UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO: 1:22-cv-00611-WO-JLW

COMMON CAUSE, ELIZABETH MARION SMITH, SETH EFFRON, JAMES M. HORTON, TYLER C. DAYE, and SABRA J. FAIRES, Plaintiffs, v. TIMOTHY K. MOORE, Speaker, North Carolina House of Representatives; and PHILLIP E. BERGER, President Pro Tempore, North Carolina Senate, Defendants.	REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

ARGUMENT

The crux of Plaintiffs' argument regarding standing is that Plaintiffs are interested in service and willing to serve. However, the desire to see themselves or other unaffiliated registered voters serve on the North Carolina Board of Elections is not a sufficiently particularized injury to convey standing. Even with standing, Plaintiffs' citation to N.C. Gen. Stat. § 1-72.2 as a waiver of sovereign immunity in federal court is misplaced. Section 1-72.2 is not specific enough to fall in line with other statutes courts have held expressly waive sovereign immunity. And last, Plaintiffs' insistence that this case is about the right to vote is erroneous. Because this challenge does not involve

traditional voting rights, and instead is about public service appointment to a board or commission, the *Anderson-Burdick* framework does not create a question of fact sufficient to deny Defendants' motion to dismiss.

Plaintiffs Lack Standing

While a defendant can raise standing, it is the plaintiff, the party invoking federal jurisdiction, who bears the burden of establishing standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), as revised (May 24, 2016). "Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element." *Id*. (cleaned up). Plaintiffs fall short of this task.

Plaintiffs argue that they have demonstrated standing by having a willingness to serve and the qualifications to do so. The criteria for service on the North Carolina Board of Elections are not measured in years of dedicated service, but instead, in conditions about one's service in active elections and electioneering campaigns—with gubernatorial appointments limited to those people who affiliate with one of the two highest political parties. *See* N.C. Gen. Stat. § 163-19(b), (f), and (g). Millions of North Carolinians meet these criteria; therefore, qualifications for service are not as select as Plaintiffs make them out to be. For instance, Plaintiffs are as equally qualified to be appointed by the Governor to the North Carolina Utilities Commission as they are to the Board of Elections. *See* N.C. Gen. Stat. § 62-10(a) (identifying the members of

the Utilities Commission as appointees of the Governor confirmed by the North Carolina Senate).

The core of Defendants' argument though, is that Plaintiffs cannot meet their individualized burden of showing a concrete, particularized injury beyond the assertion that a grievance is suffered by all North Carolinians who might think it best to have unaffiliated voters on boards of elections. As noted by the Court in *Carney v. Adams*, 141 S. Ct. 493, 498 (2020), none of the Plaintiffs have alleged they expressed their interest in serving on the Board or took steps to do so while they were affiliated with either of the primary political parties. No Plaintiff alleges that he or she has sought to serve on the local boards of election in the gubernatorially appointed seats that are unrestricted by party affiliation. Plaintiffs ignore this issue in their Response. And, like the plaintiff in *Carney*, Plaintiffs' failure to take steps toward public service in elections boards where that service is available should be dispositive of their lack of standing.

And just like service on the North Carolina Board of Elections, service on a county board or commission as an unaffiliated registrant requires selection by the Governor. This independent decision making is problematic for Plaintiffs' standing. Plaintiffs argue that the Governor's appointment is ministerial and irrelevant. (DE #16, 6, 9). Service on the Board of Elections, regardless of the nominee's affiliated status, goes through the Governor. His

appointment, supervision, and removal powers over executive boards and commissions are hardly ministerial or irrelevant acts; rather, the North Carolina Supreme Court has held them to be integral to the Governor's constitutional role of executing the law. *State v. Berger*, 368 N.C. 633, 646, 781 S.E.2d 248, 256 (2016). This gubernatorial independence severs the necessary causal link for Plaintiffs' standing.

Common Cause argues that it has standing because it is an organization focused on ensuring fair and open elections. For instance, in *Common Cause Indiana v. Indiana Sec'y of State*, 60 F. Supp. 3d 982, 986 (S.D. Ind. 2014), aff'd sub nom *Common Cause Indiana v. Individual Members of the Indiana Election Comm'n*, 800 F.3d 913 (7th Cir. 2015), Common Cause was arguing that a "statutory scheme denies eligible Marion County voters their First Amendment right to cast a meaningful vote for candidates for Marion Superior Court Judge in the general election." But the participation Common Cause is raising here is not one of expanding its members' rights to vote; rather, the question is about service on a state board or commission. Common Cause does not cite authority for its argument of organizational standing in such a circumstance.

