UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
Docket No. 1:22-cv-611-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; and ROY A. COOPER, III, Governor of North Carolina, *(all in their official capacity only)*,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

Common Cause and five of the 2.6 million unaffiliated voters in North Carolina bring this action. They ask the Court to declare unconstitutional the state law requiring all members of the State Board of Elections to be registered as Democrats or Republicans and barring unaffiliated voters from serving—even though unaffiliated voters outnumber both parties. The statutes violate plaintiffs' First Amendment rights to free speech and association and their Fourteenth Amendment right to equal protection. Defendants Moore and

Berger ("defendants") have moved to dismiss the Amended Complaint. Defendants' Motion to Dismiss. (Doc. 26). The Court should deny the motion.

STATEMENT OF FACTS

The structure of the State Board of Elections ("State Board") was established in 1901 and has remained essentially unchanged since. It has five members appointed by the governor, all of whom must be registered as Democrats or Republicans and come from names submitted by the parties. Three are appointed from the governor's party, two from the other party. N.C. Gen. Stat. § 163-19(b); Sec. Am. Compl. ¶ 28 (Doc. 20).

Most states' elections are supervised by the Secretary of State, typically utilizing county clerks or other local officials.[1] North Carolina, ten other states, and the District of Columbia have independent boards. The North Carolina board, more so than any other, controls voter registration, candidate challenges, precinct boundaries, polling places, ballot format, voting equipment, one-stop voting, county board appointments, employment of election directors, ballot counting, canvassing, investigation of irregularities, certification of winners, and protests. Sec. Am. Compl. ¶ 24; N.C. Gen. Stat. §§ 163-22, -182.4, -182.12. It may conduct evidentiary hearings, invalidate

[1] *See* https://ballotpedia.org/State_election_agencies (last visited Nov. 3, 2022).

results, and order new elections without court involvement. Sec. Am. Compl. ¶ 25.

The electorate differs dramatically today from when the State Board was first established. Currently more voters are registered unaffiliated than for either party. Sec. Am. Compl. ¶ 31. Thirty-five percent are unaffiliated, and the percentage will grow as 42 percent of voters aged 25–40 are unaffiliated, as are 47 percent of those under 25. Sec. Am. Compl. ¶¶ 31, 34.

ARGUMENT

Plaintiffs have stated valid claims, and they have standing. Defendants Moore and Berger are proper defendants because they have no immunity for this type of suit. Plaintiffs have adequately alleged the burden caused by the total ban on unaffiliated members on the State Board, and defendants cannot offer any compelling, important, or rational basis for their exclusion.

I. Defendants' Rule 12(b)(1) Standing Motion Should be Denied.

The allegations of the Second Amended Complaint regarding standing must be assumed true and read broadly at this stage. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Under *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992), and other cases, those allegations are more than sufficient to establish that each individual plaintiff and Common Cause has standing to seek relief from the injury caused by the provisions of N.C. Gen. Stat. § 163-

19. That statute bars the governor from considering them for appointment to the State Board. Removal of that bar through a prospective injunction will redress their injury.

A. The Individual Plaintiffs Have Standing.

Defendants' argument against standing for the individual plaintiffs is that the "absence of allegations" that any individual plaintiff has applied for appointment to the State Board is "fatal to standing." Defendants' Memorandum in Support of Motion to Dismiss (Doc. 27), ("Defs.' Br.") 7.

This argument misperceives and distorts the injury caused to the individual plaintiffs by N.C. Gen. Stat. § 163-19. Their injury flows from the statutory bar interposed to the governor even considering an unaffiliated voter for appointment to the State Board, not from the failure of the governor to consider their applications for that position. Indeed, under N.C. Gen. Stat. § 163-19 there is no way for any unaffiliated voter to apply for appointment to the State Board. That statute expressly requires the governor to appoint State Board members, and fill vacancies on the State Board, exclusively from lists of nominees submitted by the chairs of the Democratic and Republican parties. Cementing that bar to the appointment of unaffiliated voters, the statute goes on to forbid the chairs of the Democratic and Republican parties from

submitting to the governor the name of any person "not affiliated" with their parties.

