



**CHEROKEE NATION**  
**OFFICE OF THE ATTORNEY GENERAL**

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**OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL**

**Question Submitted by:** Shawna Calico, Chairperson of the Cherokee Nation Election Commission

**Opinion Number:** 2021-CNAG-01

**Date Issued:** March 24, 2021

You have asked for an opinion answering the following questions:

- I. Under LA 24-20, what is the legal age required of a witness?
- II. Under LA 24-20, does the witness have to include a government issued photo ID; or, does only the voter have to include a government issued photo ID to comply with Section 78 of the Election Code?
- III. If a witness does not provide an ID, how does the Commission determine whether the witness is of legal age; or, is it necessary that the Commission determine if the Witness is of legal age?
- IV. Does an affidavit envelope signed by two witnesses meet the requirements of Section 78?

**ANSWER AND ANALYSIS**

**Short Answers:**

- I. The legal age required to be a witness under LA-24-20 is eighteen (18) years of age.
- II. The statute is ambiguous as to whether the witness must include a copy of a government issued photo ID, however in expanding absentee voting verification options, the Council placed an additional statutory responsibility upon the Election

Commission to ensure that the witness verifying such ballot is of legal age. The voter is required to include a copy of their government issued photo ID.

- III. Because the statute is silent as to how the Commission should determine a witness's legal age, the Election Commission must determine how it will satisfy this statutory responsibility.
- IV. No, an affidavit envelope signed by two witnesses does not meet the requirements of 26 CNCA § 78.

### **Background:**

Legislative Act 24-20 ("Act"), passed by the Tribal Council and signed into law by the Principal Chief, amended Title 26, Section 78 of the Cherokee Nation Code Annotated to "enhance and expand the verification of identification of Cherokee citizens voting through absentee ballots." LA-24-20.<sup>1</sup> The initial amendment contained in LA 24-20 was introduced as follows:

#### **§ 78. Return of absentee ballots**

A. A voter shall mark his ballot in permanent black or blue ball point ink; seal the ballot in the secrecy envelope; fill out completely and sign the affidavit on the front of the affidavit envelope ~~in the presence of a notary public; the affidavit envelope must be notarized and the notary seal affixed for the ballot~~ : (i) in the presence of a notary public; (ii) in the presence of two (2) witnesses; or (iii) in the presence of one (1) witness and enclose a copy of a government issued photo identification or their Cherokee Nation issued voter identification card. The affidavit envelope must be: (a) notarized and the notary seal affixed to the affidavit; (b) signed by the two (2) witnesses; or (c) signed by the one (1) witness and included an enclosed copy of a government issued photo identification or their Cherokee Nation issued voter identification card to be counted; and return the documents inside the postage paid return envelope via the United States mail to the Election Commission. Only those absentee ballots which are mailed to the Election Commission and which reach the Election Commission post office box in Tahlequah, Oklahoma, no later than 7:00 p.m. on Election Day shall be counted; provided that personal delivery of an absentee ballot shall be accepted during in person absentee voting as provided in 26 CNCA § 62(D) and on Friday the day before election and election day from 7:00 a.m. to 7:00 p.m., only if the voter or person designated by the voter delivers the ballot to the Election Commission Office. Voting in person at a precinct by a voter who has requested an absentee ballot shall be permitted, however, that voter must cast a challenged ballot to allow the Commission to determine whether an absentee ballot was cast. In the event that a valid absentee ballot was returned by the voter, the challenged ballot will not be

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<sup>1</sup> The archived video footage of the Rules Committee meeting during which the Act was considered is available at: [https://www.youtube.com/watch?v=RHGw3Pgrlzk&list=PLZEkBhbUA\\_CUw\\_E6bhmKcVwG23jA54mJD&index=8](https://www.youtube.com/watch?v=RHGw3Pgrlzk&list=PLZEkBhbUA_CUw_E6bhmKcVwG23jA54mJD&index=8)

counted. In the event that a valid absentee ballot was not returned by a voter, the challenged ballot will be counted.

In accordance with the appropriate procedure, the Speaker entertained discussion of the Act during which various Tribal Councilors voiced their thoughts. The debate included, among other things, the potential burden of the notarization requirement, election security, ballot integrity, and potential criminal authority over non-Indians. Councilor Janees Taylor offered a “friendly amendment” to strike section (ii) and all references to “of their Cherokee Nation issued voter identification card” contained in the original version of the Act. As the debate continued, several Councilors and the Council’s attorney clarified the impact of the “friendly amendment.” The Act’s sponsors ultimately accepted the “friendly amendment.” A roll call vote was conducted and the final version of the amendment—reflecting Councilor Taylor’s “friendly amendment”—was passed 12-5.

At no point during the discussion reflected in the archived meeting footage was the term “legal age” discussed. At some point—though it is unclear when—the phrase “legal age” was included into the final version of the Act that was ultimately passed by the Tribal Council and signed into law by the Principal Chief. The final version transmitted to and signed by the Chief reads as follows:

