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.	)	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

NATURE OF THE MATTER

Plaintiffs are registered unaffiliated voters in North Carolina backed by Common Cause. Together Plaintiffs argue that the current makeup of party-affiliated voters on the North Carolina State Board of Elections ("SBOE" or "Board") is unconstitutional. Section 163-19 of the North Carolina General Statutes notes that no more than three members of the Board shall be from the same political party and that the Governor will pick the five members from lists prepared by the party chair of each of the two political parties having the highest number of registered affiliates. "Each party chair shall submit a list of four nominees who are affiliated with that political party."

N.C. Gen. Stat. § 163-19(b). Plaintiffs argue that by not allowing unaffiliated voters to serve on the State Board, their First Amendment and Equal Protection rights are violated.

However, these Plaintiffs lack standing to bring those claims. And Defendants, members of the legislative branch, who enact but do not enforce laws are immune from suit for such claims in federal court. Even if Plaintiffs could overcome these issues, the federal constitution does not support such associational claims, and, these claims run headlong into the North Carolina Constitution, which has been interpreted by North Carolina courts to require that the Governor be able to control the SBOE. Counterbalancing one major party's views and priorities on the Board with that of the other major party's views, therefore, is a rational approach to election administration adopted by numerous other states.

This Court should grant Defendants' motion to dismiss.

STATEMENT OF FACTS

Each Plaintiff, aside from Common Cause, asserts that he or she is currently registered with the SBOE as an unaffiliated voter. (Doc #20, ¶ 3). Plaintiffs Smith and Faires believe that neither current major political party is consistent with their own views. (*Id.* ¶¶ 4, 12). Plaintiffs Effron and Horton enjoy voting in either Democratic or Republican primaries as the circumstances suit them, (*id.* ¶¶ 7, 9), a popular reason for registering

unaffiliated that is available to only unaffiliated voters, *see* N.C. Gen. Stat. § 163-119. Plaintiff Daye simply does not like political parties and sees them as a problem. (Doc #20, ¶ 10). Plaintiffs do not allege that they are all members of Common Cause or that they have anything in common with each other beyond their apparent desire to be on the Board.

Plaintiffs ask that Defendants, sued in their official capacities as Speaker of the North Carolina House of Representatives and President Pro Tempore of the North Carolina Senate, be enjoined from enacting laws that prevent unaffiliated voters from serving on the Board of Elections. (Doc #20, p.18). Plaintiffs have named the Governor, charged with enforcing the laws of the State, as a defendant and claim that his choice of appointee to the State Board is a "ministerial, but unconstitutional duty." (*Id.* ¶ 17).

Plaintiffs' allegations focus on the duties of the SBOE and how many unaffiliated voters exist in North Carolina. They allude to only once when an unaffiliated person served on the board. (Doc #20, ¶ 36). But Plaintiffs do not elaborate as to why that otherwise unbroken century of service by party-affiliated members was as brief as it was.

Session Law 2018-2, Part VIII did alter the makeup the board governing elections and ethics enforcement, but it was a change essentially undoing the General Assembly's attempts to create a bipartisan elections and ethics board. Session Law 2017-6 created a board evenly split between the

two major parties. *See Cooper v. Berger*, 370 N.C. 392, 395, 809 S.E.2d 98, 100 (2018). Governor Cooper sued, arguing that his obligation to faithfully execute the laws required that he have more influence and control over the board than an evenly, politically split board would provide. Relying on the North Carolina Supreme Court's decision in *Cooper*, 370 N.C. at 415, 809 S.E.2d at 112, which adopted the Governor's interpretations, the General Assembly found in Session Law 2018-2 that "appointment of a State Board member who is not affiliated with the two largest political parties will foster nonpartisan decision-making by the State Board." 2018 N.C. Sess. Law 2 § 8(a). The proposal to add one member to the board who was not a registered affiliate of either of the two largest political parties was enacted on 16 March 2018. *Id.* §§ 8(b) and 9.

The Governor then sued again, arguing that the 4-4-1 political makeup of the board also violated the separation of powers doctrine in our state Constitution by preventing him, as chief executive, from controlling the views and priorities of the State Board. (*See* Exhibit A, Order in 18 CVS 03348). A three-judge superior court panel agreed, and the trial court enjoined Part VIII of Session Law 2018-2. (*See id.*) Following this decision, the General Assembly returned the administrative structure of elections, ethics, and lobbying to the 2016 structure, which included the reestablishment of N.C. Gen. Stat. § 163-19. *See* 2018 N.C. Session Law 146 §§ 3.1 and 3.2.

QUESTION PRESENTED

1. Whether Defendants' motion to dismiss for lack of standing should be granted when Plaintiffs lack the requisite representative standing to represent unaffiliated voters and service on the Board involves the independent judgment of third parties.

2. Whether Defendants' motion to dismiss should be granted because Defendants, as legislators sued in their official capacities, are entitled to Eleventh Amendment immunity.

3. Whether Defendants' motion to dismiss should be granted because there is no First Amendment right to serve in a policymaking election administration role, and requiring party affiliation in such a role is rationally related to legitimate government interest, thereby negating an equal protection challenge.

ARGUMENT

I. Plaintiffs lack the requisite representative standing to represent unaffiliated voters and service on the Board involves the independent judgment of third parties.

Defendants challenge Plaintiffs' standing to bring the claims they do and, therefore, whether this Court has subject matter jurisdiction. When analyzing a complaint on a motion to dismiss for lack of subject matter jurisdiction, "the court will read the Complaint as a whole and will construe it broadly and liberally." *Flue-Cured Tobacco Co-op. Stabilization Corp. v. U.S. E.P.A.*, 857 F. Supp. 1137, 1140 (M.D.N.C. 1994). "Unlike a 12(b)(6) review, however, the court will not draw argumentative inferences in favor of Plaintiffs." *Id.* "Finally, the court will consider all uncontroverted factual

allegations to be true, but will not accept unsupported conclusions of law." *Id.*

To show an appropriate case or controversy a litigate must "prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). "[A] grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an injury in fact." *Id.* Rather, a person must be able to show an "injury in fact that must be concrete and particularized, as well as actual or imminent." *Id.* "It cannot be conjectural or hypothetical." *Id.*

Here, like the unaffiliated plaintiff in *Carney* who wanted to be a judge in Delaware where there were political party requirements, Plaintiffs assert that each wants to serve on the SBOE but cannot do so due to their unaffiliated status. Accordingly, each bears the individualized burden of showing a concrete, particularized injury beyond the assertion that a grievance is suffered by all North Carolinians who might like to see unaffiliated voters on boards of elections. *See id.* at 499. Plaintiffs attempt to assert a concrete, particularized injury by alleging that they are "willing to serve," (Doc #20, ¶ 5), "should be able to serve," (*id.* ¶ 7), "would like to serve," (*id.* ¶ 9), are "interested in serving," (*id.* ¶ 11), and "wish[ ] to serve," (*id.* ¶

13). But there are no other allegations about each Plaintiffs' concrete and particularized injury that would differentiate each of them over any member of the general population who might wish, like, or believe that unaffiliated voters should be able to serve on the SBOE. This type of bare bones allegations of "some day intentions do not support a finding of the actual or imminent injury that our cases require." *Carney*, 141 S. Ct. at 502. Rather, as the Court in *Carney* noted, a plaintiff can demonstrate she is able and ready, in part, by having applied to the position she is seeking when she was affiliated with one of the major parties. *Id.* The same is true here and the absence of allegations on that point are fatal to standing. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 182 (4th Cir. 2013) (Courts "are powerless to create our own jurisdiction by embellishing otherwise deficient allegations of standing."). Plaintiffs Smith, Horton, and Faires all allege they were registered with major parties but do not allege that any of them served or sought to be nominated during the period they were affiliated with either the Republican or Democratic parties. And Plaintiffs Effron and Daye fair no better. Similar to the other Plaintiffs, neither Effron nor Daye alleges to have sought to catch the Governor's eye by currently serving as chair on any of the county boards of elections, where gubernatorial appointments are not required to be associated with either major political party. *See* N.C. Gen. Stat. § 163-30.

Plaintiffs, by failing to allege that they have sought the local boards of elections positions that are available to them, and by failing to allege that they would definitively seek or achieve nomination from the Governor if it were not for section 163-19, fall far short of their burden to allege a sufficient, particularized injury.

