Two "core functions" of county boards of elections include "ensuring the elections are administered in a fair and equitable manner, and ensuring that the *public views* election administration as fair and equitable." *Simpson v. Rockingham Cty. Bd. of Elections*, No. 1:20CV1100, 2021 U.S. Dist. LEXIS 168164, at *25-26 (M.D.N.C. Aug. 6, 2021) (emphasis added). As set forth above, the actions of Forestieri and DeHaan directly undermine both.

IV. Conclusion

Secretary Forestieri and Member DeHaan had a multitude of other options to express their disagreement with North Carolina's election laws as private citizens speaking on matters of public concern. Indeed, it is not uncommon for government officials to express good faith disagreements with the law in their personal capacities, or even on the public record in a manner consistent with their oaths of office. But Forestieri and DeHaan decided to forego these options using

inflammatory and dangerous language that demonstrates they reject their oath of office and allegiance to the rule of law.

The risks to our election system presented by Forestieri’s and DeHaan’s actions as election officials are not hypothetical: unfounded challenges to the legitimacy of the 2020 election—deemed the “most secure in American history” by the Department of Homeland Security—have resulted in “one in three registered voters believing the results of the 2020 U.S. presidential election were illegitimate.”³ If left unchecked, Forestieri and DeHaan may be the first of many board members throughout the state and across the political spectrum who cannot be trusted to faithfully certify election results or who would undermine the credibility of our elections based upon their personal disagreements and own misinterpretation of the governing law they have sworn to support, maintain and defend. As Secretary Forestieri and Member DeHaan have failed to uphold their oaths of office and instead have acted in a manner that undermines the faithful administration of elections in this state, they must be removed.

Respectfully submitted, this the 6th day of February, 2023.

SOUTHERN COALITION FOR SOCIAL JUSTICE

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³ Machael Baldassar, Katie Harbath, Michael Scholtens, *The Big Lie and Big Tech: Misinformation Repeat Offenders and Social Media in the 2020 U.S. Election* at 3, THE CARTER CENTER (August 2021), https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/the-big-lie-and-big-tech.pdf.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy via email on the foregoing in the above-captioned action to legal@ncsbe.gov and the following parties by electronic mail:

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Respectfully submitted, this the 6th day of February, 2023.

/s/ Hilary Harris Klein
Hilary Harris Klein