Defendants Are Entitled to Immunity

"In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction," sovereign immunity applies to suits against a state.

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 3147, 87 L. Ed. 2d 171 (1985). Attempting to validate their action against Defendants, Plaintiffs cite N.C. Gen. Stat. § 1-72.2 as an unequivocal waiver of immunity in federal court. Their argument falls well short.

Section 1-72.2(a) is entitled "standing of legislative officers" and clarifies those heads of government who represent the State of North Carolina when *the state* is sued. *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2202 (2022) ("North Carolina has expressly authorized the legislative leaders to defend the State's practical interests in litigation of this sort.").

The statute does reference "federal court" separately from state courts, which is apparently why Plaintiffs cite *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990). But *Feeney* is much different. There, the United States Supreme Court evaluated statutes establishing the Port Authority that noted the Port Authority "*consents* to suits, actions, or proceedings of any form or nature at law, in equity or otherwise." *Id*. at 306 (emphasis added). That consent to be sued—which the Court noted was not sufficiently clear in and of itself to waive immunity—was limited by a venue provision consenting to venue in federal court: "the foregoing consent is granted on the condition that venue shall be laid within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District." *Id*. at 307.

Section 1-72.2 is not nearly the same. It is not a statute consenting to be sued in federal court. The word "consent" appears nowhere within the text. After discussing similar language regarding public policy for cases brought in state court, section 1-72.2 notes:

> It is the public policy of the State of North Carolina that in any action in any federal court in which the . . . constitutionality of an act of the General Assembly . . . is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina; the Governor constitutes the executive branch of the State of North Carolina; that, when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina; and that a federal court presiding over any such action where the State of North Carolina is a named party is requested to allow both the legislative branch and the executive branch of the State of North Carolina to participate in any such action as a party.

N.C. Gen. Stat. § 1-72.2(a). This statute establishes that in cases where either a legislative act or constitutional amendment is challenged, the State of North Carolina consists of both the executive and legislative branches of government and that when the State is a party in those actions, a federal court should permit intervention of the Speaker of the House and President Pro Tempore of the Senate when requested. *See Berger*, 142 S. Ct. at 2197 (2022) (discussing the advantages of structuring state government to speak, at times, through more than one voice). North Carolina's General Assembly has empowered the

leaders of its two legislative houses to participate in litigation *on the State's behalf* under certain circumstances and with counsel of their own choosing. *See* N.C. Gen. Stat. Ann. § 1–72.2 (2021); *Berger*, 142 S. Ct. at 2197. The State of North Carolina is the real party interest here because Defendants are named in their official capacities. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). One of the things the legislative leadership may do, where permitted to appear or sued directly as they are here, is assert immunity. Simply appearing as a party in a suit does not constitute a waiver of immunity defenses for the State of North Carolina.

Plaintiffs also cite to state civil procedure Rule 19(d) whereby in "any suit challenging the constitutionality of any act of the General Assembly" the President Pro Tempore of the Senate and Speaker of the House of Representatives are necessary parties. This state rule of civil procedure, however, is not applicable in federal court (operating under the federal rules of civil procedure), and regardless of any interpretation in state court, it cannot constitute a waiver of sovereign immunity in this Court.

Supreme Court precedent is well established – a valid waiver of an immunity defense must be unambiguous. *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) (exploring how the history of the Fourteenth Amendment and section 5 "clearly contemplate" limits on a state's immunity but showing that such a carve-out is rare). Waivers have only been found in the narrowest

of circumstances.[1] *See Cent. Virginia Cmty. Coll. v. Katz,* 546 U.S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006) (finding waiver in the Bankruptcy Clause); *see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (rejecting the idea that a state's actions could give rise to a constructive or implicit waiver of immunity). That is why most recently in *Allen v. Cooper,* 895 F.3d 337, 347 (4th Cir. 2018), the Fourth Circuit found that, by opening itself to "remedies as provided by law or equity," North Carolina still preserved any "legal or equitable limitations on those remedies." That logic holds true here. Simply providing the leadership of the General Assembly with an avenue to be a part of a specific type of legal challenge by virtue of § 1-72.2 does not equate to a blanket waiver of Defendants' entitlement to immunity.