There may be instances in which a plaintiff may need to open an unlocked door to gain standing to seek redress for an injury, but surely no plaintiff must knock down a locked door to gain standing. The main authority cited by defendants against standing for the individual plaintiffs is *Carney v. Adams*, 141 S. Ct. 493 (2020) ("*Carney I*"), but *Carney I*, properly applied, validates plaintiffs' position, not defendants' position.

Carney I did concern a challenge by an unaffiliated voter, Adams, to a Delaware law limiting appointments to some courts to registered Republicans and Democrats, but the resemblance between the facts of this case and *Carney I* ends there. Adams had never sought a judgeship when he was registered as a Democrat and thereby eligible for appointment; that he retired from his law practice and abandoned active bar status in 2015; that in early 2017 Adams read an article suggesting that Delaware's law was unconstitutional; and shortly thereafter, just days before filling suit, he resumed active bar status and changed his registration to independent. This evidence strongly suggested that Adams was a gadfly intrigued by an abstract legal issue, but with no concrete interests in becoming a judge and perhaps not qualified to serve.

The allegations of the Second Amended Complaint stand in sharp contrast to the record in *Carney I*. All individual plaintiffs (other than the youngest, Daye) have been registered as unaffiliated for many years: plaintiff Smith for eight plus years (Sec. Am. Compl. ¶ 4); plaintiff Effron for thirty-five plus (Sec. Am. Compl. ¶ 6); plaintiff Horton for twenty plus (Sec. Am. Compl. ¶ 9); and plaintiff Faires for nineteen plus (Sec. Am. Compl. ¶ 12). Plaintiff Daye changed his registration from Democrat to unaffiliated in 2022. (Sec. Am. Compl. ¶ 10.)

The plaintiffs registered unaffiliated for various reasons: Smith because "the policies and practices of both [ ] parties were inconsistent with her own views." (Sec. Am. Compl. ¶ 4); Horton because "he generally favors a more moderate approach than either major party." (Sec. Am. Compl. ¶ 9); Daye because "political parties are the principal cause of the extreme polarization and tension in today's world." (Sec. Am. Compl. ¶ 10); and Faires because "her views did not align with either [ ] party." (Sec. Am. Compl. ¶ 12).

The individual plaintiffs are, and allege they are, committed citizens who have served their communities as physicians, lawyers, journalists, librarians, and political activists who would like to serve on the State Board. Sec. Am. Compl. ¶¶ 5, 7, 9, 11, 13. Defendants claim that nothing distinguishes the individual plaintiffs from North Carolina's other 2.6 million unaffiliated

voters. Defs.' Br. 8. That is simply not correct. With respect, not all unaffiliated voters are qualified for an appointment to the State Board, and many may not be willing to serve. The plaintiffs have alleged they are qualified and willing to serve. Under *Carney I*, those allegations defeat defendants' argument.

Cases since *Carney I* affirm the individual plaintiffs have standing to pursue this lawsuit. In *Libertarian Party of Ohio v. Wilhem*, 988 F.3d 274 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 427 (U.S. 2021) (mem.), the Libertarian party and its former chair Harold Thomas challenged a requirement that the Ohio Elections Commission be composed of three members from each of the two major political parties plus one unaffiliated member. The court decided Thomas had standing, concluding;

> Thomas "has introduced evidence that he would like to be on the Ohio Elections Commission," but his membership in the Libertarian Party prevents him from being considered for the seventh commission seat. Under these circumstances, "a plaintiff need not translate his or her desire for a job into a formal application" because "that application would be merely a futile gesture."

Id. at 279 (quoting *Carney I*, 141 S. Ct. at 50) (other internal quotations omitted).

