UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action 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; 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.	**GOVERNOR COOPER'S BRIEF IN SUPPORT OF MOTION TO DISMISS** [Fed. R. Civ. P. 12(b)(1) and 12(b)(6)]

NOW COMES Defendant ROY A. COOPER, III, Governor of North Carolina (hereinafter "the Governor"), by and through undersigned counsel, and hereby submits this memorandum of law in support of his motion to dismiss Plaintiffs' Second Amended Complaint ("SAC"), and all claims asserted therein.

INTRODUCTION

Plaintiff Common Cause, along with five individual plaintiffs bring a facial challenge to N.C.G.S. § 163-19, which governs the appointment of members to the N.C. State Board of Elections (the "Board"). Plaintiffs seek a declaration that the law violates their First Amendment and Equal Protection rights and assert that the law

unconstitutionally prohibits unaffiliated voters from being appointed to the Board.

Plaintiffs also seek to enjoin the legislature from enacting any laws regarding appointments to the Board "that discriminate[] against unaffiliated voters"; and enjoin the Governor from enforcing any such law.

However, Plaintiffs lack standing to sue. Moreover, even if they do have standing, Plaintiffs have not sufficiently alleged that Section 163-19 is unconstitutional, and they further fail to demonstrate that "no set of circumstances exists under which [the Act] would be valid or that the statute lacks any plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 472 (2010) (quotation marks and citation omitted).

Indeed, Plaintiffs as a matter of law cannot demonstrate that Section 163-19 violates the First Amendment because Board positions are related to political interests, and partisan affiliation is an appropriate requirement for the position. Furthermore, Section 163-19 does not discriminate against a protected class and is rationally related to a legitimate state interest. Accordingly, this Court should grant Governor Cooper's motion to dismiss.

STATEMENT OF FACTS

Shortly after Governor Cooper was elected to his first term in 2016, the N.C. General Assembly ("GA") enacted laws altering the composition and structure of the Board. *See, e.g.*, 2017 N.C. Sess. Law 6; 2018 N.C. Sess. Law 2. The N.C. Supreme Court subsequently struck down the statute because it violated the N.C. Constitution. *See Cooper v. Berger*, 370 N.C. 392, 415 (2018). The Court determined that the changes to the statute unconstitutionally prevented the Governor from controlling the views and priorities of the

Board.[1] As a result of the adverse rulings, the GA returned the structure and appointment process of the Board to the way it had been structured prior to the changes. *See* 2018 N.C. Session Law 146 §§ 3.1-3.2.

Section 163-19, the provision at issue here, sets forth how the Board is constituted, and sets out the appointment process for its members. *See, id.* Pursuant to the law, the Board consists of five registered voters who serve four-year terms. *Id.* at 163-19(b). The Governor is responsible for appointing the members of the Board. *Id.* However, no more than three of the five members can belong to the same political party, and the Governor may only appoint members from a list of nominees submitted "by the State party chair of each of the two political parties having the highest number of registered affiliates." *Id.* The party chairs each submit a list of four people who are affiliated with their respective parties to the Governor. *Id.*

As an example in practice, because the Democratic and Republican parties are the two largest parties in the state, the current Board includes three Democratic members and two Republican members.

In the event of a vacancy on the Board, the Governor appoints an individual to complete the unexpired term. The Governor chooses "from a list of three nominees submitted to the Governor by the State party chair of the political party that nominated the

[1] The GA attempted to address the Court's concerns when it enacted 2018 N.C. Sess. Law 2. However, that law also was found to be unconstitutional. *See Cooper v. Berger*, No. 18 CVS 3348, Wake Cnty. Sup. Ct. (Oct. 16, 2018)

vacating member." *Id.* at 163-19(c). The three nominees must be affiliated with the political party of the vacating member. *Id.*

Common Cause, a self-described non-profit "dedicated to ensuring fair and open elections," brings this action on behalf of itself and its North Carolina members. (SAC ¶¶ 1-2). It alleges that Section 163-19, "den[ies] all unaffiliated voters the opportunity to participate in the supervision, management[,] and administration of the state's elections through service on the Board." (SAC ¶ 2)

All the Individual Plaintiffs assert that they are currently registered as independent/unaffiliated voters. (SAC ¶¶ 4-13). They all allege that they are "qualified and desire to serve on the Board but are barred from serving...because of their status as unaffiliated voters." (SAC ¶ 3)

Plaintiffs ask that Defendants, sued in their official capacities, be enjoined from enacting and enforcing laws that prevent unaffiliated voters from serving on the SBOE. (SAC at 18).