Moreover, given the undefined characteristics of unaffiliated voters, it is hard to find a basis on which Common Cause or the individual plaintiffs can represent more than 2.5 million unaffiliated voters, (Doc #20, ¶ 29). Standing is an individualized assessment. An overall interest "to vindicate the constitutional validity of a generally applicable [ ] law" is not Article III standing. *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013). "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). This applies equally to associations and individuals asserting the rights of third parties. *See Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 89 (D.C. Cir. 1987) ("When an organization seeks standing to litigate, it may do so in two capacities. First, and most obviously, it may sue on its own behalf. In this institutional capacity, the organization's pleadings must survive the same standing analysis as that applied to individuals.").

Common Cause, on its own behalf, lacks standing. As an institution, it cannot serve in public office under any set of circumstances. Moreover, there are no assertions as to how the lack of unaffiliated voters on the SBOE has caused Common Cause to divert its focus or limited resources from its other activities in an effort to secure potentially non-member, unaffiliated voters on the Board. *Cf. Action NC v. Strach*, 216 F. Supp. 3d 597, 617–18 (M.D.N.C. 2016) (citing cases of allegations like this supporting organizational standing). "The Supreme Court's teachings with respect to an organization's injury in fact [ ] require more than allegations of damage to an interest in seeing the law obeyed or a social goal furthered." *Am. Legal Found.*,, 808 F.2d at 92. But furtherance of social goals is all that is alleged here. (*See, e.g.*, Doc. 20, ¶ 1).

Common Cause's associational or representative standing is lacking as well. Representational standing is present for an organization when "(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *N. Carolina Motorcoach Ass'n v. Guilford Cnty. Bd. of Educ.*, 315 F. Supp. 2d 784, 796 (M.D.N.C. 2004). Here, Common Cause notes that its membership is comprised of voters who are affiliated with major political parties as well as unaffiliated voters. (Doc #20, ¶ 1).

Common Cause fails to allege how not having unaffiliated voters on the SBOE has harmed its members. Members who are Republicans or Democrats are certainly not harmed. And the potential conflicts among registered unaffiliated voters make it virtually impossible to say how one association could represent all of them. Unaffiliated does not equate to independence or neutrality. Unaffiliated voters are not affiliated with each other; that they desire not to be affiliated with any political party is all that one can say about them collectively. And that is not an immutable characteristic because people can change their status for any reason or no reason at all. As the Court in *Maryland Highways* noted, the third associational standing "prong is not met when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests." *Maryland Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246, 1252 (4th Cir. 1991). Because it is not clear that unaffiliated voters even universally have a desire to see unaffiliated voters serve on the Board—some may actively oppose such activity—it must be equally apparent that one organization cannot speak for all of them.

The Governor's involvement further complicates Plaintiffs' standing because service on the State Board is predicated on the Governor choosing them. Even if unaffiliated members could serve on the State Board, the authority to appoint those members belongs to the Governor. And courts

"have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013). "For an injury to satisfy the causation element, it must result from the actions of the respondent, not from the actions of a third party beyond the Court's control." *Bethel v. Rogers*, No. 1:20CV330, 2022 WL 4585809, at *4 (M.D.N.C. Sept. 29, 2022). Plaintiffs each allege, in varying degrees of desire, that he or she should be appointed to the State Board of Elections, but the person who makes those appointments—the Governor—would need to agree. Plaintiffs certainly do not allege that the Governor would appoint them to the Board absent this law; they only argue that they are qualified to serve. "Any prediction how the Executive Branch might eventually implement this general statement of policy is no more than conjecture at this time." *Trump v. New York*, 141 S. Ct. 530, 535 (2020).

II. Defendants, as legislators sued in their official capacities,[1] are entitled to Eleventh Amendment immunity.

Even assuming this Court were to determine that at least one Plaintiff had standing to bring a claim, Plaintiffs' claims are barred by the Eleventh Amendment.[2]

Defendants are entitled to dismissal under the doctrine of sovereign immunity. It is well settled that the Eleventh Amendment affords States, their agencies, and officials immunity from suit in federal court. *See Allen v. Cooper,* 895 F.3d 337, 347 (4th Cir. 2018). Where applicable, this immunity is also typically absolute. As the Fourth Circuit has observed, Supreme Court precedent makes clear that a state must expressly and unambiguously consent to suit in federal court to waive its sovereign immunity. *Id.* (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305–06 (1990)). Indeed, such consent is not found even when a state expresses its intention to sue or be sued. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999). Here, because Defendants are named

[1] Defendants are not being sued in their individual capacity, (*see* Doc #20, ¶¶ 14-15), therefore a discussion regarding the applicability of legislative immunity to shield any individual liability does not appear necessary at this time. Defendants do not intend to waive legislative immunity, but instead are focusing on the claims as drafted.

[2] Though "not a true limit on the subject-matter jurisdiction of federal courts, the Eleventh Amendment is a block on the exercise of that jurisdiction." *McCants v. Nat'l Collegiate Athletic Ass'n*, 251 F. Supp. 3d 952, 955 (M.D.N.C. 2017) (discussing the jurisdictional scope of the Eleventh Amendment.

in their official capacities, the State of North Carolina is the real party interest, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and Plaintiffs need an exception to the Eleventh Amendment to seek relief.

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, but unlike the statutory provisions in *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307 (1990), it does not clearly and unequivocally demonstrate consent to be sued in federal court. The word "consent" appears nowhere within the text. Instead, section 1-72.2 clarifies through which voices the state should be allowed to speak when in federal court. *See Berger*, 142 S. Ct. at 2197 (2022) (discussing the advantages of structuring state government to speak, at times, through more than one voice). 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.

Further, the narrow exception to sovereign immunity arising from *Ex Parte Young* is inapplicable here. 209 U.S. 123 (1908). Plaintiffs must show some connection between the challenged act and the ability of the defendants to *enforce* the change, assuming a favorable outcome for the plaintiffs. *See, e.g.*, *Allen,* 895 F.3d at 355 (citing *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 550 (4th Cir. 2014). "The requirement that there be a relationship between the state officials sought to be enjoined and the enforcement of the state statute prevents parties from circumventing a State's Eleventh Amendment immunity." *Hutto*, 773 F.3d at 550. Defendants, as legislators who *enact* laws, tend to have no expressed role in enforcement of the laws once they are enacted. Legislators enforcing the law would likely implicate separation of powers concerns. *See, e.g., Cooper v. Berger*, 370 N.C. 392, 414, 809 S.E.2d

98, 111 (2018) ("[S]eparation-of-powers violations can occur when one branch exercises power that the constitution vests exclusively in another branch or when the actions of one branch prevent another branch from performing its constitutional duties.").

In the absence of any applicable exception, immunity from suit is the default, and Defendants are thus protected.

III. There is no First Amendment right to serve in a policymaking election administration role, and requiring party affiliation in such a role is rationally related to legitimate government interest, thereby negating an equal protection challenge.

First Amendment

Plaintiffs allege that section 163-19 violates their freedom of speech and freedom of association by requiring affiliation with either of the current two major political parties as a prerequisite to serving as an election administration official. (Doc. #20, ¶¶ 50, 59). Courts have dismissed similar infringement arguments and this Court should too.

To survive a motion to dismiss for failure to state a claim, Plaintiff cannot rely on "unwarranted inferences, unreasonable conclusions, or arguments," *Does 1-5 v. Cooper*, 40 F. Supp. 3d 657, 675 (M.D.N.C. 2014), but instead must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "To be facially plausible, a claim must plead factual content that

allows the court to draw the reasonable inference that the defendant is liable and must demonstrate more than a sheer possibility that a defendant has acted unlawfully." *Calloway v. Durham Cty. Pub. Sch. Bd. of Educ.*, 1:15-CV-187, 2016 WL 634878, at *6 (M.D.N.C. Feb. 17, 2016) (cleaned up). "Dismissal of a complaint is proper where a plaintiff's factual allegations fail to produce an inference of liability strong enough to nudge the plaintiff's claims across the line from conceivable to plausible." *Cooper*, 40 F. Supp. 3d at 675 (cleaned up).

Section 163-19(b) does not prohibit anyone from affiliating – or not affiliating – with any political party. The law neither restricts voter choice nor anyone's ability to run for elected office. Rather, N.C. Gen. Stat. § 163-19(b) governs who is eligible to serve on the SBOE. The question is then whether section 163-19(b) infringes upon a First Amendment-protected right to public service. It does not. "There is simply no abstract constitutional right to be appointed to serve as an election [official]." *Werme v. Merrill*, 84 F.3d 479, 484 (1st Cir. 1996).