Plaintiffs' standing here is also confirmed by recent developments in Delaware. Following the Supreme Court's 2020 decision in *Carney v. Adams*, the court observed that in challenges to governmental barriers to

governmental benefits, the injury to be redressed is "the imposition of the barrier, not the ultimate inability to obtain the benefit." *Adams v. Carney*, No. 20-1680. 2022 WL 4448196 (D. Del. Sept. 23, 2022) ("*Carney II*") (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993)).

B. Common Cause has Standing.

For over 50 years Common Cause has sought to protect the rights of all citizens to participate fully and fairly in our democracy. (Sec. Am. Compl. ¶ 1). It sometimes pursues this goal as a plaintiff in lawsuits in state and federal courts in North Carolina and elsewhere. *See*, *e.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (U.S. 2019) (partisan gerrymandering challenge); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285 (S.D.N.Y 2020) (challenging voter roll purge procedures); *Common Cause Ind. v. Ind. Sec'y of State*, 60 F. Supp. 3d 982 (S.D. Ind. 2014), *aff'd*, 800 F.3d 913 (7th Cir. 2015) (challenging county's method for electing judges).

Defendants advance three arguments why Common Cause should be dismissed. None has merit. First, defendants claim Common Cause lacks standing because "it cannot serve in public office under any set of circumstances." Defs.' Br. 9. This argument is based on defendants' flawed view

that the remedy plaintiffs seek is appointment to the State Board. The defect in the statute to be redressed here, as noted in the previous section, is not appointment to the State Board, but the removal of the barrier to the appointment of any voter other than registered Democrats and Republicans. Common Cause cannot fill a seat on the State Board, but its members can.

Second, defendants argue that because Common Cause has Democratic and Republican members, as well as unaffiliated members, "potential conflicts" among members make it "virtually impossible" for Common Cause to "represent all of them." Defs.' Br. 10. This argument is defeated by the allegations in the first paragraph of the Second Amended Complaint, which must be treated as true: "Membership in Common Cause is open to all persons without regard for their political party or affiliation" and members of Common Cause are "dedicated to ensuring fair and open elections in which all citizen are encouraged and allowed to participate regardless of party." *See also Common Cause Ind.*, 60 F. Supp. 3d at 988 (rejecting argument that Common Cause could not represent Republicans, Democrats, and Independents because the case was not about the outcome of elections, it was about citizens having their voices heard in the political process).

Defendants' final point is that courts should be "reluctant to endorse standing theories that require guesswork as to how independent

decisionmakers will exercise their judgment." Defs.' Br. 11. That argument is refuted by the words of N.C. Gen. Stat. § 163-19 as enacted by the defendants. The governor is not an "independent decisionmaker" in the appointment of State Board members. Defendants have tied his hands with respect to the unaffiliated voters and made his role as to them ministerial. N.C. Gen. Stat. § 163-19 fixes the size of the State Board, requires the governor to appoint all five from short lists by the chairs of the Democratic and Republican parties, and forbids those chairs from nominating anyone not a member of their parties. Unless the governor violates the law he is sworn to uphold, he cannot appoint an unaffiliated voter.

II. North Carolina has Waived its Eleventh Amendment Immunity to this Lawsuit.

A state's Eleventh Amendment immunity is "a personal privilege which it may waive at pleasure." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense. Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 477 (1883)). Waiver of a state's Eleventh Amendment immunity can occur by express statutory declaration, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), or by the voluntary invocation of federal jurisdiction by authorized state officials. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002). Whether these forms of waiver exist is a

question of federal law. *Id.* at 623. Notwithstanding the protestations of the defendants, both forms of waiver are present in this case.

