

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005**

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**SENATE BILL 133
Judiciary I Committee Substitute Adopted 2/17/05**

Short Title: Reconfirming Provisional Voting.

(Public)

Sponsors:

Referred to:

February 15, 2005

A BILL TO BE ENTITLED

1 AN ACT TO RESTATE AND RECONFIRM THE INTENT OF THE GENERAL
2 ASSEMBLY WITH REGARD TO PROVISIONAL VOTING IN 2004; AND TO
3 SEEK THE RECOMMENDATIONS OF THE STATE BOARD OF ELECTIONS
4 ON FUTURE ADMINISTRATION OF OUT-OF-PRECINCT PROVISIONAL
5 VOTING.
6

7 The General Assembly of North Carolina enacts:

8 **SECTION 1.** The General Assembly makes the following findings:

9 (1) In 2003, the General Assembly enacted S.L. 2003-226, which
10 contained a number of changes to the State's election laws, designed in
11 part to implement provisions of the federal Help America Vote Act of
12 2002 (HAVA) in such a way as to avoid having separate laws for
13 federal and State elections and otherwise to encourage and expand the
14 exercise of the franchise. One such enactment was codified as
15 G.S. 163-166.11, which spells out procedures for the casting of
16 provisional official ballots. A voter's eligibility to cast a provisional
17 official ballot depends on being a registered voter in the jurisdiction in
18 which the voter seeks to vote. The "jurisdiction" in which a voter in
19 North Carolina registers to vote is the county. This is the unmistakable
20 meaning of G.S. 163-82.1 and has not heretofore been challenged or
21 questioned.

22 (2) In S.L. 2003-226, the General Assembly expressly stated its intent to
23 "ensure that the State of North Carolina has a system for all elections
24 that complies with the requirements for federal elections set forth in"
25 HAVA. It was then and is now the intent of the General Assembly that
26 the provisions of HAVA be broadly construed and that they be
27 implemented in North Carolina in a manner to ensure a unified system
28 of federal and State elections in compliance with HAVA.

- 1 (3) When it enacted G.S. 163-166.11, it was then and is now the intent of
2 the General Assembly that any individual who is a registered voter in a
3 county but whose name does not appear on the official list of
4 registered voters at the voting place at which that voter appears be
5 allowed to cast a provisional official ballot.
- 6 (4) When it enacted G.S. 163-166.11, it was then and is now the intent of
7 the General Assembly that all provisional ballots be counted for all
8 those ballot items for which a voter was eligible to vote. In enacting
9 G.S. 163-166.11 in 2003, the General Assembly was fully mindful of
10 and intended to reinforce the fact that prior statutory enactments in
11 2001 had already recognized the right of a voter to cast a provisional
12 ballot and to have that ballot counted for all items for which that voter
13 was eligible to vote. See G.S. 163-182.2(a)(4). Even prior to 2003,
14 the General Statutes recognized the right of a registered voter to cast a
15 provisional ballot and to have that ballot counted for all those items for
16 which the voter was duly qualified to vote.
- 17 (5) When it enacted G.S. 163-166.11, it was then and is now the intent of
18 the General Assembly that the State Board of Elections act in a manner
19 that would result in a single system for federal and State elections,
20 rather than one system for federal elections and another for State
21 elections. In enacting G.S. 163-166.11 in 2003, the General Assembly
22 was mindful of and intended to reinforce the fact that it had already
23 provided in 2001 in G.S. 163-166.7(c)(6) that the State Board of
24 Elections would adopt rules to ensure that voters "not clearly eligible
25 to vote in the precinct but who seek to vote there are given proper
26 assistance in voting a provisional official ballot or guidance to another
27 voting place where they are eligible to vote." The possibility of
28 out-of-precinct provisional voting was thus recognized by the General
29 Assembly as early as 2001.
- 30 (6) The law regarding provisional ballots does not rest solely on
31 G.S. 163-82.15(e), which addresses the narrow circumstance of
32 "Unreported Move[s] to Another Precinct Within the County." Though
33 that statute mentions two ways in which precinct officials may process
34 registrants, it is not exclusive. G.S. 163-82.15(e) is part of the statutory
35 Article on voter registration, rather than on voting, and should be read
36 in that context. It was enacted in 1994, before provisional voting was
37 codified in North Carolina. The enactment of G.S. 163-166.7(c)(6) in
38 2001 is the authority giving the State Board of Elections the duty to
39 apply the broader laws of provisional voting, including
40 G.S. 163-166.11. Any reading of G.S. 163-166.11 that would limit that
41 statute's provisions to the narrower class of voting situations governed
42 by the earlier enacted provisions of G.S. 163-82.15(e) would ignore
43 the long-standing principle of statutory construction that statutes
44 relating to the same subject matter should be reconciled in such a