While the Supreme Court has established that the speech or political association of government employees cannot be wholly constrained, government employees do not have the same unfettered rights as citizens, *see Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 568 (1968), and, when in "policymaking" positions, can be subject to

adverse employment consequences if their views do not line up with that of the administration. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). Under *Elrod* and *Branti*, the government may *require* partisan affiliation for an appointment if the position at issue is a policymaking role for which "political affiliation is a reasonably appropriate requirement for the job in question." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 714 (1996). *See, e.g., Rash–Aldridge v. Ramirez*, 96 F.3d 117 (5th Cir.1996) (finding no First Amendment violation where council member was removed for failing to support the council's plan because she had been appointed rather than elected). "If these [policymaking] jobs are filled with employees who take a view different from the administration, then these employees could thwart the government's ability to enact the policies it had been elected to advance." *Powers v. Richards*, 549 F.3d 505, 509 (7th Cir. 2008). The law treats policymaking appointments under the same *Elrod/Branti* exception to First Amendment. As aptly noted in *McKinley v. Kaplan*, 262 F.3d 1146, 1151 (11th Cir. 2001), appointees in policymaking positions do not have First Amendment claims when his or her contrary view could thwart the policymaking goals of their appointor.

> By speaking out publicly and signing a resolution against a policy proposed by her appointing authority and adopted by a unanimous County Commission, we

> think it fair to say that Appellant did not represent either party's interests. As such, we do not believe that the First Amendment imposes on Kaplan[, as the appointer,] or the County Commission an obligation to retain her as an advisory board appointee.

Id.; s*ee, e.g., Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997) (dismissal of deputy sheriffs not a violation of First Amendment rights of those deputies).

It follows then that Plaintiffs cannot use the First Amendment to end run Section 163-19(b)'s partisan affiliation requirement. Political affiliation has long been held to be an appropriate criterion for selection and service in policymaking positions. In *Davis v. Martin*, 807 F. Supp. 385, 386 (W.D.N.C. 1992), the plaintiff challenged as violative of his First Amendment rights a statute that required judicial vacancies to be filled by the Governor from lists submitted by the district bar of the names of three people residing in that district and who are members of the same political party as the vacating judge. The court held that "there is no constitutional impediment to the North Carolina General Assembly's decision to fill judicial vacancies only with nominees of the same political affiliation as the vacating judge," and granted the defendant's motion to dismiss. *Davis v. Martin*, 807 F. Supp. 385, 388 (W.D.N.C. 1992); *see also Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), (finding that a Puerto Rican statute that allowed only members

of a deceased legislator's political party to appoint his successor and excluded members of an opposition political party from the process did not violate freedom of association).

Here, the North Carolina Supreme Court has already determined that the State Board is a policymaking body. *Cooper v. Berger*, 370 N.C. 392, 415-16, n.11, 809 S.E.2d 98, 112-13 (2018) ("[T]he General Assembly has, in the exercise of its authority to delegate the making of interstitial policy decisions to administrative agencies, given decision making responsibilities to the executive branch by way of the [State] Board."). The Court in *Cooper*, having determined that the State Board was a policymaking board and relying on its decision in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016), went on to hold that the Governor must have the "ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed." *Cooper v. Berger*, 370 N.C. 392, 415, 809 S.E.2d 98, 112 (2018). Indeed, the Court referred "to the ability of the executive branch to make these discretionary determinations as the effectuation of 'the Governor's policy preferences.'" *Cooper v. Berger*, 370 N.C. 392, 415, n.11, 809 S.E.2d 98, 113 (2018). Scrutiny of the political affiliation of elections board members is necessary, and as *Cooper* instructs, a state constitutional requirement, to ensure that the political views and priorities of the Governor are capable of being carried out. Hence, the exception to the

protection of the First Amendment in *Elrod/Branti* applies. A panel of North Carolina Superior Court judges solidified that determination when that panel held that adding an unaffiliated voter to a nine-member State Board otherwise comprised of 4 Democratic party nominees and 4 Republican party nominees unconstitutionally thwarted the Governor's ability to control or influence the policymaking decisions of the State Board. (*See* Exhibit A, Attached Exhibit Opinion).

While it is conceivable that a person with no party affiliation may want to serve in a political public office, federal and state courts have held that it is not an infringement of that person's First Amendment rights to limit service in policymaking positions to those people with views that match that of the appointing policymaker. Accordingly, it is not a First Amendment violation for North Carolina to create a deliberately bipartisan commission in which representatives of the top two political parties in the state—whichever parties those may be—must find common political ground for the administration of elections. *See, e.g., Morrison v. City of Reading*, CIV.A. 02-7788, 2007 WL 764034, at *9 (E.D. Pa. Mar. 9, 2007) (while not allowed to snuff out political opinion, appointing authorities can determine governmental interests without every viewpoint being represented on a commission); *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("Moreover, the Commission is inherently

bipartisan in that no more than three of its six voting members may be of the same political party, § 437c(a)(1), and it must decide issues charged with the dynamics of party politics, often under the pressure of an impending election.").

Fourteenth Amendment

Plaintiffs also allege that section 163-19 "discriminates against plaintiffs, and all other unaffiliated voters, by denying them the same opportunity as registered Democrats and Republicans to be a member of the SBOE and participate equally in the supervision, management, and administration of elections in North Carolina." (Doc #20, ¶ 59) and therefore violates the Fourteenth Amendment's equal protection clause. These allegations fall well short of stating a claim.

"For equal protection purposes, unless a classification infringes upon a fundamental right or a suspect class, a law or ordinance must only be rationally related to a legitimate state interest." *Shanks v. Forsyth Cty. Park Auth., Inc.*, 869 F. Supp. 1231, 1235 (M.D.N.C. 1994) (*citing City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam)). Plaintiffs do not allege that unaffiliated voters are members of a suspect class. Political party (or, in this case, lack of affiliating with a political party) has not been found to be a suspect class. *See Greenville Cty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 669 (D.S.C. 2011) ("this court is

unfamiliar with, and Plaintiffs have not cited, any authority categorizing political parties as an inherently suspect class. Therefore, any discrimination against political parties may be justified if it is rationally related to a legitimate state interest.").

Plaintiffs try to infer that because the right to vote is a fundamental right that the right to serve in election administration is also a fundamental right. (*See* Doc #20, ¶ 58). Not so. The United States Supreme Court has "rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982). Plaintiffs' right to vote is *not* at issue in this action. *See Pirincin v. Bd. of Elections of Cuyahoga Cty.*, 368 F. Supp. 64, 69 (N.D. Ohio 1973) ("[It has been] concluded that the right to vote, as that right is protected by the United States Constitution, is not impinged by the Ohio scheme of selecting members of the boards of elections."). "The effectiveness of [Plaintiffs'] ballot is in no way impaired by the composition of the county boards of elections and [their] First Amendment rights, therefore, are not violated." *Id.* at 75. Rather, what is at issue is Plaintiffs' purported "right" to be appointed to the SBOE, but there is no such constitutional right. *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.").

Absent suspect class or a fundamental right, "rational basis is the appropriate standard of review." *Shanks*, 869 F. Supp. at 1235.

> When applying rational basis review, courts presume the constitutionality of the ordinance's classification. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Shanks, 869 F. Supp. at 1235–36. "To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to governmental classifications." *Giarratano*, 521 F.3d at 303. If the plaintiff fails to make sufficient allegations, his complaint is subject to dismissal under Rule 12(b)(6). *See, e.g., id.* at 305.

North Carolina's choice to ensure bipartisan representation on the State Board has many rational justifications. First, courts have long recognized the states' legitimate interest in securing "the integrity of the electoral process." *Storer v. Brown*, 415 U.S. 724, 731 (1974); *see Werme*, 84 F.3d at 486. The appointment of members from the top-two oppositional parties to the boards overseeing critical aspects of elections serves this purpose. Members of the Board exercise sensitive duties over the conduct of elections. Involving members of the principal opposing political parties in these tasks helps ensure that they are carried out in an even-handed manner

and helps to prevent either party from exercising complete control without accountability over elections administration. *See Pirincin*, 368 F. Supp. at 71 (holding that Ohio's similar requirement for bipartisan appointments "creates a county elections board with built-in checks and balances"); *Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984) (noting that selecting poll watchers from the main two political parties "insure[s] against tampering with the voting process").