In 2017 the General Assembly enacted legislation amending N.C. Gen. Stat § 1-72.2 to expressly authorize the defendants here, the Speaker of the House and President Pro Tem of the Senate, to invoke federal jurisdiction by intervening in any federal proceeding challenging the validity of any state statute. *See* An Act to Make Base Budget Appropriations for Current Operations of State Departments, Institutions, and Agencies, and for Other Purposes, S.L. 2017-57, §§ 6.7(i)–(m), 2017 N.C. Sess. Laws 248, 263–65, attached as Exhibit A. In this act, the General Assembly "requested" "a federal court presiding" over "any action" "challenging the validity or constitutionality of an act of the General Assembly" to allow the legislative branch of the State of North Carolina to participate in any such action as a party, and authorized the Speaker and the President Pro Tem as "agents of the State" to seek intervention in such actions in federal court "on behalf of the General Assembly." *Id.*

In *Atascadero*, the Supreme Court considered whether a provision of the California Constitution generally waiving the state's sovereign immunity, but not expressly authorizing federal court jurisdiction, was sufficient to waive Eleventh Amendment immunity. It held that "[i]n the absence of an

unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that California has waived its constitutional immunity." 473 U.S. at 242. The express consent to federal court jurisdiction absent from California law is present in North Carolina's law.

The General Assembly's unequivocal authorization to the Speaker and President Pro Tem to intervene in lawsuits, like this lawsuit, constitutes another form of waiver of the state's Eleventh Amendment immunity. The Supreme Court has long held that when a state "voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Lapides*, 535 U.S. at 619 (quoting *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906)).

The litigation conduct at issue in *Lapides* is analogous to the litigation conduct here. In *Lapides* a public university invoked federal court jurisdiction by removing a lawsuit to federal court and then argued the Eleventh Amendment barred the action. Here the state legislature itself has expressly authorized its leaders to invoke federal court jurisdiction by intervening in a class of lawsuits, like this suit, where the constitutionality of a state law is challenged.

Defendants may argue that *Lapides* applies only in those cases where the Speaker and President Pro Tem exercise the discretion conferred on them by N.C. Gen. Stat. § 1-72.2 and voluntarily intervene in a case. For example, they may argue that *Lapides* would apply in a case like *Bryant v. Stein*, in which the Speaker and President Pro Tem have voluntarily chosen to intervene, but not in a case like this where they have not exercised that discretion. *See* Memo. in Support of Motion to Intervene as Defs., *Bryant v. Stein*, No. 1:23-cv-77 (M.D.N.C. Feb. 21, 2023), ECF No. 30. That argument would fail.

The Court's unanimous holding in *Lapides* rests upon the need to prohibit "the selective use of immunity to achieve litigation advantage." *Lapides*, 535 U.S. at 620 (interpreting the Eleventh Amendment to find "waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire which might, after all, favor selective use of immunity to achieve litigation advantage."). Interpretation of N.C. Gen. Stat. § 1-72.2 to permit the Speaker and President Pro Tem selectively to invoke the bar of the Eleventh Amendment to federal court jurisdiction in some cases challenging the validity of a state law, but not

others, would allow the "inconsistency, anomaly and unfairness" *Lapides* condemns. [2]

III. The First Amendment and Equal Protection Clauses protect the rights Plaintiffs seeks to redress.

Defendants' Rule 12(b)(6) argument is that this is a political patronage case for which *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), allow party affiliation to control appointments. Plaintiffs' claims actually are about the right to vote, and to participate in elections on equal terms with Democrats and Republicans, subject to strict scrutiny under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Whichever test is applied, however, plaintiffs have stated valid claims.

In many ways this case is like James Adams' challenge to Delaware law limiting judicial appointments to Democrats and Republicans. *Carney I*, 141 S. Ct. 493. While defendants use Adams' case often for their argument about

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[2] The last sentence of N.C. Gen. Stat. § 1-72.2, which states that participation of the Speaker and President Pro Tem "in any action, State or federal, as a party or otherwise, shall not constitute a waiver of legislative immunity," does not change the analysis. Eleventh Amendment immunity and legislative immunity are distinct doctrines. *McCray v. Md. Dep't of Transp., Md. Transit Admin.*, 741 F.3d 480, 484 (4th Cir. 2014), *aff'd*, 662 F. App'x 221 (4th Cir. 2016). Moreover, Eleventh Amendment immunity belongs to the State of North Carolina, not its legislature.

standing, they omit its final resolution. In January this year the federal court approved a consent judgment finding that the exclusion of Adams and other unaffiliated voters from the appointments violated the First Amendment. Stipulated Consent Judgment and Order, *Adams v. Carney*, No. 1:20-cv-1680 (D. Del. Jan. 30, 2023) ECF No. 72, attached as Exhibit B. Plaintiffs here make the same claim, and the result should be the same.