QUESTIONS PRESENTED

1. Whether Plaintiffs have standing to sue when they have failed to allege the requisite representational standing and their alleged injuries are speculative grievances and unrelated to traditional remediable harms.

2. Whether Plaintiffs have sufficiently alleged that Section 163-19 violates the First Amendment when Board members are policymakers for whom partisan affiliation is an appropriate consideration for selection.

3. Whether Plaintiffs have sufficiently alleged that Section 163-19 violates the Equal Protection Clause when it does not burden a fundamental right or discriminate against a protected class and is rationally related to a legitimate government interest.

STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of proving subject matter jurisdiction. *Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir. 1999). "Without jurisdiction the court cannot proceed at all in any cause." *Stop Reckless Econ. Instability Caused By Democrats v. FEC*, 814 F.3d 221, 228 (4th Cir. 2016) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)).

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). To survive a 12(b)(6) motion, a complaint must contain facts sufficient "to raise a right to relief above the speculative level" and satisfy the court that the claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

Facial challenges to legislation are "generally disfavored." *United States v. Chappell*, 691 F.3d 388, 392 (4th Cir. 2012). A court must presume the statute is constitutional and may not strike it down if it may be upheld on any reasonable ground. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *United States v. Bollinger*, 798 F.3d 201, 207 (4th Cir. 2015); *see also Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 539 (2002) ("In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground.").

"To succeed in a typical facial attack, [a party] would have to establish 'that no set of circumstances exists under which [a statute] would be valid,' or that the statute lacks

any 'plainly legitimate sweep.'" *Chappell*, 691 F.3d at 394 (*quoting United States v. Stevens*, 559 U.S. 460, 472 (2010)).

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ALLEGE THE REQUISITE REPRESENTATIONAL STANDING AND THEIR ALLEGED INJURIES ARE TOO GENERALIZED, SPECULATIVE, AND CONJECTURAL TO CONSTITUTE AN INJURY-IN-FACT.

Plaintiffs purport to bring their claims on behalf of themselves, all of Common Cause's in-state members, and all other unaffiliated voters in the state. (*See* SAC ¶¶ 1-2, 4-13; *see also* SAC at 18). However, Plaintiffs do not have representational standing to seek representation on the Board on behalf of unaffiliated voters as a class. Moreover, Plaintiffs have failed to sufficiently allege a concrete and particularized injury that is traceable to the challenged conduct and is redressable by a favorable judicial decision.

A. Plaintiffs Lack Representational Standing.

A plaintiff must demonstrate standing "for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). And "[i]t is well settled that under Article III of the United States Constitution, a plaintiff must establish that a 'case or controversy' exists 'between himself and the defendant' and 'cannot rest his claim to relief on the legal rights or interests of third parties.'" *Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007).

Plaintiffs are unaffiliated voters who allege that they are "ready" and "willing" to serve on the Board, but Section 163-19 bars them from doing so. (SAC ¶ 3). They purport to bring this suit on behalf of themselves and all other unaffiliated voters in the State.

However, Plaintiffs do not have the right to seek relief on behalf of unaffiliated voters as a class.

Indeed, for Plaintiffs to seek an order for the Board to include members who are unaffiliated voters, they must show that unaffiliated voters, as a class, share their goal in this litigation. But by their very nature, unaffiliated voters have not come together to espouse common goals, much less to seek "representation" on boards of elections. *See Pirincin v. Bd. of Elections of Cuyahoga Cty.*, 368 F. Supp. 64, 72 (N.D. Ohio), *aff'd*, 414 U.S. 990 (1973) ("[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."). Courts generally refuse to extend standing to litigants seeking relief on behalf of a large class of people whom the litigants cannot show they actually represent. *See* Charles A. Wright, *et al.*, 13A Fed. Prac. & Proc. Juris. §3531.9.5 n. 70-71 (3d ed., April 2019 update).