Limiting representation to party affiliates allows for a more efficient selection of members to the Board from the millions of registered voters in North Carolina. Plaintiffs offer no explanation as to how "unaffiliated" voters are similarly situated such that selection of one unaffiliated voter would represent any other unaffiliated voters. Because there are many reasons why a person may register as unaffiliated in North Carolina, there is not a common set of ideologies, principles, or beliefs that unites unaffiliated voters. Adding more parties (and nonparties) to oversee elections could make the boards operate less efficiently and lead to confusion and mistakes. *Werme*, 84 F.3d at 486; *Baer*, 728 F.2d at 476; *Pirincin*, 368 F. Supp. at 72.

Second, bipartisan appointments serve to promote public confidence in elections, an objective that the Supreme Court has recognized as legitimate. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). Politics in the United States and in North Carolina are dominated by two political

parties. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997); *Libertarian Party v. State*, 365 N.C. 41, 44, 707 S.E.2d 199, 201–02 (2011). Consequently, millions of registered Democrats, Republicans, and unaffiliated voters support candidates from either the Republican or Democratic parties. Therefore, counterbalancing Democrats with Republicans as election officials ensures that the public can have the utmost confidence in the electoral process. *See MacGuire v. Houston*, 717 P.2d 948, 954 (Colo. 1986) ("[P]airing Democrats and Republicans as election monitors provides an appearance of propriety to the voters.").

Third, bipartisan appointments to the State Board also promote efficient election administration, which the Supreme Court has recognized as a legitimate governmental interest. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("[T]he State understandably and properly seeks to prevent the clogging of its election machinery . . . ."). The First Circuit in *Werme* accepted New Hampshire's efficiency justification for limiting election official appointments to the two main political parties. *See* 84 F.3d at 486. The court held, "[c]ommon sense suggests that if election inspectors and ballot clerks become too numerous, they will merely get in each other's way and thus frustrate the moderator's ability to afford close supervision." *Id.* The Northern District of Ohio similarly accepted the administrative efficiency rationale with regard to bipartisan elections board appointments. *Pirincin*,

368 F. Supp. at 72. Accordingly, North Carolina's choice to limit certain elections board appointments to affiliates of the dominant political parties is rationally related to the legitimate objective of efficient election administration.

Fourth, the bipartisan makeup of the SBOE ensures that the prevailing policy views on election administration are represented on the boards. Elections board members are policymakers, as explained more fully above. Although election administration must be accomplished without favor to any particular party, the main political parties have valid policy disagreements with respect to election administration. For this reason, the Governor sued to overturn a law that kept him from maintaining executive control over the majority of the members of the State Board. *See Cooper*, 370 N.C. at 415, 420–21, 809 S.E.2d at 112, 115–16. Representation from the Democratic and Republican parties ensures that the policy views on these boards reflect the predominant strains of thought among the public with respect to the administration of elections. To this end, it was rational for the legislature to include the two main parties but not representatives of unaffiliated voters, because unlike the political parties, unaffiliated voters as a collective, have no discernible policy views. *See Pirincin*, 368 F. Supp. at 72 ("[I]t is apparent that one or two independent voters who might be appointed could not truly serve as adequate representatives of all independent voters. Each

independent voter can really only represent himself."). The legislature, therefore, could reasonably conclude that reserving board appointments to Democratic and Republican representatives served the purpose of reflecting the public's divergent views on election administration.

North Carolina's section 163-19 is not unique. In fact, at least eight other states have comparable statutes that effectively create bipartisan election boards comprised of members from the two major political parties. See 10 ILL. COMP. STAT. 5/1A-2 (West 2022); MD. CODE ANN., ELECTION LAW § 2-101(e)(1) (West 2022); N.Y. ELECTION LAW § 3-100(1) (McKinney 2022); OKLA. STAT. tit. 26, § 2-101.1 (2022); VA. CODE. ANN. § 24.2-102 (West 2022); WIS. STAT. ANN. § 7.20(2) (West 2022); HAW. REV. STAT. ANN. § 11-7 (West 2022); S.C. CODE ANN. § 7-3-10 (2022). Notably, of these eight comparable statutes, only one has faced a similar constitutional challenge—and prevailed. *See Green Party of the State of N.Y. v. Weiner*, 216 F.Supp.2d 176, 192–96 (S.D.N.Y. 2002). Likewise, here the Court should not find merit in Plaintiffs' argument that our legislature's vesting of authority to members of the major political parties to regulate elections somehow unconstitutionally burdens unaffiliated voters' rights.

Having failed to allege facts sufficient to overcome the presumption of rationality and in light of readily apparent justifications, Plaintiffs' claim under the Fourteenth Amendment should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motions to dismiss and dismiss Plaintiffs' Second Amended Complaint.

Respectfully submitted this 10th day of March, 2023.

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CERTIFICATE OF WORD COUNT

Counsel for Defendants certify that pursuant to LR 7.3(d) of the Local Civil Rules, the foregoing Memorandum is fewer than 6,250 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

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2023, 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:

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Exhibit A

Cooper v. Berger, No. 18 CVS 3348, Wake County Superior Court (Oct 16, 2018) (slip opinion)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 3348

FILED
2018 OCT 16 P 4:48
WAKE COUNTY, C.S.C.

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

vs.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned duly-appointed three-judge Court during the July 26, 2018, special session of Wake County Superior Court upon (1) the Motion to Dismiss filed by Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives ("Legislative Defendants") and (2) the Motion for Summary Judgment filed by Plaintiff Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina regarding the constitutionality of Part VIII of Session Law 2018-2, and Sections 7(h) (composition of county boards and rotation of chair of county boards) and 17 (appointment of executive director of Bipartisan State Board) of Session Law 2017-6. The Plaintiff challenges each of these sections individually and standing alone, as well as making a facial constitutional challenge to these entire statutes.

This Court heard arguments from counsel Jim W. Phillips, Eric M. David, and Daniel F.E. Smith of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP for Plaintiff, and heard arguments from counsel Noah H. Huffstetler, III and D. Martin Warf of Nelson Mullins Riley & Scarborough LLP for Defendants. The motions have been fully briefed, and the motions are ripe for consideration. Upon consideration of all matters of record and affidavits on file, the Court finds and concludes as follows:

I.

Background of Session Law 2017-6

1. Session Law 2017-6 was enacted into law on April 25, 2017, and reorganized the State Board of Elections ("Board of Elections") and the State Ethics Commission ("Ethics Commission") into the Bipartisan State Board of Elections and Ethics Enforcement ("Bipartisan State Board").[1] The Bipartisan State Board was to consist of eight members to be appointed by the Governor—four from each of the two largest political parties—to be selected from lists provided by the State party. Members could be removed by the Governor from the State Board only for misfeasance, malfeasance, or nonfeasance.

2. On April 26, 2017, Plaintiff filed suit in Wake County Superior Court Case No. 17 CVS 5084, raising a facial constitutional challenge to Sections 3 through 22 of Session Law 2017-6 (codified as Chapter 163A) and seeking to enjoin the enforcement thereof.

3. On June 1, 2017, this Court entered its unanimous Order granting Defendants' Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction based upon a non-justiciable political question and dismissing Plaintiff's constitutional challenge to Sections 3 through 22 of Session Law 2017-6.

[1] Session Law 2017-6 also repealed Part I of Session Law 2016-125, a law passed by the General Assembly at the end of 2016 that was an earlier effort to merge the Board of Elections and the Ethics Commission and which this Court found unconstitutional. An appeal was taken but dismissed as moot when Session Law 2017-6 was passed.

4. On June 30, 2017, Plaintiff filed his Petition for Discretionary Review prior to review by the Court of Appeals, which was granted by the Supreme Court on July 19, 2017.

5. Following oral argument, the Supreme Court asked this Court to provide additional information regarding this Court's June 1, 2017 decision, and the Supreme Court also asked this Court to determine how it would rule on the merits if, in fact, there was subject matter jurisdiction.

6. On October 31, 2017, this Court certified to the Supreme Court an Order providing findings of fact and conclusions of law supporting its decision to dismiss the action pursuant to lack of subject matter jurisdiction and also providing a unanimous indicative ruling that Session Law 2017-6 was not unconstitutional.

7. On January 26, 2018, the Supreme Court, in a 4-3 decision, issued its opinion reversing and remanding this Court's June 1, 2017 order, *see Cooper v. Berger*, 370 N.C. 392, 422, 809 S.E.2d 98, 117 (2018), finding that the General Assembly's merger of the Board of Elections and Ethics Commission into the Bipartisan State Board was a constitutional exercise of its authority but that provisions of Session Law 2017-6 relating to the membership of and appointment to the Bipartisan State Board were unconstitutional. *Id.* at 409, 415-16, 809 S.E.2d at 108, 112. In its opinion, predicated on its interpretation of *McCrory v. Berger*, 368 N.C. 633 (2016), the Supreme Court expressly discussed Plaintiff's arguments regarding the unconstitutionality of the selection of the Executive Director of the Bipartisan State Board, the composition of the county boards of elections, and the rotation of the chair of the Bipartisan State Board among political parties but expressed no opinion regarding any possible independent separation-of-powers violations created by those provisions. *Id.* at 420-21, 809 S.E.2d at 115-16.