Regardless of Applicable Standard, Plaintiffs Fail to State a Claim

Plaintiffs' entire argument is premised on the idea that "the fundamental right to vote is at issue" here, triggering application of the *Anderson-Burdick* test. (D.E. 16, at p. 12–15). The right to vote is not at issue here. Even outside the direct right to vote, other concerns like candidacy for

[1] Even traditional notions of statutory construction, such as where a legislature expresses one thing but not another, are not specific enough to support waiver of sovereign immunity. *See Pense v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 926 F.3d 97, 102 (4th Cir. 2019). Therefore, the fact that section 1-72.2(b) specifically notes that participation by members of the General Assembly does not waive their legislative immunity cannot be read to implicate that participation waiving sovereign immunity.

political office, access to ballots, the ability to associate together and advocate for a cause are not at issue here. Not one of the cases Plaintiffs cite in support of their right-to-vote argument involves public service on a commission or board, much less a challenge to a board/commission composition statute. Many are commonplace election law issues. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down Tennessee's one-year residence requirement to vote); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (striking down Louisiana property-ownership law which gave only property owners right to vote in special election); *DeLaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C. 2004) (finding unconstitutional North Carolina ballot access law that required more signatures for unaffiliated candidates as compared to party candidates); *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii election law that barred write-in voting); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (finding apportionment structure in drawing congressional districts violated Art. I Sec. 2 of Constitution under "one person, one vote" principle).

Next, built upon the incorrect premise that voting rights and associational rights are at issue, Plaintiffs further contend that the restrictions imposed by N.C.G.S. § 163-19 on these rights are "severe." (D.E. 16, at pp. 16-19). This argument is not substantiated by any relevant case law. Other than citing to the general standards set forth in *Anderson-Burdick*, Plaintiffs rely on cases that are just simply inapplicable. *See League of Women Voters v.*

Diamond, 965 F.Supp. 96, 100 (D. Me. 1997) (finding Maine's term limit law "does not impermissibly violate Plaintiffs' First and Fourteenth Amendment rights); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995) (finding North Carolina's general election scheme does not violate First or Fourteenth Amendments); *Greene v. Bartlett*, No. 5:08-cv-88, 2010 WL 3326672 (W.D.N.C. Aug. 24, 2010) (finding ballot qualification requirements for unaffiliated U.S. Congressional candidates constitutional), *aff'd*, 449 F. App'x 312 (4th Cir. 2011) (unpublished); *Cromer v. State of S.C.*, 917 F.2d 819, 821 (4th Cir. 1990) (holding unconstitutional the "requirement that independent candidates declare their candidacies as early as March 30"), *disapproved of by Wood v. Meadows*, 117 F.3d 770 (4th Cir. 1997).

Further, Plaintiffs try to argue that all voters registered as unaffiliated are *affiliated* together. The falsity of that premise is proven by the fact that the Plaintiffs themselves express varied reasons as to why they are registered unaffiliated. (*See* Doc #11, ¶¶ 4, 7, 9, 10, 12).

Even if the *Anderson-Burdick* framework were applicable, Plaintiffs' Amended Complaint would still fail to state a claim. As demonstrated in *Daunt v. Benson,* 956 F.3d 396 (6th Cir. 2020), restrictions on participation in public office meet the flexible approach set out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio's early filing deadline for independent

candidates to appear on ballot), and *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii election law that barred write-in voting).

In *Daunt*, amongst other things, the 6th Circuit addressed—in the context of reviewing the District Court's denial of a preliminary injunction—whether certain plaintiffs were "unconstitutionally excluded from serving on the [Independent Citizens] *Redistricting* Commission" due to certain eligibility criteria "which prohibit[ed] eight classes of individuals with certain current or past political ties from serving as commissioner." *Id*. at 401 (emphasis added). The 6th Circuit acknowledged that this was a "matter[ ] of first impression not only in this circuit but in federal courts generally." *Id*. at 406. Unsure of which test to apply, the Court applied two,[2] including the *Anderson-Burdick* test, stating that plaintiffs were "unlikely to succeed under either framework." *Id*. at 406.