In this case, North Carolina's registered unaffiliated voters are not a "discrete, stable group of persons with a definable set of common interests." *Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 90 (D.C. Cir. 1987). Most unaffiliated voters reliably support either Democrats or Republicans, while some split their ballots. *See* Michael Bitzer, *Generational Partisanship*, Old North State Politics (Feb. 27, 2018) (finding "independent 'leaners' aren't really all that independent in their vote choices" and "demonstrate as much partisan loyalty as their fellow partisans").

Given these circumstances, there is no way to discern whether Plaintiffs are

representing the interests of all the State's unaffiliated voters.[2] Plaintiffs cannot show that their interests are sufficiently aligned with the State's unaffiliated voters to permit them to seek proportional representation for unaffiliated voters on the Board. *See Am. Legal Found.*, 808 F.2d at 90. Accordingly, Plaintiffs lack representational standing to bring this suit.

B. Plaintiffs Cannot Establish Article III Standing Because They Lack a Concrete Injury-in-Fact.

"To invoke federal jurisdiction, a plaintiff bears the burden of establishing" the three required elements of Article III standing. *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017). These elements are:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005). Standing is a question of the Court's subject matter jurisdiction. *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019).

The Supreme Court's "standing decisions make clear that 'standing is not dispensed

---

[2] Plaintiff Common Cause lacks standing because, as an organization, it cannot serve on the State Board under any circumstances. Moreover, it has not shown that the absence of unaffiliated voters on the State Board has harmed it in any way. "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 [overturned] or a social goal furthered." *Am. Legal Found.*, 808 F.2d at 92.

in gross.'" *Town of Chester, N.Y.*, 137 S. Ct. at 1650 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). In other words, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.*

Plaintiffs bear the burden of establishing the elements of standing and must support each element with sufficient factual allegations. *White Tail*, 413 F.3d at 458. The injury must be both concrete *and* particularized. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical." *Beck*, 848 F.3d at 270 (citation and quotations omitted); *see also Spokeo,* 136 S. Ct. at 1548 ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'").

Particularization requires that the plaintiff "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). A generalized grievance common to all members of the public is insufficient. *United States v. Richardson*, 418 U.S. 166, 176-80 (1974); *see also Spokeo*, 136 S. Ct. at 1548 (collecting cases).

Here, Plaintiffs allege only speculative, generalized harms rather than "concrete and particularized injur[ies] that [are] fairly traceable to the challenged conduct, and [are] likely to be redressed by a favorable judicial decision." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). Plaintiffs allege that they are "interested in serving," willing to serve," and "would like to serve" on the Board. (SAC ¶¶ 5, 9, 11, 13). These allegations about some possible

future "intentions do not support a finding of the actual or imminent injury that our cases require." *Carney*, 141 S. Ct. at 502.

Other than alleging a generalized, vague interest in serving on the Board, Plaintiffs have alleged nothing that would differentiate them from the millions of other registered, unaffiliated voters. That is insufficient to show standing. For example, Plaintiffs have not alleged that they have sought local election board positions for which they are eligible. Nor have they alleged that they would have been nominated (and selected by the Governor) to serve on the Board if not for Section 163-19. Absent such allegations demonstrating a concrete, particularized injury, Plaintiffs lack standing to sue.

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE FIRST AMENDMENT.

Plaintiffs assert that Section 163-19 violates their First Amendment rights to freedom of speech and association because it requires affiliation with either of the two current major political parties in order to serve as an election administration official. (SAC ¶ 50). Plaintiffs' First Amendment allegations are not supported by the facts or the law, and therefore, the claim warrants dismissal.

A. The *Elrod/Branti* Test Determines Whether Partisan Affiliation Is an Appropriation Consideration for Appointment.

Appointments to elections boards fall under the Supreme Court's *Elrod/Branti* exception to the First Amendment. When governmental appointments based on partisan loyalty are challenged as violating the First Amendment, courts review such claims under an analytical framework established by the two Supreme Court cases that give the

framework its name: *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). 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).

This exception is designed to "give effect to the democratic process," by permitting political control over officials who carry out policymaking functions. *McCaffrey v. Chapman*, 921 F.3d 159, 164 (4th Cir. 2019); *see Powers v. Richards*, 549 F.3d 505, 509 (7th Cir. 2008) ("If these 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.").