1 manner as to effect the scope and meaning of the later enactment and
2 read in a manner that would tend most completely to secure the rights
3 of all persons affected by the legislation. It was then and is now the
4 intent of the General Assembly in enacting G.S. 163-166.11 to expand
5 the exercise of the franchise, not to limit it or to restrict it by the terms
6 of earlier and narrower enactments.

7 (7) The State Board of Elections and all county boards of elections were
8 following the intent of the General Assembly when they administered
9 G.S. 163-166.11 and the earlier enacted statutes in
10 G.S. 163-182.2(a)(4) and G.S. 163-166.7(c)(6) to count in whole or in
11 part ballots cast by registered voters in the county who voted outside
12 their resident precincts in the July 20, 2004, Primary, the August 17,
13 2004, Second Primary, and the November 2, 2004, General Election.

14 (8) Several hundred thousand registered North Carolina voters cast ballots
15 outside their resident precincts during the one-stop absentee balloting
16 ("early voting") period pursuant to G.S. 163-227.2 prior to the General
17 Election in November 2004, during the two primaries in
18 2004, and then on the date of the General Election in November 2004.
19 There is no statutory basis upon which to distinguish out-of-precinct
20 voting that occurred on the date of the General Election in November
21 2004 from out-of-precinct voting that occurred during the First and
22 Second Primaries in 2004 or that occurred during the period of
23 one-stop absentee ("early") voting prior to the General Election of
24 2004.

25 (9) The General Assembly takes note of the fact that of those registered
26 voters who happened to vote provisional ballots outside their resident
27 precincts on the day of the November 2004 General Election, a
28 disproportionately high percentage were African-American.

29 (10) The General Assembly notes that in addition to provisional voting on
30 the date of the General Election pursuant to G.S. 163-166.11, the
31 General Statutes abound with provisions that allow voters to cast votes
32 outside their resident precincts:

- 33 a. Civilian absentee voting by mail, G.S. 163-226.
- 34 b. Military and overseas citizens absentee voting, G.S. 163-245.
- 35 c. One-stop absentee (early) voting, G.S. 163-227.2.
- 36 d. Voting in a voting place on a lot adjacent to the precinct,
37 G.S. 163-128.
- 38 e. Temporarily voting in an adjacent precinct, G.S. 163-128.
- 39 f. Voting in a precinct outside the voting place where no suitable
40 facility exists inside it or adjacent to it, G.S. 163-130.1.
- 41 g. Voting at a central location in the county by voters who no
42 longer live in the precinct where their name is listed on
43 registration lists, G.S. 163-82.15(e).

1 All those provisions were enacted prior to G.S. 163-166.11. Most were
2 enacted decades before. As many as 1,000,000 people in North
3 Carolina may have cast out-of-precinct votes using all out-of-precinct
4 methods in 2004.

5 (11) It would be fundamentally unfair to discount the provisional official
6 ballots cast by properly registered and duly qualified voters voting and
7 acting in reliance on the statutes adopted by the General Assembly and
8 administered by the State Board of Elections in accordance with its
9 intent. Moreover, to subtract such ballots only from the count for the
10 General Election of 2004 without also doing so for the First or Second
11 Primaries of 2004 would create a bizarre result in which
12 out-of-precinct provisional ballots are allowed to count for some
13 elections but not others. The General Assembly did not and does not
14 now intend to create such a system.