8. The case was remanded to this Court for entry of a final judgment, *see id.* at 422, 809 S.E.2d at 116, and, on March 5, 2018, this Court entered its Final Judgment declaring N.C. Gen. Stat. § 163A-2 void and of no effect and permanently enjoining § 163A-2. This Court did not invalidate any other portion of Session Law 2017-6, although Plaintiff's counsel argued that all of Sections 3 through 22 of the Session Law should be voided following the Supreme Court's opinion.

9. On March 6, 2018, Plaintiff filed his Motion to Enforce Mandate, requesting that the Supreme Court declare Sections 3 through 22 of Session Law 2017-6 void and of no effect. On March 13, 2018, the Supreme Court entered its *per curiam* Order denying the Motion to Enforce Mandate.

Background of Session Law 2018-2

10. On February 13, 2018, House Bill 90, which contains material amendments to § 163A-2, was ratified and presented to the Governor for his action. Under House Bill 90, the Bipartisan State Board consists of nine members; the Governor appoints four members from each of the State's two largest political parties (i.e., the Democratic and Republican parties) from lists of six nominees provided to the Governor by the State party chairs for the two parties. The ninth member is not to be affiliated with either the Democratic or Republican party but is to be appointed by the Governor from a list of two nominees submitted by the other eight members of the Bipartisan State Board. Any member of the Bipartisan State Board may be removed by the Governor in his discretion.

11. On March 16, 2018, House Bill 90 became Session Law 2018-2 when the Governor neither approved nor returned House Bill 90 to the General Assembly with his objections in the time allowed by law. *See* N.C. Const. Art. II, Sec. 2(7) (after bill is presented to the Governor, it shall become a law unless, within 30 days after adjournment for more than 30 days, it is returned by the Governor with objections and veto message).

12. These previous and new statutes are sometimes referred to collectively herein as the "Acts."

Procedural Background

13. On March 13, 2018, Plaintiff filed his Verified Complaint bringing a facial challenge to the constitutionality of (1) Part VIII of Session Law 2018-2; (2) Part VIII of Session Law 2018-2 together with the "unamended portions" of Session Law 2017-6; (3) Sections 7(h) and 17 of Session Law 2017-6, separately; and (4) the Rotating Chair Provisions of Session Law 2018-2 and Session Law 2017-6.

14. By Order dated March 14, 2018, and pursuant to N.C. Gen. Stat. § 1-267.1, Chief Justice Mark Martin of the North Carolina Supreme Court assigned the undersigned to the three-judge Court to hear Plaintiff's constitutional challenge.

15. On May 1, 2018, Defendants filed their Motion to Dismiss and Answer to Verified Complaint.

16. On June 15, 2018, Plaintiff filed his Motion for Summary Judgment.

North Carolina Constitutional Provisions Implicated

17. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." Article I, Sec. 6.

18. "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." Article II, Section 1.

19. "The executive power of the State shall be vested in the Governor." Article III, Section 1.

20. "The Governor shall take care that the laws be faithfully executed." Article III, Section 5(4).

II.

Standards of Review on Constitutional Challenge

21. When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the Constitution. If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly. *Hart v. State*, 368 N.C. 122, 126 (2015). The party meeting the constitutional challenge must show there are no circumstances under which the statute might be unconstitutional. *Hart v. State*, 368 N.C. 122 (2015).

22. Plaintiff's claim is a facial constitutional challenge to a law based on an alleged violation of the separation of powers, in particular the ability of the Governor to faithfully execute the laws.

III.

Findings of Fact, Conclusions of Law, and Judicial Rulings

A. Doctrine of *Res Judicata*

23. As noted above in paragraph 2, previously in Wake County Superior Court Case 17-CVS-5084, Plaintiff successfully challenged Sections 3 through 22 of Session Law 2017-6 as being unconstitutional, which includes Sections 7(h) and 17, but did not raise the claims as to these or any other provisions of Session Law 2017-6.

24. In this current action, Plaintiff has alleged for the first time that Sections 7(h) and 17 of Session Law 2017-6, which were not amended by Session Law 2018-2, are unconstitutional.

25. Defendants have asserted the affirmative defense of *res judicata* as to those new claims. The requisite elements of *res judicata* are: 1) The parties are the same as in the first action; 2) The claim alleged in the current action is the same as in the prior action; and 3) There was a final judgment rendered on the raised claim. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84 (2005).

26. Under the doctrine of *res judicata,* any right, fact, or question in issue and *directly adjudicated* on or necessarily involved in the determination of an action before a competent court...*on the merits is conclusively settled by the judgment* therein cannot again be litigated between the parties and privies. *Gaither Corp. v. Skinner*, 241 N.C. 532, 535, 85 S.E.2d 909, 911 (1955) (emphasis added).

27. Defendants concede that not all constitutional claims Plaintiff alleges in this action are barred by *res judicata.* (Defendants' attorney, Mr. Warf, trial transcript, pp. 72-74).

28. Plaintiff contends that the newly enacted provisions of Session Law 2018-2, the constitutionality of which Plaintiff has challenged in this action, have changed the totality of the

circumstances in the case which the Court must analyze to determine whether the elements of *res judicata* are satisfied. (Plaintiff's attorney, Mr. Smith, Trial Transcript p. 95).

29. Defendants cite *City of Asheville v. State*, 192 N.C. App. 1 (2008), as a primary legal authority in support of their argument. In that decision, the Court of Appeals found that *res judicata* barred a challenge against several statutes, setting forth three reasons:

1) The city had previously litigated an earlier constitutional challenge to the previously enacted statute, provisions of which were newly challenged in the later action;

2) Nothing prevented the city from raising all possible constitutional claims to that statute in the previous action;

3) The Supreme Court expressly ruled the statute was not constitutional.

30. The decision of *City of Asheville v. State*, *Supra* is distinguished from the facts of this case. In the instant case, neither the second or third criteria of the Supreme Court's analysis in *Asheville* exists. The General Assembly has changed the statutory scheme of the Acts, which impacts the nature and effect of the laws as a whole. In *Cooper*, there was no holding that any portion of 2017-6 not challenged was either constitutional or unconstitutional. Instead, the Supreme Court made its decision on a narrow ground, invalidating a small portion of Session Law 2017-6. Rather than ruling on the overall constitutionality of 2017-6, the Supreme Court afforded the General Assembly the opportunity to enact new provisions which would meet the constitutional standard. In doing so, the Supreme Court did not abdicate its judicial role as to determining the constitutionality of a law which could be amended, but instead gave due deference and respect for the separate legislative branch of government.

31. Defendants acknowledge that a change in the totality of circumstances can result in a different adjudication in a subsequent challenge to a law which has undergone some legislative changes:

> It was the totality of the circumstances limitations on appointment, supervision and removal that led to the Court's determination that the

> provisions of Session Law 2017-6 concerning the membership on an appointment to the bipartisan board was unconstitutional. Any material change to just one of the factors in the totality of the circumstances could lead to a different constitutional outcome. (Defendants' Memorandum In Support of Motion to Dismiss, p. 9).

32. By passing Session Law 2018-2, the legislature has changed the totality of the circumstances of the nature and effect of the Acts. Thus, the entire statutory scheme as a whole has changed. Even the unmodified portions of the 2017-6 legislation, are changed in now that they are contained in an entirely different law and viewed in an entirely different context from when the Court previously reviewed them.

33. The Supreme Court in *Cooper* made plain that the overall structure of the statutory scheme could well affect the constitutional challenge. Indeed, the very example it used was how the Bipartisan State Board is structured, which is precisely what the General Assembly changed in adopting Session Law 2018-2:

> As the bipartisan State Board is structured in Session Law 2017-6, the General Assembly's decision to appoint the Executive Director of the Bipartisan State Board and to preclude the Bipartisan State Board from either selecting a new Executive Director prior to May 2019 or removing the Executive Director in the absence of "cause," N.C.G.S. § 163A-6(b), could impermissibly constrain the Governor's ability to ensure that the laws are faithfully executed. *See McCrory*, 368 N.C. at 645-46, 781 S.E.2d at 256-57. On the other hand, in the event that the membership of the Bipartisan State Board is structured in such a manner as to pass constitutional muster under Article III, Section 5(4) of the North Carolina

> Constitution and the Board is given adequate control over the manner in which the duties assigned to the Executive Director are performed, the Bipartisan State Board's ability to supervise and control the actions of the Executive Director might suffice to give the Governor adequate control over the Executive Director's activities, which appear to be primarily administrative in nature, for separation-of-powers purposes. *Cooper v. Berger, Supra*, pp. 38-39.