The *Elrod/Branti* test involves a two-step inquiry: first, the court "must examine whether the position at issue relates to partisan political interests," *id.*, and if so, the court then "examine[s] the particular responsibilities of the position to determine whether it resembles...[an] office holder whose function is such that party affiliation is an equally appropriate requirement," *id.* (quoting *Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990)).

Importantly, the *Elrod/Branti* test is not an invitation for courts to heavily scrutinize a state's choice to allow partisanship to be considered for certain appointments. Instead, "the inquiry is whether the affiliation requirement is a reasonable one." *O'Hare Truck Service*, 518 U.S. at 719; *see id.* at 717 (requirement must be "reasonably appropriate").

As a matter of procedure, the *Elrod/Branti* exception is appropriate to determine a

motion to dismiss. *McCaffrey*, 921 F.3d at 168–69 & n.7. This is because whether the exception applies is an issue of law, *Jones v. Dodson,* 727 F.2d 1329, 1336 (4th Cir. 1984), and the analysis is based on the generic description of the position's duties that are set forth in law, *Waskovich v. Morgano*, 2 F.3d 1292, 1298 (3rd Cir. 1993).

B. Positions on the Board Are Policymaking Positions for Which Partisanship is an Appropriate Consideration.

The Board positions fall within the *Elrod/Branti* exception to the First Amendment because Board members are policymakers and partisan affiliation is an appropriate requirement for the position.[3]

The N.C. Supreme Court recently addressed these questions in a different context and held that executive control by the Governor is appropriate when it comes to election administration. In *Cooper v. Berger*, the state's high court held that the Governor must be able to exercise control over the Board because the Board has considerable discretion over policy. *See* 370 N.C. at 415 n.11, 809 S.E.2d at 112 n.11. The court explained that the legislature "did not . . . make all of the policy-related decisions" on election administration, but "[i]nstead...has delegated to the members of the [] State Board the authority to make numerous discretionary decisions." *Id.*

[3] Although the *Elrod/Branti* line of cases refers to "partisan political interests," *McCaffrey*, 921 F.3d at 165, this phrase does not suggest that the positions that fall under the exception are limited to those for which naked partisanship is acceptable. *See id.* at 168. Rather, the phrase refers to the need for a person in the position to "make policy-oriented decisions." *Id.* Accordingly, even for positions that require a degree of nonpartisanship, such as elections board members, political affiliation may still be an appropriate qualification. *See Peterson v. Dean*, 777 F.3d 334, 347–48 (6th Cir. 2015).

The court enumerated some of the Board's most significant policymaking functions, including adopting administrative rules and regulations, asserting jurisdiction over election-related protests pending before county boards, and setting the early voting locations and hours. *Id.* Finally, the court emphasized the appropriateness of executive, political control over these decisions by referring to these discretionary decisions as "the effectuation of the Governor's policy preferences." *Id.* (internal quotation marks omitted).

Various courts that have reviewed the appointment of election administrators under the *Elrod/Branti* exception have agreed that partisan interests are relevant to such positions. For instance, the Sixth Circuit applied the exception to staff-level elections administrators who are appointed by county elections boards in Tennessee. *See Peterson v. Dean*, 777 F.3d 334, 345 (6th Cir. 2015). In reaching this conclusion, the court looked beyond whether the county elections board members job titled indicated that they were policymakers and based its holding on the level of policymaking discretion that the local boards delegated to the administrators. *Id.* Several other courts have applied the exception to similar positions that carry out the same duties as North Carolina's Board. *See, e.g., Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 267 (6th Cir. 2010) (case involving county clerks who are responsible for "registering voters and performing other election-related duties"); *Millus v. D'Angelo*, 224 F.3d 137, 138 (2d Cir. 2000) (per curiam) (involving an elections day operations coordinator supervised by a local elections board); *Soelter v. King Cty.*, 931 F. Supp. 741, 744-45 (W.D. Wash. 1996) (involving a local "elections manager").

Here, the Board performs the same politically sensitive functions that were

determined to fall within the exception in the above cases. Indeed, the Board supervises all elections administration and implements redistricting. *See* N.C.G.S. §§163A-741(a), (g)–(h), -974(a), -1184(b). Moreover, the Board exercises greater policymaking discretion than the officials in the cases described above because it is responsible for investigating election misconduct, ordering recounts and new elections, hearing challenges to voters and candidates, and adjudicating election protests. *See infra* pp. 20-21.