15 (12) Even if the State Board of Elections had misread the language and
16 intent of the General Statutes concerning provisional voting, which it
17 did not do, it has been the long-standing and hitherto unquestioned law
18 of this State, confirmed by prior decisions of the North Carolina
19 Supreme Court, that an innocent voter's ballot shall not be disqualified
20 because of errors or omissions by elections officials. This fundamental
21 principle was adopted by Justice Samuel J. Ervin Jr. in the case of
22 Owens v. Chaplin, 228 N.C. 705 (1948) using the following language:

23 "We can conceive of no principle which permits the
24 disfranchisement of innocent voters for the mistake, or even the
25 willful misconduct, of election officials in performing the duty cast
26 upon them. The object of elections is to ascertain the popular will,
27 and not to thwart it. The object of election laws is to secure the
28 rights of duly-qualified electors, and not to defeat them."

29 See also Appeal of Judicial Review by Republican Candidates for
30 Election in Clay County, 45 N.C. App. 556 (1980).

31 The General Assembly endorses and reaffirms this fundamental
32 principle.

33 (13) It is the will of the people, as expressed through their representatives in
34 the General Assembly, that the validity of the primaries and elections
35 conducted in 2004 and certified by a county board of elections or the
36 State Board of Elections, not be called into question by retroactively
37 revisiting the propriety of provisional ballots cast by duly registered
38 voters of a county.

39 (14) To avoid all doubt and remove any possible future question as to the
40 General Assembly's plain intent with respect to the subject of
41 provisional voting, and to avoid misinterpretation of any other statute,
42 the General Assembly enacts Sections 2 through 5 of this act.

43 **SECTION 2.** G.S. 163-55 reads as rewritten:

44 **"§ 163-55. Qualifications to vote; exclusion from electoral franchise.**

1 (a) Residence Period for State Elections. – Every person born in the United
2 States, and every person who has been naturalized, and who shall have resided in the
3 State of North Carolina and in the precinct, ward, or other election district in which ~~he~~
4 the person offers to register and vote for 30 days next preceding ~~the ensuing an~~ election,
5 shall, if otherwise qualified as prescribed in this Chapter, be qualified to register and
6 vote in ~~the precinct in which he resides~~: any election held in this State. ~~Provided, that~~
7 removal Removal from one precinct, ward, or other election district to another in this
8 State shall not operate to deprive any person of the right to vote in the precinct, ward, or
9 other election district from which he has removed until 30 days after ~~his~~ the person's
10 removal.

11 ~~The~~ Except as provided in G.S. 163-59, the following classes of persons shall not be
12 allowed to register or vote in this State:

13 (1) Persons under 18 years of age.

14 (2) Any person adjudged guilty of a felony against this State or the United
15 States, or adjudged guilty of a felony in another state that also would
16 be a felony if it had been committed in this State, unless that person
17 shall be first restored to the rights of citizenship in the manner
18 prescribed by law.

19 (b) Precincts and Election Districts. – For purposes of qualification to vote in an
20 election, a person's residence in a precinct, ward, or election district shall be determined
21 in accordance with G.S. 163-57. When an election district encompasses more than one
22 precinct, then for purposes of those offices to be elected from that election district a
23 person shall also be deemed to be resident in the election district which includes the
24 precinct in which that person resides. An election district may include a portion of a
25 county, an entire county, a portion of the State, or the entire State. When a precinct has
26 been divided among two or more election districts for purposes of elections to certain
27 offices, then with respect to elections to those offices a person shall be deemed to be
28 resident in only that election district which includes the area of the precinct in which
29 that person resides. Qualification to vote in referenda shall be treated the same as
30 qualification for elections to fill offices."

