

Petition for Rulemaking

Arrangement of Official Ballots

The below Petition for Rulemaking ("Petition") is submitted pursuant to G.S. § 150B-20 as implemented by 08 NCAC 15 .0101 and arranged in numbered sections, as prescribed therein:

1
Petitioner Joshua Leo Lloyd Lawson ("Petitioner") in my personal capacity only as a voter in Wake County (NCID BL383965) residing at 5071 Langley Circle in the City of Raleigh, and reachable at josh@lawson.legal for purposes relevant to this Petition.

2
Citation The Petition is for an addition of subsection (d) to 08 NCAC 06B .0103 ("Arrangement of Official Ballots"), or where the Board otherwise sees fit.

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Proposal (d) An official ballot shall display party designation in a partisan ballot item by listing a candidate's name followed by the nominating political party, followed by "Nominee." When a candidate qualifies by petition to appear on a partisan ballot item, the official ballot shall display the candidate's name, followed by "Unaffiliated Candidate."

With annotations:

(d) An official ballot ["official ballot" GS § 163-165(5)] shall display party designation in a partisan ballot item ["party designation in partisan ballot items" GS § 163-165.5(a)(4)] by listing a candidate's name [GS § 163-165.5(a)(3)], followed by the nominating political party, followed by "Nominee." When a candidate qualifies by petition [petition process GS §§ 163-122 and 163-296 (municipal)] to appear on a partisan ballot item, the official ballot shall display the candidate's name, followed by "Unaffiliated Candidate." [G.S. § 163-122(c)]

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Explanation and Effect

Jurisdiction

In North Carolina, the State Board prepares,¹ certifies,² and "determine[s], in the manner provided by law, the form and content of ballots."³ By statute, that *manner* must include "party designations in partisan ballot items."⁴ The Board has performed this duty, in part, by adopting rules that prescribe the "Arrangement of Official Ballots"⁵ codified within North Carolina's Administrative Code. The State Board, thus, possesses clear jurisdiction over the subject-matter of this Petition, bearing clear statutory responsibilities and having previously exercised its rulemaking

¹ GS § 163-22(e)

² GS § 163-165(5)

³ GS § 163-22(e)

⁴ GS § 163-165.5(a)(4)

⁵ 08 NCAC 06B .0103

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authority in the area. Petitioner has standing to bring this matter, as any “person” may file a Petition for Rulemaking under 08 NCAC 15 .0101. So the Board may proceed to the substance.

Summary of Proposed Change

| | Current | Proposed |
|----------------|--------------------------------------|--|
| Single Nominee | Johnathan Smith Republican | Johnathan Smith Republican Nominee |
| | Jane Doe Democrat | Jane Doe Democratic Nominee |
| | John Roe Libertarian | John Roe Libertarian Nominee |
| Cross-Nominee | [unknown] | Johnathan Doe Republican & Libertarian Nominee |
| Petition | Jane Smith Unaffiliated | Jane Smith Unaffiliated Candidate |

Merits

Agency rulemaking is most appropriate when used to formalize often-repeated administrative acts. Especially where ministerial functions are foreseeable and frequent, an agency should consider rulemaking, because discretion is best confined to unforeseen and non-standard scenarios where ordinary deliberation and reliance interests necessarily yield to the exigencies. But ballot arrangement is no crisis.

Indeed, the configuration of ballots is ideal for rulemaking. Each election requires that the State Board to prepare, proof, and certify the official ballots.⁶ The agency has adopted a small collection of rules to operationalize that obligation.⁷

But no rule today specifies how the State Board will display “party designations in partisan ballot items.”⁸ Instead, the agency’s practice each cycle is to select a piece of a recognized party’s name and affix it beneath a nominee. The nominee of the Democratic Party becomes simply *Democrat*, the nominee of the Republican

⁶ See GS §§ 163-22(e) and 163-165(5).

⁷ 08 NCAC 06B .0103

⁸ GS § 163-165.5(a)(4)

Party becomes *Republican*, and so on, while a petition-candidate — whether she is affiliated with a party or not — becomes simply *Unaffiliated*.