In sum, the Board positions clearly fall within the *Elrod/Branti* exception to the First Amendment. First, the nature of the positions is policymaking and the positions relate to partisan political interests. Second, the Board's duties are analogous to other positions that have been held to fall under the exception and for which those courts have determined that partisan affiliation is an appropriate requirement.

Third, the Supreme Court in *Branti* singled out election judges as a paradigmatic example of a position that would fit within the exception to First Amendment liability, even though that position may not make policy. *See* 445 U.S. at 518. The Court held that bipartisan supervision of elections presents a special justification for partisan appointment, even apart from any policymaking duties of the position, because "party membership [is] essential to the discharge of the employee's governmental responsibilities." *Id.* Consequently, with respect to elections board members, where the same need for bipartisan supervision of elections is present *and* the position engages in policymaking, the justification for applying the *Elrod/Branti* exception is even stronger.

III. PLAINTIFFS FAIL TO STATE AN EQUAL PROTECTION CLAIM.

Similarly, Plaintiffs' SAC fails to state an equal protection claim. The Equal Protection Clause provides that no state may deny any person the equal protection of the law. U.S. Const., amend. 14, sec. 1. However, "laws are presumed to be constitutional under the equal protection clause for the simple reason that classification is the very essence of the art of legislation." *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citation and quotation omitted). If a statute targets a suspect class or involves a fundamental right, courts will apply a heightened level of scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 172 (4th Cir. 2000).

However, when a statute neither violates a fundamental right nor targets some protected class, such as race, religion, or gender, it is presumed valid and need only to be "related to a legitimate state interest." *City of Cleburne*, 476 U.S. at 440. Plaintiffs bear the burden of demonstrating that the statute is not a rational means of advancing a legitimate governmental purpose. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

Plaintiffs' claim necessarily fails because there is no fundamental right to serve on an administrative board overseeing elections, and the law being challenged does not draw a distinction based on a suspect classification. First, unaffiliated voters are not a protected class. *See, e.g.*, *Greenville Cty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 669 (D.S.C. 2011) (noting that unaffiliated voters, much like voters who affiliate with a political party, are not a suspect class for the purposes of equal protection

analysis). Second, the State has several legitimate reasons for appointing representatives of the two main political parties to election boards.

A. Plaintiffs' Equal Protection Claim is Subject to Rational Basis Review.

A law that is challenged on equal protection grounds is subject to rational basis review unless it makes suspect classifications or infringes on a fundamental right. *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012). The rational basis standard is "quite deferential" and "simply requires courts to determine whether the classification in question is, at a minimum, rationally related to legitimate governmental goals." *Wilkins v. Gaddy*, 734 F.3d 344, 347-48 (4th Cir. 2013). "Under this deferential standard, the plaintiff bears the burden 'to negate every conceivable basis which might support' the legislation." *Giarratano*, 521 F.3d at 303; *Armour*, 566 U.S. at 681. A statute will satisfy rational basis review "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Plaintiffs allege that Section 163-19 violates equal protection because it 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 Board of Elections" and prevents them from participating "equally in the supervision, management, and administration of elections" in the State. (SAC ¶ 59). However, as previously noted, unaffiliated voters are not a suspect class. In addition, there is no fundamental right to be considered for (or appointed to) a position on an election board.

See Snowden v. Hughes, 321 U.S. 1, 7 (1944) (concluding that "denial by state action of a right to state political office" is not a denial of a property or liberty interested protected by the constitution); *Werme v. Merrill*, 84 F.3d 479, 484 (1st Cir. 1996) ("There is simply no abstract constitutional right to be appointed to serve as an election inspector or ballot clerk."); *see also Penny v. Salmon*, 217 N.C. 276, 279, 7 S.E.2d 559, 561 (1940) ("The right of plaintiff to stand for election to an office is a political privilege and not inalienable, and certainly when a different method of selection has been provided...the fact that his aspiration has been thwarted by a nondiscriminatory change of the law gives him no cause of action."); *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016) (no constitutional right to serve as a poll watcher).