34. In *Cooper v. Berger*, the Supreme Court declined to rule on the constitutionality of the 2017-6 as to the Executive Director, which is now challenged:

> For that reason, an interim appointment to the position of Executive Director of the Bipartisan State Board made by the General Assembly for a limited term might not constitute a separation-of-powers violation in the event that the Governor otherwise has sufficient control over the Bipartisan State Board. For that reason, given our determination that, in light of the totality of the circumstances, the manner in which the members of the Bipartisan State Board must be selected pursuant to Session Law 2017-6 is constitutionally invalid, we need not reach the issue of whether the provisions governing the selection of the Executive Director constitute a separate violation of Article III, Section 5(4) of the North Carolina Constitution at this time and decline to do so. *Cooper v. Berger, Supra*, p. 40.

35. The Supreme Court in *Cooper* also expressly left open the constitutional issues regarding the chair positions at the structure of the county boards of elections, which is now challenged:

> [We] express no opinion concerning the extent, if any, to which an independent separation-of-powers challenge relating to provisions of Session Law 2017-6 governing the rotation of the office of chair of the Bipartisan State Board among the two largest political parties or the provisions of Session Law 2017-6 governing the [evenly divided] composition of the county boards of elections would have merit. *Id.* at 421, 809 S.E.2d at 116.

36. North Carolina courts have held that *res judicata* does not bar a claim when the court in the prior action *refused to resolve* an issue presented by the parties, which is what the Supreme Court did in *Cooper*.

> *See e.g., Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993) ("Where the second action between the same parties is upon a different claim, the prior judgment serves as a bar only as to the issues actually litigated and determined in the original action."); *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986) (noting one purpose of *res judicata* is to prevent relitigation of "previously *decided* matters" (emphasis added)). So a prior proceeding where a court had denied a motion for moneys (sic) to be paid in the hands of receivers was not "an adjudication on the merits" when it "expressly left the merits of the matter open for future adjudication." *Whitmire v. First Fed.*

Sav. & Loan Ass'n of Hendersonville, 23 N.C. App. 39, 42, 208 S.E.2d 248, 250-51 (1974).

37. The "totality of the circumstance" consideration is the appropriate analysis to be employed by the Court, and this Court finds the new statute, Session Law 2018-2, alters the "totality of the circumstances" of the Acts.

38. For the foregoing reasons, this Court unanimously finds as fact and concludes as a matter of law that the doctrine of *res judicata* does not prevent Plaintiff from raising constitutional challenges for the first time in this action as to portions of the statute in effect at the time Plaintiff filed his previous lawsuit in 17-CVS-5084.

B. Structure of the State Board

39. The Supreme Court has held that the State Board is primarily administrative or executive in character. *Cooper*, 370 N.C. at 415, 809 S.E.2d at 112; *see also, e.g.*, Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat. § 163A-5, which directs the State Board to "exercise its statutory powers, duties, functions, and authority and . . . have all powers and duties conferred upon the heads of principal departments under G.S. 143B-10."); *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982) (finding it "crystal clear" that the Environmental Management Commission is an executive agency).

40. Part VIII of Session Law 2018-2 creates a nine-member Bipartisan State Board of Elections and Ethics Enforcement ("State Board"). As described in paragraph 10, four members must be appointed from a list of six candidates submitted to the Governor by the chair of the Republican Party and four must be appointed from a list of six candidates submitted to the Governor by the chair of the Democratic Party. The final member, an individual who is not a registered voter with the Democratic or Republican Party, must be appointed by the Governor from two names provided to the Governor by the other eight members of the State Board.

41. The Governor is not empowered to appoint a majority of the State Board. Instead he appoints four members that will reflect his views and priorities. An evenly split board—which

is the same structure held unconstitutional by *Cooper*—is tasked with nominating the potential ninth member of the board. This creates a scenario in which four members appointed by the chair of the political party opposed to the Governor have the power to disapprove any and even all such nominees until they comply with the policy views and priorities of the political party opposed to the Governor.

42. The Governor may remove any member for any reason. However, for a majority of State Board members, the Governor does not have the ability to select replacements who will reflect his views and priorities. Instead, for a majority of members of the State Board, the nominee to replace a removed member will reflect policy views and priorities of the political party opposed to the Governor. This fails to provide the Governor with constitutionally sufficient removal power over the State Board.

43. The Governor's inability to appoint a majority of State Board members who share his policy views and priorities, and to remove and replace a majority of members, substantially undermines his ability to ensure these policy views and priorities are implemented and effectuated.

44. Applying *McCrory*, 368 N.C. 633 (2016) at 635, the Supreme Court in *Cooper* elaborated on the exact nature of executive control that our Constitution grants and reserves to the Governor, explaining:

> Although we did not explicitly define "control" for separation-of-powers purposes in *McCrory*, we have no doubt that the relevant constitutional provision, instead of simply contemplating that the Governor will have the ability to preclude others from forcing him or her to execute the laws in a manner to which he or she objects, also *contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed*, through delegation from the General Assembly, to make as well.

Cooper, 370 N.C. at 414–15 (emphasis added). Because the legislature structured the State Board to deprive the Governor of such control, the Court concluded that "the manner in which the membership of the Bipartisan State Board is structured and operates under Session Law 2017-6 impermissibly, facially, and beyond a reasonable doubt interferes with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina." *Id.* at 418.

45. *Cooper, McCrory,* and earlier precedent establish that there are two types of violations of the separation of powers, which occur " 'when one branch exercises power that the constitution vests exclusively in another branch' or 'when the actions of one branch prevent another branch from performing its constitutional duties.' " *Cooper*, 370 N.C. at 414, (quoting *McCrory*, 368 N.C. at 645); *see Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631 (2003).

46. The Acts violate the North Carolina Constitution in both ways. The General Assembly improperly exercises executive power through the legislative appointment of the Executive Director of the State Board, the chief state elections official vested with day-to-day supervisory powers over the enforcement of ethics, election, lobbying, and campaign finance laws. Moreover, the Acts interfere with the Governor's faithful execution of the laws by structuring the State Board in a manner that fails to ensure the Governor's "ability to affirmatively implement" executive policy decisions. *Cooper*, 370 N.C. at 415, 809 S.E.2d at 112.

47. A majority of this Court finds as fact that the structure of the State Board as an individual provision and standing alone fails to provide the Governor with constitutionally sufficient control, and therefore it violates separation of powers and is thus unconstitutional.

Judge Foster dissents from these findings, conclusions, and rulings.

Executive Director of the State Board

48. Through the Acts, the General Assembly appoints the Executive Director of the State Board until at least May 2019.[2] Session Law 2017-6, § 17. Under the Acts, the Executive Director is the "chief State elections official" who is "responsible for staffing, administration, and execution of the State Board's decisions and orders." *See* Session Law 2017-6, § 4 (enacting §§ 163A-6(c) and (d)). Ms. Strach was initially hired by the SBOE on a 3-2 partisan vote following Governor McCrory's election and Governor McCrory's appointment of a majority Republican Board. *See* Deposition of Kimberly Westbrook Strach ("Strach Dep.") (Feb. 24, 2017) pp. 43-45.

49. The State Board has the powers and duties of a principal department. Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat § 163A-5(a)). The Executive Director is a full-time employee who ensures completion of the day-to-day tasks necessary to enforce election, ethics, lobbying, and campaign finance laws. *Id.* (enacting § 163A-6). While the Acts only require the State Board to meet monthly, the Executive Director supervises, executes, and directs the enforcement of the State's elections, ethics, and campaign finance laws. *See id.* (enacting §§ 163A-3(a), 163A-6).

50. The Acts grant the Executive Director significant authority. She is solely responsible for staffing, administers the State Board, and executes the board's decisions. *See id.* (enacting § 163A-6). She has the authority under certain circumstances (e.g., a hurricane) to exercise emergency powers and the authority, *on her own*, to adopt rules setting those powers. *See* N.C. Gen. Stat. § 163A-750.