A. The fundamental right to vote is at issue in plaintiffs' claims.

Strict scrutiny applies when the fundamental right to vote is breached by state law. *Reynolds v. Sims*, 377 U.S. 533 (1964). Defendants, though, take a narrow view of the right and do not think it is affected by the wholesale exclusion of unaffiliated voters from election administration.

Recent elections starkly demonstrate how election administration is a foundational aspect of the right to vote. The abstract "right to vote" does not exist unless one can register, cast a ballot, and have that ballot counted. When a president pressures election officials to "find more votes"; when campaigns declare that election machines were programmed to change votes; when citizens disrupt vote counting — when those things happen they affect the right to vote. In North Carolina, election board members decide who is qualified to register to vote, where they may vote, when they may vote, and

whether their vote is counted. The State Board is where the right to vote is maintained.

Although the issue in this case has not come before it, the Supreme Court often has recognized in other contexts that the right to vote is not just the right to cast a ballot, it is the right to participate equally in all aspects of elections. "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Thus the court has struck down durational residency requirements, *id.*; property ownership requirements, *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969); burdensome petition numbers for candidates, *Williams v. Rhodes*, 393 U.S. 23 (1968); excessive signatures for new parties, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); malapportioned legislative districts, *Wesberry v. Sanders*, 376 U.S. 1 (1964); limits on federal workers voting in local elections, *Evans v. Cornman*, 398 U.S. 419 (1970); restrictions on military personnel voting where stationed, *Carrington v. Rash*, 380 U.S. 89 (1965); and political party regulations on endorsements and rotation of party offices, *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

Likewise, lower courts have recognized voters' rights in regulations not directly related to the act of voting, including laws that prevent non-party candidates from putting "independent" by their names on ballots, *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992); the use of punch card ballots and optical scan voting systems, *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated as moot en banc*, 473 F.3d 692 (6th Cir. 2007); ballot format laws favoring one party, *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996); and ballot designs tying independent state candidates to unrelated presidential parties, *Devine v. Rhode Island*, 827 F. Supp. 852 (D.R.I. 1993).

Service on the State Board is just as important to equal participation in elections as any of those other activities. The right to vote depends on being allowed to register, to cast a ballot, and to have that ballot counted. It depends on being part of the process by which those decisions are made. As this court has previously noted, unaffiliated voters "provid[e] a voice for voters who feel unrepresented by the prevailing political parties." *DeLaney v. Bartlett*, 370 F. Supp. 2d 373, 377 (M.D.N.C. 2004).

B. The *Anderson-Burdick* test applies here.

Discrimination based on political affiliation implicates both First Amendment and equal protection rights. "The right that *Anderson* affirms is best understood as a hybrid, grounded in both the First Amendment and the

Equal Protection Clause of the Fourteenth Amendment." Daniel P. Tokaji, *Voting is Association*, 43 Fla. St. U. L. Rev. 763, 776 (2016). The *Anderson-Burdick* test is applied to determine whether state law infringes First Amendment rights. *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169 (4th Cir. 2017). "[T]he rationales for applying the *Anderson-Burdick* test—ensuring that the democratic processes are fair and honest, and maintain[ing] the integrity of the democratic system — resonate" for a wide range of election laws. *Daunt v. Benson*, 956 F.3d 396, 406–07 (6th Cir. 2020) (applying *Anderson-Burdick* to a challenge to the membership of a state redistricting commission) (citations omitted).