Plaintiffs attempt to overcome this hurdle by framing their right to be considered for appointment to the Board as an extension of their fundamental right to vote. (SAC ¶ 58). However, the fundamental right to vote has never been extended so far as to ensure that every registered voter has a constitutional right to be selected to a state administrative body that oversees elections. Indeed, the Supreme Court has rejected similar attempts to broaden the fundamental right to vote to encompass activities that are not strictly necessary for the exercise of the franchise. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

In *San Antonio*, the plaintiff argued that voters had a fundamental right to an adequate education in order to participate meaningfully in elections. *Id.* at 35-36. The Court recognized that having an informed electorate is a laudable policy goal, but that such goals

are not to be "implemented by judicial intrusion into otherwise legitimate state activities." *Id.* at 36. The Court construed the right to vote to encompass the actual exercise of the franchise, holding that it "ha[s] never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice." *Id.*

Similarly, in *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999), the Sixth Circuit rejected an attempt to apply heightened scrutiny to a state's qualifications for appointment to a local school board. The Sixth Circuit held that the qualifications "do not impinge on the right to vote." *Id.* at 403. The court explained that the analysis is straightforward as to whether the fundamental right to vote is implicated: "If the challenged legislation grants the right to vote to some residents while denying the right to others, then we must subject the legislation to strict scrutiny .... If the legislation, however, does not infringe on the right to vote, we examine the challenged statute under the rational basis standard." *Id.* at 402 (internal citations omitted); *see also Libertarian Party v. Wilhem*, No. 2:19-cv-02501, 2020 U.S. Dist. LEXIS 5176 at *13-14 (S.D. Ohio Jan. 13, 2020) (determining that an Ohio law that restricts appointment to the board of elections to the two major parties in the state was nondiscriminatory and subject to rational basis review).

The Eleventh Circuit also rejected a request to construe all elections-related legislation as directly affecting the right to vote. *See Harris v. Conradi*, 675 F.2d 1212, 1216 (11th Cir. 1982). The court in that case held that the appointment of more Democrats than Republicans as elections administrators did not implicate the right to vote. *Id.* The

court explained, "[i]n attempting to prove a state infringement of the constitutionally protected right to vote, it is not enough merely to show facts related to the management of elections and then allege a violation of the [F]ourteenth [A]mendment." *Id.* Rather, the court noted, an aggrieved party must go further and demonstrate how these facts cause an impairment of that right. *Id.* Plaintiffs have completely failed to do so in this case.

In sum, because Section 163-19 does not involve either suspect classifications or fundamental rights, Plaintiffs' equal protection claim is subject to rational basis review.

B. Section 163-19 is Rationally Related to Legitimate State Interests.

Under rational basis review, a law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Courts do not "judge the wisdom, fairness, or logic of legislative choices." *Id.* at 319 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Instead, a law's classification "is accorded a strong presumption of validity." *Id.* The State, moreover, "has no obligation to produce evidence to sustain the rationality of a statutory classification," and the State's rationale "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 320 (citation omitted). The plaintiff has the burden "to negative every conceivable basis which might support" the challenged law. *Id.*

The Supreme Court has held that the determination of qualifications for public office holders—whether elected or appointed—is a power that "inheres in the State" as a matter of constitutional law. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). This includes

the authority "to prescribe the duties and qualifications of persons who work at the polls, and the manner in which they will be selected." *Werme*, 84 F.3d at 483.

In exercising this inherent authority, North Carolina's choice to ensure bipartisan representation on state and county elections boards has many rational justifications.

1. *The State has a legitimate interest in safeguarding the integrity of the electoral process.*

Courts have long recognized that the states have a legitimate interest in securing "the integrity of the electoral process." *Storer v. Brown*, 415 U.S. 724, 731 (1974) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)); *see also 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.

Indeed, 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. These tasks include:

- Enforcing election law compliance among county boards and removing county board members for neglect of duties or fraud, N.C.G.S. §163A-741(c);
- Investigating "fraud and irregularities" in elections, *id.* §163A-741(d);
- Accessing the contents of ballot boxes and voting machines, *id.* §163A-741(j);
- Tabulating election returns, declaring results, and certifying elections, *id.* §§163A-741(h), -1184(b);
- Ordering recounts and new elections, *id.* §§163A-1174(a), 163A-1181;

- Hearing challenges to a candidate's right to appear on the ballot, *id.* §163A-1027(3); and
- Adjudicating election protests, *id.* §§163A-1179(b), -1180.