51. Among her other duties and discretionary powers, the Executive Director:

- Provides "directives" to county boards of elections. *See* N.C. Gen. Stat. § 163A-1073; *see also, e.g.*, *id.* N.C. Gen. Stat. § 163A-879 (regarding administrative changes in voter registration related to county boundaries).

[2] In *Cooper*, the Court squarely rejected Defendants' argument that Session Law 2017-6 simply "extended the term" of Ms. Strach, the legislature's selection to serve as State Board Executive Director. 370 N.C. at 419, 809 S.E.2d at 114.

• Provides opinions to candidates and political committees on campaign finance issues. If her opinion is followed, those candidates and committees are immune from prosecution. *See* N.C. Gen. Stat. § 163A-1441.

• Decides whether to retain or fire county directors of elections if a majority of a county board recommends termination—and she has the power to suspend such county directors unilaterally. N.C. Gen. Stat. § 163A-775.

• Approves county plans for out-of-precinct voting places, even though such plans must be unanimously adopted by the county board of elections. N.C. Gen. Stat. § 163A-1048.

• Approves county plans to temporarily use two voting places for the same precinct, even though such plans must be unanimously adopted by the county board of elections. N.C. Gen. Stat. § 163A-1049.

• Approves county plans to transfer voters from one precinct to an adjacent precinct. N.C. Gen. Stat. § 163A-1045(a).

• "[M]ay grant special permission for a county board of elections to enter into an agreement with the owners or managers of a nonpublic building to use the building as a voting place. . . ." if certain conditions are met. *See* N.C. Gen. Stat. § 163A-1134(c).

• "[M]ay permit a county board of elections to provide more than one type of voting system in a precinct, but only upon a finding that doing so is necessary to comply with federal or State law." N.C. Gen. Stat. § 163A-1119.

• Approves plans submitted by political campaign treasuries for goods or services sold by political parties. *See* N.C. Gen. Stat. § 163A-1415.

• Coordinates the North Carolina's "responsibilities under the National Voter Registration Act." *See* N.C. Gen. Stat. § 163A-861; *see also* N.C. Gen. Stat. § 163A-886 (registration of members of the military).

52. The relevant statutes clearly grant the Executive Director substantial executive authority. Despite her executive role, she was given her authority and position by the General Assembly and cannot be replaced until May 2019 (at the earliest). *See* Session Law 2017-6, § 17. Measured in terms of the powers of appointment, supervision, and removal, we find as fact and conclude as a matter of law that the Executive Director: (1) was appointed by the legislature; (2) cannot be removed by the Governor or the State Board; and (3) accordingly, is not subject to supervision either directly by the Governor or indirectly by the State Board.[3] As the Supreme Court observed, Session Law 2017-6:

> limits the ability of persons who share the Governor's policy preferences to supervise the day-to-day activities of the Bipartisan State Board, at least in the short term, by ensuring that no one could be appointed to the position of Executive Director other than the General Assembly's appointee until May 2019. *Cooper v. Berger*, 370 N.C. at 416, 809 S.E.2d at 112.

In short, the Acts provide the Governor *with no control over the Executive Director of an executive agency*, violating separation of powers.

53. The challenged provisions regarding the Executive Director, who is the State's chief elections official, thus violate separation of powers because: (a) the legislature directly appoints the Executive Director; (b) the legislature prohibits the State Board from removing the

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[3] The *Cooper* Court observed that the legislature could not, within the limits of the North Carolina Constitution, "structure an executive branch commission in such a manner that the Governor is unable, *within a reasonable period of time*, to 'take care that the laws be faithfully executed' . . . " 370 N.C. at 418, 809 S.E.2d at 114 (emphasis added). The Supreme Court's observation recognizes that many executive boards and commissions are structured with staggered terms for their members and that, as a result, a newly elected Governor does not assume complete control of the entire executive branch the day he or she assumes the office. But within a reasonable time the Governor must have sufficient control because it is the Governor—not an appointed executive officer—who is politically accountable to the electorate.

In the present case, at the time this order is filed, the legislatively appointed Executive Director will have already served more than twenty-one months after Governor Cooper took office. Unless Section 17 of Session Law 2017-6 is invalidated, that Executive Director will continue to serve for more than twenty-nine months into Governor Cooper's term. This is not a "reasonable period of time" sufficient for the Governor to ensure faithful execution of the laws. N.C. CONST. art. III, § 5(4).

Executive Director for more than half of the Governor's four-year term of office; and (c) and, as a result, neither the Governor nor his appointees to the State Board have any power of supervision over the Executive Director. *See* Session Law 2017-6, § 17.

54. Accordingly, this Court finds as fact and concludes as a matter of law the Acts' provisions regarding the Executive Director, as individual provisions and standing alone, violate the separation of powers clause of the State Constitution, and are unconstitutional.

Structure and Chair of the County Boards of Elections

55. Plaintiff has alleged that, with regard to the makeup and chairmanship appointment provisions for the County Boards of Election, the Governor's control is limited by the structure of the county boards of election, which consist of four members: two from the political party with the highest number of registered affiliates (Democratic Party) and two from the political party with the second highest number of registered affiliates (Republican Party).

56. As recognized by the Supreme Court, the General Assembly has the authority to set the size of the county boards, *see Cooper*, 370 N.C. at 417, 809 S.E.2d at 113, and, notably, requiring that half of the members of a county board belong to a certain political party, is not, in and of itself, unconstitutional, *see id.* at n.13.

57. Moreover, the members of the county boards are subject to supervision and removal by the Bipartisan State Board, *see, e.g.,* N.C. Gen. § 163A-741 (discussing oversight of county boards of election by Bipartisan State Board), whose members are subject to removal by the Governor.

58. Additionally, the Governor has challenged the appointment of the Chair of the County Boards on the basis of the fact that there is a political test for the chair of the Board for every year that Presidential, gubernatorial, and Council of State elections are held. *See* Session Law 2018-2 § 8(b) (enacting § 163A-2(f)).

59. There has been a political test for the Chair of County boards in place for many years. Prior to this series of legislative acts, the chair of the County boards was selected from the political party of the sitting governor, which is also a "political test."

60. There was however, never in place a provision which could deprive one party of the Chairmanship of all County Boards of Election during every election year in which the Governor and the President were selected.

61. This Court can see no other reason for such provision other than to place one political party in control of the Chair of the County Boards at the most critical election times.

62. In evaluating this provision under the separation of powers analysis set forth above, there is no circumstance under which the deprivation of one party's opportunity to ever chair a county board of elections during the year of a major election can be constitutional, in that it will have an impact on the opposing party Governor's ability to see that the election laws are faithfully executed in the manner deemed by that Governor to be necessary and appropriate under the laws as they exist.

63. The Governor has met his burden in the facial challenge with regard to the Chairmanships of the County Boards.

64. With regard to the makeup of the county boards, the supervision from the State level over the actions and disputes at the county level is sufficient so as to insure that the Governor has sufficient control to see that the election laws are faithfully executed at the county level.

65. The Governor has not met his burden in a facial challenge of the makeup of the county boards.

66. Therefore, it is the Ruling of this Court that the provisions in Session Law 2017-6 are Unconstitutional with regard to the partisan requirements for the Chairman of the County Boards of Election, and are Constitutional as to the makeup of the county boards. Notwithstanding the finding of constitutionality as to the makeup of the county boards, that in and of itself is not sufficient to render the act Constitutional.

Chair of the State Board

67. Plaintiff also argues that his control is limited because he has no authority to appoint the chairs of the Bipartisan State Board[4] or the county boards and because the chair during major election years (i.e., presidential and gubernatorial election years) must be a member of the party with the second highest number of registered affiliates (currently, the Republican party)

68. The Defendants argue that the powers of the chair of the Bipartisan State Board are limited. *See, e.g.*, N.C. Gen. Stat. §§ 163A-3(a) (chair or a majority of members may call a meeting); 163A-4(a)-(b) (chair or vice chair may sign and issue subpoenas, summon witnesses, and compel production of documents); 163A-4(c) (chair or any member may administer oaths). Because of these limited powers, and because under Session Law 2018-2, the Governor has unfettered removal power as a check on the members of the Bipartisan State Board, that this constitutes sufficient control over such members and the Bipartisan State Board as a whole.

69. The Plaintiff argues that the Acts impose a political test for the chair of the State Board for every year that Presidential, gubernatorial, and Council of State elections are held. *See* Session Law 2018-2 § 8(b) (enacting § 163A-2(f)). This would in effect insure that one party controls the Chairmanship of the State Board each year that the Governor and President are elected, regardless of the political affiliation of the Governor.