**§ 78. Return of absentee ballots**

A. A voter shall mark his ballot in permanent black or blue ball point ink; seal the ballot in the secrecy envelope; fill out completely and sign the affidavit on the front of the affidavit envelope ~~in the presence of a notary public; the affidavit envelope must be notarized and the notary seal affixed for the ballot~~ : (i) in the presence of a notary public; or (ii) in the presence of one (1) witness of legal age and enclose a copy of a government issued photo identification. The affidavit envelope must be: (a) notarized and the notary seal affixed to the affidavit; or (b) signed by the one (1) witness of legal age and included an enclosed copy of a government issued photo identification to be counted; and return the documents inside the postage paid return envelope via the United States mail to the Election Commission. Only those absentee ballots which are mailed to the Election Commission and which reach the Election Commission post office box in Tahlequah, Oklahoma, no later than 7:00 p.m. on Election Day shall be counted; provided that personal delivery of an absentee ballot shall be accepted during in person absentee voting as provided in 26 CNCA § 62(D) and on Friday the day before election and election day from 7:00 a.m. to 7:00 p.m., only if the voter or person designated by the voter delivers the ballot to the Election Commission Office. Voting in person at a precinct by a voter who has requested an absentee ballot shall be permitted, however, that voter must cast a challenged ballot to allow the Commission to determine whether an absentee ballot was cast. In the event that a valid absentee ballot was returned by the voter, the challenged ballot will not be counted. In the event that a valid absentee ballot was not returned by a voter, the challenged ballot will be counted.

**Analysis:**

The Act's language is ambiguous and includes undefined terms. The general starting point in statutory interpretation is the ordinary meaning of the statutory text. Under the "ordinary meaning" canon of statutory construction, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). As an initial matter, it is unclear from the archived meeting video how or when the phrase "legal age" was included in the final amendment. The term was not contained in the original draft and it was not considered as a floor amendment. It also was not included in the amended draft the Tribal Council's Legislative Aide read back to the body in preparation for the final vote. Nevertheless, such phrase was incorporated and ultimately included in the final version of the Act transmitted to and signed by the Chief. Such acts make it the law of the Cherokee Nation.

In any event, the term "legal age" was not expressly defined by the Tribal Council. "Legal age" has many meanings depending on the context surrounding its usage. Reading this Act *in pari materia* with the remaining provisions of Title 26 however, it is apparent that the Tribal Council has only granted rights under the election laws of the Cherokee Nation to persons who are at least eighteen (18) years of age. For example, the age of eligibility to cast a vote or to aide another in casting a vote is eighteen (18) years of age. *See* 26 CNCA § 3(1); 26 CNCA § 21(A). Candidates running for elective office must be at least 25 years old to run for Tribal Council or 30 years old to run for Principal or Deputy Chief. *See* 26 CNCA §§ 32; 33. Minors are expressly prohibited from making campaign contributions. *See* 26 CNCA § 43(C). In sum, no person under the age of eighteen (18) may exercise any right granted under Title 26.

Fundamentally, we are generally required to presume that legislative enactments intend to produce reasonable and logical results. If possible, such presumption should lie against futility. *See United States v. O'Driscoll*, 761 F.2d 589, 597 (10th Cir. 1985). Because other provisions contemplating age within Title 26 require an individual to reach at least eighteen (18) years of age before exercising the rights granted therein and another provision expressly prohibits participation *via* campaign contributions from "minors"; the term "legal age" in this instance should be read to logically align with the rest of the title. Therefore, the term "legal age" as used in 26 CNCA § 78 means eighteen (18) years of age.

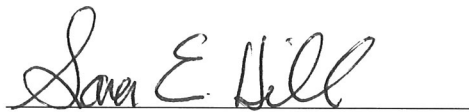
With regard to the Act's remaining ambiguity—who is required to provide proof of photo identification upon verifying an absentee ballot—we begin with the legislative history. The stated purpose of the Act was to "expand the verification of voter identification of Cherokee citizens voting through absentee ballots." LA 24-20. Upon a plain reading, the Act appears to attempt to establish two ways through which a voter casting an absentee ballot may be verified to be counted. During discussion of the Act, Councilor Patzkowski sought clarification of the friendly amendment's affect and specifically asked whether the witness and the voter must submit a copy of their government issued photo ID. It appears that a few Councilors, though it is unclear who exactly, indicated that the voter must submit such proof of identification. Thus, it is clear to this Office that the intent was to, at least, require the voter to submit proof of identification. Therefore, the Election Commission should require a copy of the voter's proof of identification under 26 CNCA § 78.

Moreover, though the final version of the Act does not expressly reflect this direction and in expanding absentee voting verification options, the Council placed an additional statutory responsibility on the Election Commission: to ensure that the witness verifying an absentee voter's identity is of "legal age." Because we must again presume that the Council did not intend for a futile result and absent express direction from the legislature in the statutory text, this ambiguity must be read to permit the Election Commission to determine the process that will enable them to carry out their statutory duty.

Accordingly, to ensure compliance under Section 78, the Commission must either require a witness to also enclose a copy of their government issued photo ID or include printed language on the affidavit envelope through which a witness can affirm their age under penalty of perjury. The Act's ambiguity cannot be read so that the Election Commission is compromised in carrying out their statutory duties. Further, under the plain language of the Act, an affidavit envelope signed by two witnesses does not fulfill the verification requirements established under 26 CNCA § 78.

**IT IS THEREFORE, THE OFFICIAL OPINION OF THE ATTORNEY GENERAL THAT:**

- 1) The term "legal age" as used in 26 CNCA § 78 means eighteen (18) years of age.
- 2) The statute is ambiguous as to whether a witness must include a copy of their government issued photo ID, however the voter is required to include a copy of their government issued photo ID.
- 3) The Council placed an additional statutory responsibility upon the Election Commission to ensure that the witness verifying an absentee ballot is of "legal age," but provided no process through which the Election Commission must fulfill such responsibility. Because the statute is silent as to how the Commission should determine a witness's legal age, the Election Commission must determine how it will satisfy this statutory responsibility.
- 4) An affidavit envelope signed by two witnesses does not meet the requirements of 26 CNCA § 78.



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