C. *Anderson-Burdick* requires strict scrutiny when restrictions based on political preference are severe.

Anderson-Burdick is a flexible test, starting with the recognition that in a comprehensive state election code "[e]ach provision . . . inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson*, 460 U.S. at 788. The court is to "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" and "then . . . identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 789. Strict scrutiny applies when the

plaintiff's voting rights are subject to severe restrictions. "If the statute's restrictions are 'severe,' they will be upheld only if they are narrowly drawn to advance a compelling interest." *DeLaney*, 370 F. Supp. 2d at 377 (citing *Burdick*, 504 U.S. at 434).

A restriction is "severe" when it limits "political participation by [an] identifiable political group whose members share a particular viewpoint, associational preference, or economic status'." *League of Women Voters v. Diamond*, 965 F. Supp. 96, 100 (D. Me. 1997) (quoting *Anderson*, 460 U.S. at 793). "Such laws are subjected to strict scrutiny and, generally, held unconstitutional." *Id.* at 101.

D. North Carolina's restrictions are severe.

By excluding unaffiliated voters entirely from serving on the State Board, North Carolina law severely restricts the rights of a large and identifiable group. Those voters are united in their shared view that neither major party adequately represents them. It is that associational preference—to not be required to express allegiance to either the Democratic or Republican party—and that preference alone that completely excludes them from all major decisions of election administration.

Control over the entirety of election administration helps entrench the two major parties and is part of a long-term pattern of state law favoring the

established parties over all other voters. *See McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995); *DeLaney*, *supra*; *Greene v. Bartlett*, No. 5:08-cv-88, 2010 WL 3326672, at *4 (W.D.N.C. Aug. 24, 2010), *aff'd.*, 449 F. App'x. 312 (4th Cir. 2011) (unpublished).

E. The legislature's own words contradict any compelling interest.

Strict scrutiny requires defendants to show a compelling interest to justify excluding unaffiliated voters from the State Board. As discussed below, their claim of even a rational basis is illogical, and certainly falls short of a compelling interest. The General Assembly's own enactments further belie any such interest. When in 2018 the legislature enacted a brief iteration of the State Board including a single unaffiliated member, it based the act on these findings:

> The General Assembly finds that the entity enforcing these laws [the State Board] must have sufficient distance from political interference due to the potential for abuse of oversight of elections and ethics investigations for partisan purposes. The General Assembly further finds 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.

An Act . . . to Implement the North Carolina Supreme Court's Holding in *Cooper v. Berger* by Giving the Governor Increased Control Over the Bipartisan

State Board of Elections and Ethics Enforcement, S.L. 2018-2, § 8.(a), 2018 N.C. Sess. Laws 1, 8, attached as Exhibit C.

Plaintiffs agree with the General Assembly that the current partisan makeup of the State Board diminishes public confidence in election administration and does not serve a state interest.

F. The authorities relied upon by defendants are inapplicable.

Given the unique role of the State Board, and the remarkable rise of unaffiliated registration in North Carolina, the cases cited by defendants from other jurisdictions are not relevant and none is directly on point. For example, the Ohio district court case, *Pirincin v. Board of Elections of Cuyahoga County*, 368 F. Supp. 64 (N.D. Ohio 1973), *aff'd*, 414 U.S. 990 (1973), was decided a decade before *Anderson* and involved a system where voters did not register by party. In *Green Party of the State of New York v. Weiner*, 216 F. Supp. 2d 176 (S.D.N.Y. 2002), there is no information of the authority exercised by the election board and the plaintiffs' attempt to show intentional discrimination in appointments was not supported by their affidavits. In other cases, political parties asked for clerical precinct positions where no significant control of elections was exercised and where the addition of officials would tax facilities. *See Werme v. Merrill*, 84 F.3d 479 (1st Cir. 1996) (Libertarian Party seeking ballot clerks); *Baer v. Meyer*, 728 F.2d 471 (10th Cir. 1984) (Citizens Party and

Libertarians seeking poll watchers); *MacGuire v. Houston*, 717 P.2d 948 (Colo. 1986) (county election judges). Several of defendants' other cases have nothing to do with the issues here. *See Morrison v. City of Reading*, No. 02-7788, 2007 WL 764034 (E.D. Pa. Mar. 9, 2007) (claim of free speech retaliation in failing to name plaintiff to a city human rights commission); *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (deference due election commission on campaign expenditure issue); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (voter ID requirement partly justified by state's interest in maintaining public confidence in elections).