31 **SECTION 3.** G.S. 163-82.15(e) reads as rewritten:

32 "(e) Unreported Move to Another Precinct Within the County. – If a registrant has
33 moved from an address in one precinct to an address in another precinct within the same
34 county more than 30 days before an election and has failed to notify the county board of
35 the change of address before the close of registration for that election, the county board
36 shall permit that person to vote in that election. The county board shall permit the
37 registrant described in this subsection to vote at the registrant's new precinct, upon the
38 registrant's written affirmation of the new address, or, if the registrant prefers, at a
39 central location in the county to be chosen by the county board. If the registrant appears
40 at the old precinct, the precinct officials there shall send the registrant to the new
41 precinct or, if the registrant prefers, to the central location, according to rules which
42 shall be prescribed by the State Board of Elections. At the new precinct, the registrant
43 shall be processed by a precinct transfer assistant, according to rules which shall be

1 prescribed by the State Board of Elections. Any voter subject to this subsection may
2 instead vote a provisional ballot according to the provisions of G.S. 163-166.11."

3 **SECTION 4.** G.S. 163-166.11 reads as rewritten:

4 **"§ 163-166.11. Provisional voting requirements.**

5 If an individual seeking to vote claims to be a registered voter in a jurisdiction as
6 provided in G.S. 163-82.1 and though eligible to vote in the election does not appear on
7 the official list of eligible registered voters in the voting place, that individual may cast
8 a provisional official ballot as follows:

- 9 (1) An election official at the voting place shall notify the individual that
10 the individual may cast a provisional official ballot in that election.
- 11 (2) The individual may cast a provisional official ballot at that voting
12 place upon executing a written affirmation before an election official
13 at the voting place, stating that the individual is a registered voter in
14 the jurisdiction as provided in G.S. 163-82.1 in which the individual
15 seeks to vote and is eligible to vote in that election.
- 16 (3) At the time the individual casts the provisional official ballot, the
17 election officials shall provide the individual written information
18 stating that anyone casting a provisional official ballot can ascertain
19 whether and to what extent the ballot was counted and, if the ballot
20 was not counted in whole or in part, the reason it was not counted. The
21 State Board of Elections or the county board of elections shall
22 establish a system for so informing a provisional voter. It shall make
23 the system available to every provisional voter without charge, and it
24 shall build into it reasonable procedures to protect the security,
25 confidentiality, and integrity of the voter's personal information and
26 vote.
- 27 (4) The cast provisional official ballot and the written affirmation shall be
28 secured by election officials at the voting place according to guidelines
29 and procedures adopted by the State Board of Elections. At the close
30 of the polls, election officials shall transmit the provisional official
31 ballots cast at that voting place to the county board of elections for
32 prompt verification according to guidelines and procedures adopted by
33 the State Board of Elections.
- 34 (5) The county board of elections shall count the individual's provisional
35 official ballot for all ballot items on which it determines that the
36 individual was eligible under State or federal law to vote."

37 **SECTION 5.** G.S. 163-182.2(a)(4) reads as rewritten:

- 38 "(4) Provisional official ballots shall be counted by the county board of
39 elections before the canvass. If the county board finds that an
40 individual voting a provisional official ballot is not eligible to vote in
41 one or more ballot items on the official ballot, the board shall not
42 count the official ballot in those ballot items, but shall count the
43 official ballot in any ballot items for which the individual is eligible to
44 vote. Eligibility shall be determined by whether the voter is registered

1 in the county as provided in G.S. 163-82.1 and whether the voter is
2 qualified by residency to vote in the election district as provided in
3 G.S. 163-55 and G.S. 163-57. If a voter was properly registered to vote
4 in the election by the county board, no mistake of an election official
5 in giving the voter a ballot or in failing to comply with G.S. 163-82.15
6 or G.S. 163-166.11 shall serve to prevent the counting of the vote on
7 any ballot item the voter was eligible by registration and qualified by
8 residency to vote."

9 **SECTION 6.** The State Board of Elections shall make recommendations by
10 April 15, 2005, for consideration by the 2005 General Assembly on administration of
11 provisional voting in the future, taking into account the relevant experience in the 2004
12 elections in this and other states.

13 **SECTION 7.** This act is effective when it becomes law and, being
14 declaratory of existing law, applies to all elections held after January 1, 2004, the
15 effective date of G.S. 163-166.11.