Past practice is understandable but incomplete. Rightly understood, the statutory directive⁹ is to display the nominating *entity*, not the candidate’s personal *registration* — the “party designations” of the candidacies, not the candidates themselves. Surely the General Assembly did not intend that a registered Republican who qualified by petition would nonetheless appear as “Republican” on the ballot and alongside her GOP-nominated opponent. And certainly, a nominee should appear alongside the name of the nominating party, even if that nominee isn’t personally affiliated¹⁰ — an issue some raised when Sen. Bernie Sanders neared nomination by the Democratic Party in 2016.

The modifier *Democrat* may describe a person’s registration, but the Board has never recognized an entity called the “Democrat Party.” The nomination label should carry the proper name. Similarly, a petition candidate may herself be affiliated with a recognized party, and the truncated *Unaffiliated* label could mislead voters.

We can do better, but why add *Nominee*? It is certainly true the Board could adopt a rule that merely specifies the nominating party (Republican, Democratic, Libertarian, etc.), but leaves *Nominee* implied. But adding *Nominee* creates a standard that scales over time as new parties field candidates before voters grow accustomed to their presence. (*Patriot*, *Unity*, and *Reform* read differently beneath a name than they would with *Nominee* attached). Adding *Nominee* also performs an educational function, reminding voters their general election options are downstream of extensive pre-screening processes in which they might have participated (i.e., voting in primaries or joining party organizational leadership).

Nominee might feel redundant, but that’s only because we’ve grown accustomed to open primaries in this state. Citizens would do well to remember, however, that nominations in North Carolina can be made “either in a primary or convention or by virtue of having no opposition in a primary” or even from a “vacancy . . . filled by appointment.” G.S. § 163-114. Parties are not obligated to hold primaries, ever. And when they do, unaffiliated voters are excluded by law,¹¹ unless a party expressly invites them¹² (an invitation they can withdraw). So “John Smith - Republican” is misleading. Smith is not on the ballot because he is a Republican; he’s

⁹ GS § 163-165.5(a)(4)

¹⁰ No state law unambiguously proscribes fusion candidacies or prohibits a party from nominating by convention a person not affiliated with the party. In the first convention of a newly recognized party, the nominee must affiliate with that party (GS § 163-98), and a person who loses a primary cannot compete in the general (GS § 163-114(e)). But if the General Assembly intended to foreclose so-called “fusion” nonalienations, they may not have covered all scenarios.

¹¹ GS §§ 163-59(2) and 163-59(3)

¹² GS § 163-119

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there because the Republican Party nominated him under rules it established. And those rules can change. Future ballots in our state may contain a mix of nominees from different parties that confer nomination under a variety of rules and methods, some through open primaries, others through closed primaries, and still others through convention. It is best to remind voters they have a stake in party pre-sorting activity, so voters can safeguard their place in it. *Nominee* is imperfect, but better.

How about petition candidates? Petition candidates aren't nominees. Indeed, "any qualified voter"¹³ can bypass party processes and proceed directly to the general election ballot with the support of her fellow citizens. This is because ballots are not the playthings of parties but the means for ordered liberty, with our Constitution requiring a meaningful, non-partisan path to the ballot.¹⁴ Today, the agency prints *Unaffiliated* beneath a petition candidate's name. Voters may incorrectly assume that the State is indicating the candidate's voter registration status. But petition candidacies have nothing to do with the candidate's personal registration.

Petitioner submits that the Board could indeed find that *Independent Candidate* or *Petition Candidate* more appropriately conveys the status of such a candidacy. Absent such a finding, however, this Petition suggests *Unaffiliated Candidate*, based on the statutory signature sheet language,¹⁵ and elsewhere.¹⁶ Affixing *Unaffiliated Candidate* (or some alternative), beneath the candidate's name at least attempts to avoid potentially inaccurate representations about a candidate's personal registration.

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Any Other
Information

Petitioner submits the above for review and decision in the manner and timeframe prescribed by 08 NCAC 15.0101. Petitioner does not request an opportunity to be heard, unless the Board desires. Petitioner expressly invites the Board to consider alternative formulations that better achieve the objectives described herein.

Respectfully submitted on the
26th day of March 2021,



Joshua Leo Lloyd Lawson

¹³ GS § 163-122(a)

¹⁴ See e.g. *Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down a state statutory regime that had the effect of unduly limiting association rights and narrowing voters' opportunity to support independent and third-party candidates).

¹⁵ GS § 163-122(c)

¹⁶ See e.g. GS §§ 163-1(c), 163-45(a), 163-122, 163-209, 163-221(a)(4), 163-296, and 163-299(a)(2).