As defendants assert, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997), the court did acknowledge the state's interest in the stability of the two-party system. The court added, however, "[t]his interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence," *Id.* (citing *Anderson*, 460 U.S. at 802).

Defendants, too, argue that eight other states have election boards with similar major board membership limitations. Defs.' Br. 27. Notably, none of those state boards has the sweeping powers of the North Carolina State Board and, notably, only South Carolina's board even hears election contests.

IV. The *Elrod-Branti* test for patronage cases.

Defendants argue this is a public employment unconstitutional conditions case under *Elrod v. Burns* and *Branti v. Finkel*. In *Elrod-Branti* the court recognized that First Amendment rights may be limited in certain patronage situations by conditioning public employment on loyalty to the "favored political party," *i.e.*, the political party in power. *Elrod*, 427 U.S. at 359. As *Elrod* observes, though, First Amendment protections reflect "the fundamental understanding that '(c)ompetition in ideas and governmental policies is at the core of our electoral process.'" *Elrod*, 427 U.S. at 357 (citing *Williams*, 393 U.S. at 32). To override those rights a governmental interest "must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* at 362. And "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Id.*

Defendants' argument about patronage politics hinges on the decision in *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018), that State Board members are policymakers. Their argument fails for two reasons, however.

First, being of the same party as the governor does not necessarily mean a person shares the same policy views. The North Carolina Supreme Court did *not* decide in *Cooper v. Berger* that State Board members must be of the same

party as the governor. In rejecting an iteration of the board with an even number of Democrats and Republicans the court held only that the board was a policymaking body within the executive branch and that, therefore, the governor was entitled to appoint a majority sharing his policy views. The court noted its decision was not necessarily tied to party affiliation. *See Cooper*, 370 N.C. at 417, n.13, 809 S.E.2d at 113 n.13.

When one considers the stark divisions within both major parties today, it is clear that no governor would rely on party registration alone to support the governor's policy positions on matters that might come before the State Board. Within both parties there is considerable disagreement over voter identification requirements, access to registration and absentee ballots, the length and ease of one-stop voting, and other issues of election administration. A governor who wants State Board members with compatible views on those matters can find members just as readily in the 2.6 million unaffiliated voters as in the governor's own party.

Defendants' argument fails, secondly, because being policymakers does not by itself bring the appointments within *Elrod-Branti*.

> [T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518. *See also Stott v. Haworth*, 916 F.2d 134, 140 (4th Cir. 1990) (noting the court's "reformulation" of the old policymaking standard in *Branti*).

Under this new formulation, policymaking positions remain subject to First Amendment protection when loyalty to a political party must take a back seat to a higher duty, such as the duty of public defenders to their clients or the duty of judges to be impartial. *See Branti*, 445 U.S. at 519 ("The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state."); *Adams v. Governor of Del.*, 922 F.3d 166, 179 (3d Cir. 2019) ("[T]he question before us is not whether judges make policy, it is whether they make policies that necessarily reflect the political will and partisan goals of the party in power."), *rev'd on other grounds sub nom.*, *Carney I*, 141 S. Ct. 493.

State Board members answer to such a higher duty, as defendants acknowledge when they argue that members "exercise sensitive duties over the conduct of elections" (Defs.' Br. 23), that those duties must be "carried out in an even-handed manner" (Defs.' Br. 23), and that "election administration must be accomplished without favor to any particular party." (Defs.' Br. 26). State Board members' duty is not to their political parties but to the

administration of fair elections. They are admonished to put aside their party interests, and claim to do so.