Accordingly, state law places significant responsibility in the hands of the Board. Including representatives on these boards from the dominant opposing political parties helps to prevent either party from seizing control of elections administration and abusing that power to influence elections. *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"). The bipartisanship requirement makes it difficult, for example, for members of an elections board to engage in secretive conduct, or to capriciously adjudicate voter challenges or election protests because the opposing party will be participating in the proceedings. *See 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").

Although one can make policy arguments about the desirability of other board structures, rational basis review does not require the State to select Plaintiffs' preferred method of addressing a particular governmental purpose, only a rational one. After all, states must balance competing policy priorities when drafting laws. *Accord Werme*, 84 F.3d at 486; *Baer*, 728 F.2d at 476; *Pirincin*, 368 F. Supp. at 72.

2. *Section 163-19 promotes public confidence in the electoral process.*

Similarly, the bipartisan appointments requirement promotes public confidence in

elections, which the Supreme Court has recognized to be a legitimate state interest. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008). Like other States, North Carolina is dominated by two political parties. *See Timmons v. Twin Cities Area New Party*, 502 U.S. 351, 367 (1997); *Libertarian Party v. State*, 365 N.C. 41, 44 (2011). Accordingly, when citizens of North Carolina vote, millions support candidates from the Republican Party, and millions support candidates from the Democratic party. When one party's candidate loses, the supporters of that candidate can be assured that the election results were not tainted by fraudulent election administration because that candidate's party participated in the administration of the election. *See, e.g.*, *Green Party v. Weiner*, 216 F. Supp. 2d 176, 195 (S.D.N.Y. 2002) (recognizing that it is entirely reasonable for New York to conclude that dividing responsibility over elections between the two major/main political parties furthers stability and avoids conflicts over the election process).

The State has a strong interest in ensuring that the public has the utmost confidence in the electoral process. Our democratic system requires peaceful transfers of power following elections. That can only happen if the public has faith in the process. Public confidence in elections also promotes participation in the voting process. *See Crawford*, 553 U.S. at 197.

For these reasons, North Carolina has a rational justification for appointing representatives of the main opposing political parties to administer elections.

3. *Section 163-19 promotes the efficient administration of elections.*

The bipartisan appointment process also promotes the efficient administration of

elections, another well-established legitimate state interest. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972) (recognizing that "the State understandably and properly seeks to prevent the clogging of its election machinery").

For example, in *Werme*, the First Circuit recognized New Hampshire's efficiency justification for limiting election official appointments to the two main political parties. *See* 84 F.3d at 486. The court reasoned, "[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 acknowledged the administrative efficiency rationale with regard to bipartisan elections board appointments. *Pirincin*, 368 F. Supp. at 72.

Similarly, in this case, North Carolina determined that limiting appointments to the Board to affiliates of the dominant political parties helps to promote the efficient election administration, which is a legitimate state interest.

Because there are various legitimate rationales for the bipartisan appointment law, Plaintiffs' SAC fails to state a claim for an equal protection violation.

CONCLUSION

For all the foregoing reasons, Governor Cooper respectfully requests that the Court dismiss Plaintiffs' Second Amended Complaint and grant any other relief the Court deems proper.

Respectfully submitted, this 9th day of May, 2023.

JOSHUA H. STEIN
Attorney General

/s/ Matthew Tulchin
Matthew Tulchin
Special Deputy Attorney General
N.C. State Bar No. 43921
Email: mtulchin@ncdoj.gov

Amar Majmundar
Senior Deputy Attorney General
N.C. State Bar No. 24668
E-mail: amajmundar@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6900
Facsimile: (919) 716-6761

Attorneys for Governor Cooper

CERTIFICATE OF COMPLIANCE WITH RULE 7.3(d)

Undersigned counsel certifies that the present filing is in compliance with Local Rule 7.3(d) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina including the body of the brief, heading and footnotes, and contains no more than 6,250 words as indicated by Word, the program used to prepare the brief.

Respectfully submitted this the 9th day of May, 2023.

/s/ Matthew Tulchin
Matthew Tulchin
Special Deputy Attorney General