70. There has always been a "political test" for the chair of the State Board. It traditionally has gone to the party of the sitting Governor. That system has been in place and functioned for years.

71. There was however, never in place a provision which could deprive one party of the Chair of the State Board during every election year in which the Governor and the President were selected.

[4] As acknowledged by Plaintiff, the Governor does appoint the first chair of the Bipartisan State Board, but the members select their own chair thereafter. S.L. 2017-6, § 10.

72. This Court can see no other reason for such provision other than to place one political party in control of the Chair of the State Board at the most critical election times.

73. Again, in evaluating this provision under the separation of powers analysis set forth above, there is no circumstance under which the deprivation of one party's opportunity to ever chair the State Board during the year of a major election can be constitutional, in that it will have an impact on the opposing party Governor's ability to see that the election laws are faithfully executed in the manner deemed by that Governor to be necessary and appropriate under the laws as they exist.

74. The Governor has met his burden with regard to the facial challenge to the constitutionality of this provision.

It is therefore the Ruling of the Court that the provision in Session Law 2018-2 with regard to the political party requirement of the Chair of the State Board is Unconstitutional.

The Entirety of the Challenged Acts

75. In addition to challenging that four individual provisions of the Act, individually and standing alone, violate our State Constitution, Plaintiff has also alleged that when all of those provisions are examined collectively, the Acts viewed as a whole and in their entirety unconstitutionally violate the separation of powers clause of our Constitution.

76. With respect to the Governor's powers of appointment: (a) for more than half the members of the State Board (i.e., those nominated directly or indirectly by the party different from the Governor), the Governor's appointment authority is significantly constrained, Session Law 2018-2, § 8(b) (enacting N.C. Gen. Stat. §§ 163A-2(a),(a1)); Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat. § 163A-3, -4); (b) for both initial and vacancy appointments, the Governor lacks the authority to reject any slate of nominees provided by either political party, *see id.* (enacting § 163A-2(d)); and (c) the legislature, and not the Governor, appoints the Executive Director who will serve more than 29 months into the Governor's 48-month term if the Acts are not enjoined.

77. With respect to the Governor's powers of removal: (a) the Acts prevent the removal of the Executive Director of the State Board until May 2019 and after that date only permit her

removal "for cause," *see* 2017-6, §§ 17, 4(c); (b) while the Governor may remove any member of the State Board for any reason, such removal power is constitutionally insufficient, because the Governor does not have the right, for a majority of members, to select replacements who will reflect his views and priorities. Instead, the nominees to replace a majority of removed members will reflect the policy views and priorities of the political party opposed to the Governor; and (c) the Governor has no direct power to remove members of county boards of elections, who may only be removed indirectly by the State Board, which a majority of this Court finds and concludes is not subject to sufficient control by the Governor, and only remove them for cause.

78. With respect to the Governor's powers of supervision: (a) the Acts legislatively appoint the Executive Director of the State Board and forbid her removal until 29 months into the Governor's term of office; (b) the Acts prevent the Governor from appointing a majority of members to the State Board that will reflect his views and priorities; (c) county boards of election are chaired during every even-numbered election year by a member of the political party opposed to the Governor; and (d) the State Board is chaired in every year that Presidential, gubernatorial, and Council of State elections are held by a member of the political party opposed to the Governor.

79. A majority of this Court finds as fact and concludes as a matter of law that when analyzed collectively and in their entirety, all of the foregoing provisions combine to strip the Governor of the requisite control mandated by *Cooper* and *McCrory*, and that the Acts thus prevent the Governor from fulfilling his core duty of taking care that the State's election laws are faithfully executed.

80. Accordingly, a majority of this Court finds and concludes that the Acts as a whole violate the separation of powers guaranteed by the North Carolina Constitution, and are therefore unconstitutional.

Judge Foster dissents from these findings, conclusions, and rulings.

CONCLUSION

It is therefore ORDERED, ADJUDGED, AND DECREED that:

81. Defendant's Motion to Dismiss is denied;

82. Plaintiff's Motion for Summary Judgment is granted;

83. By reason of the Court finding as fact and concluding as law that the challenged Acts in their entirety are unconstitutional, and pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and North Carolina Rule of Civil Procedure 57, the Court hereby enters final judgment:

a. Declaring that Part VIII of Session Law 2018-2 (House Bill 90) is unconstitutional and therefore void and of no effect.

b. Declaring that Section 17 of Session Law 2017-6 is unconstitutional and therefore void and of no effect.

c. Declaring that Section 7 (H) of Session Law 2017-6 is unconstitutional and therefore void and of no effect.

d. Declaring that Sections 7 (H) of Session Law 2017-6 and Section 8 (b) of Session Law 2018-2 (House Bill 90) are unconstitutional and therefore void and of no effect.

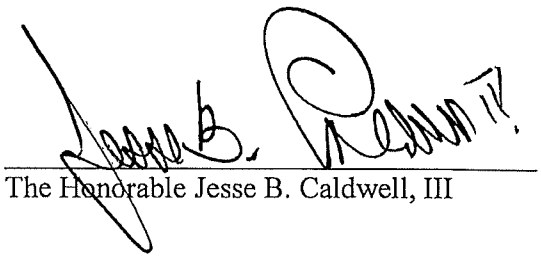
e. Permanently enjoining Part VIII of Session Law 2018-2 in its entirety, and sections 3 through 22 of Session Law 2017-6 in their entirety.

84. In light of the upcoming November 2018 elections and in the exercise of this Court's authority pursuant to North Carolina Rule of Civil Procedure 62(c), this Court hereby suspends its injunction against those portions of Section 8 (b) of Session Law 2018-2 that enact N.C. Gen. Stat. § 163A-2(a) to (e), in order to allow the current State Board (composed of nine (9) members) to continue its service during the November 2018 elections. The suspension of this injunction shall remain in place until the results of the November 2018 elections are certified by the State Board.

85. The parties shall bear their own costs.

WHEREFORE, IT IS HEREBY SO ORDERED, ADJUDGED, AND DECREED.

SO ORDERED, this the 16 day of October, 2018.



The Honorable Jesse B. Caldwell, III

SO ORDERED, this the 16th day of October, 2018.

The Honorable L. Todd Burke

SO ORDERED, this the 16th day of October, 2018.

The Honorable Jeffery B. Foster

Judge Foster dissenting:

I dissent from the decision of my learned colleagues due to my belief that the issues in the case at bar are nonjusticiable political questions, and under the political question doctrine, cannot and should not be addressed by this court. I adopt the dissent of Justice Newby in the previous Berger case to support my dissent here. *Cooper v. Berger,* 809 S.E. 2d 98, 119-128 (2018).

In the spirit of the previous Berger case, wherein the Supreme Court asked this panel to address the principal issue there, notwithstanding our finding that we had no jurisdiction to consider what we initially held to be a non-justiciable political question, I would further hold that the Plaintiff has once again failed to meet the standard of proof that this act of the Legislature is facially unconstitutional with regard to the makeup of the State Board of Elections and Ethics Enforcement.

In reviewing legislation, the North Carolina Supreme Court:

"reviews acts of the state legislature with great deference; a statute cannot be declared unconstitutional under the State Constitution unless that Constitution clearly prohibits the statute."....."[A] statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Crump v. Sneed,* 134 N.C. App. 353, 355 (1989) (citations omitted).

The Supreme Court has further determined:

An individual challenging the facial constitutionality of a legislative act must determine that no set of circumstances exist under which the act would be valid. The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *State v. Bryant,* 359 N.C. 554, 564 (2005) (citations omitted).

The Supreme Court, after its decision in *Berger*, reaffirmed this standard for facial challenges in *N.C. State Bd. Of Educ. v. State,* No.333PA17, slip opinion at 16-17 (N.C. June 8, 2018). While the Governor argues that the standard for a facial challenge in a separation of powers dispute was changed by the previous Berger decision, the Supreme Court did not go so far as to state that in its holding in *Berger*.

Because of the long line of precedent establishing the standard for a facial constitutional challenge, further supported by the Supreme Court's reiteration of that standard as early as June 8th of this year, I am of the opinion that the standard remains the same as was set out in *State v. Bryant.* Applying the standard set out in *State v. Bryant* to this case, I do not believe that the Governor has met this standard in his challenge to the facial constitutionality of the State Board of Election and Ethics Enforcement.

I therefore dissent from the decision of the panel with regard to the facial constitutionality of the State Board of Election and Ethics Enforcement. I join with my colleagues in the decision on the remaining issues, notwithstanding my position under the political question doctrine.