Significantly, one of the board's most important duties is judicial. Unlike election boards elsewhere, the State Board hears appeals from county boards' decisions on election protests, holds its own evidentiary hearings, and can order new elections, all without any involvement of the courts (*e.g.*, November 2018 election for the Ninth Congressional District). State Board members serve as judges in those circumstances, and the *Elrod-Branti* exception does not apply to judges. *Governor of Del.*, 922 F.2d at 179.

V. Defendants do not offer a rational basis for the exclusion of unaffiliated voters.

Defendants suggest a variety of ways in which the present selection of the State Board might have a rational basis, but in the end it comes down to a naked assertion, unsupported by any evidence, that appointing only Democrats and Republicans serves "political balance" and promotes public confidence in election administration. While there may have been a plausible basis for such an argument fifty years ago when virtually all voters were registered Democrat or Republican, it makes no sense in 2023.

Party affiliation can be an appropriate factor for some appointments to a board, to assure that each major political group is represented and to prevent

one faction from total control. That is altogether different, however, from totally excluding a category of voters based on their political preference.

> Bare majority requirements preclude any single political party from having more than a bare majority of the seats in a public body. . . . Major party requirements . . . by contrast, preclude anyone who is not a member of the two major political parties from serving in a public body. They are far rarer than their bare majority cousins, and they arguably impose a greater burden on First Amendment associational rights.

Carney I, 141 S. Ct. at 503 (Sotomayor, J., concurring).

A five-member board comprised of three members from a political party with which only 34 percent of voters affiliate, and two members from another party with which only 30 percent affiliate—but totally barring 35 percent of voters, based solely on their political preference—cannot in any sense be considered balanced. A state interest in a balanced election board is not to be confused with Democrats' and Republicans' interest in maintaining their monopoly at the expense of 2.6 million unaffiliated voters. "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for and against them." *Williams*, 393 U.S. at 32.

No matter how many ways defendants say the same thing, there is nothing about a board with only Democrats and Republicans that promotes public confidence in elections today. It is simply illogical. If 35 percent of the voters in the state have decided the Democratic and Republican parties do not

represent them, why would granting those two parties control of all aspects of elections make voters more confident about the fairness of the process? If 35 percent of the voters do not trust the parties enough to affiliate with them, why would they feel more secure because those two parties make all decisions about registration, voting, and counting ballots?

CONCLUSION

Plaintiffs have made sufficient allegations to put before the Court whether allegiance to one of the two major parties is an appropriate requirement for appointment to a board responsible for administering North Carolina's elections. They have alleged the absence of any rational, much less compelling, state interest for excluding unaffiliated voters. (Sec. Am. Compl. ¶¶ 53, 54, 60, 61).

Plaintiffs are well qualified by experience to serve on the State Board but cannot because they are unaffiliated. To become eligible, they would have to abandon their political views and affiliate with the Democratic or Republican party. But "a corollary of the right to associate is the right not to associate." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). The political test for selection denies plaintiffs the same opportunity that registered Democrats and Republicans have to participate fully in the election process.

> Suppose the legislature should enact a law that the school officers of any city or village in this state should be selected equally from the members of the two leading churches therein, making a religious test, would any one argue for a moment that such an act was constitutional? And certainly the right of the citizen to his political opinions is and should be as zealously guarded as his right to his religious belief.

Att'y Gen. v. Bd. of Councilmen of the City of Detroit, 24 N.W. 887, 893 (Mich. 1885) (striking down statute limiting Detroit board of commissioners of registration and election to Democrats and Republicans).

Defendants' motion to dismiss should be denied.

Respectfully submitted, this 31st day of March 2023.

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned certifies that this brief meets the word-count limitation contains in L.R. 7.3(d) in that it contains 6,216 words, excluding the caption, signature lines, and certificate of service.

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CERTIFICATE OF SERVICE

I certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

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