The 6th Circuit first acknowledged that "most—if not all—of the cases considered by the Supreme Court and this court under the *Anderson-Burdick* test have involved laws that regulate the actual administration of elections," and that "[a]t bottom, the *Anderson-Burdick* framework is used for evaluation

[2] The other test applied was the "unconstitutional-conditions doctrine," stemming from the Supreme Court's holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interests in freedom of speech." *Daunt*, 956 F.3d at 409 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

of 'state election law[s].'" *Id.* at 406–07. Nevertheless, the 6th Circuit found that "a law restricting membership of the body that draws electoral lines could conceivably be classified as an 'election law,'" and therefore proceeded with an *Anderson-Burdick* analysis. *Id.* at 407. While the North Carolina State Elections Board exercises discretionary policymaking authority in some areas of election administration, it does not draw electoral lines. Thus, there is potentially even less of a reason to apply an election law standard of analysis here. But, nonetheless, in weighing the burden imposed against the state interest, the 6th Circuit in *Daunt* stated that "[e]ven if the eligibility criteria imposed a moderate burden on activities actually protected by the First Amendment, the Amendment would easily satisfy *Anderson-Burdick*" given the "relatively insignificant" burden on plaintiffs in light of, *inter alia*, "the lack of any direct prohibition or regulation of pure speech" and "the absence of any fundamental right to be a member of the Commission." *Id.* at 409 (citations omitted). Further, the 6th Circuit emphasized that "Michigan has a compelling interest 'in limiting the conflict of interest in legislative control over redistricting'" and "[a]s a sovereign polity, Michigan has a fundamental interest in structuring its government." *Id.* (citations omitted).

These two interests are present here. First, as explained in Defendants' Memorandum, (DE #15, 22-26), the bipartisan makeup of the Board of Elections promotes the prevailing political thought on election administration,

balanced against the administrative ease of nomination and selection for a smaller Board of Elections. Second, North Carolina has a fundamental interest in structuring its governance of election administration—particularly among the executive and legislative branches of government. The General Assembly experimented with changes to election administration and the Governor challenged those changes. The North Carolina Supreme Court found that the members of the board governing election administration were policymakers and that the Governor had to have control of the Board to faithfully execute the laws. *See Cooper v. Berger*, 370 N.C. 392, 415, 420–21, 809 S.E.2d 98, 112, 115–16 (2018). While it might be possible for the Governor to still control a board with members who are registered to vote as unaffiliated, a mere possibility is not the scope of review for a First Amendment or Fourteenth Amendment right. There is no right to serve in public office, *see, e.g., Werme v. Merrill*, 84 F.3d 479, 484 (1st Cir. 1996) ("There is simply no abstract constitutional right to be appointed to serve as an election inspector or ballot clerk."); *see also Velez v. Levy*, 401 F.3d 75, (2d Cir. 2005) (collecting cases). And Defendants have already laid out rational justifications for limiting nominations to the Board of Elections to those individuals who register as affiliated with one of the two major political parties.

CONCLUSION

This is not a case about the right to vote; it is a case about whether Plaintiffs have a constitutional right to serve in public office. They do not. Defendants' motion to dismiss should be granted.

Respectfully submitted this 18th day of November, 2022.

/s/ D. Martin Warf
D. Martin Warf
N.C. State Bar No. 32982
Phillip J. Strach
N.C. State Bar No. 29456
Nelson Mullins Riley & Scarborough LLP
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Phone: (919) 329-3800
Fax: (919) 329-3799
martin.warf@nelsonmullins.com
phil.strach@nelsonmullins.com
Counsel for Defendants

CERTIFICATE OF WORD COUNT

Counsel for Defendants certify that pursuant to LR 7.3(d) of the Local Civil Rules, the foregoing Reply is fewer than 3,125 words (including the body of the brief, headings, and footnotes, but excluding the caption, signature blocks, certificate of service, this certificate of compliance, and exhibits) as reported by the word-processing software.

/s/ D. Martin Warf

D. Martin Warf

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such to the following:

Edwin M. Speas, Jr.
Caroline P. Mackie
Poyner Spruill LLP
P. O. Box 1801
Raleigh, NC 27602-1801

Michael Crowell
1011 Brace Lane
Chapel Hill, NC 27516

Attorneys for Plaintiffs

/s/ D. Martin Warf
D. Martin Warf
N.C. State Bar No. 32982
Phillip J. Strach
N.C. State Bar No. 29456
Nelson Mullins Riley & Scarborough LLP
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Phone: (919) 329-3800
Fax: (919) 329-3799
martin.warf@nelsonmullins.com
phil.strach@nelsonmullins.com
Counsel for Defendants