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 REPLY TO RESPONSE TO MOTION TO DISMISS**

NOW COMES Defendant ROY A. COOPER, III, Governor of North Carolina, in his official capacity (hereinafter "the Governor"), by and through undersigned counsel, and hereby files this reply to Plaintiffs' response to the Governor's motion to dismiss.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO SUE GOVERNOR COOPER.

In his opening brief, Governor Cooper explained that the absence of an injury-in-fact and suitable representational status reveals Plaintiffs' lack of standing to sue in this matter. Plaintiffs dispute those arguments by first claiming that they have shown injury-in-fact because their claims are not speculative, and second, that Common Cause has standing

to sue on behalf of its registered unaffiliated members pursuant to *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977). Plaintiffs are mistaken.

First, because unaffiliated voters are not a discrete bloc of individuals with a "particular viewpoint, associational preference, or economic status," their First Amendment association rights cannot be burdened as unaffiliated voters do not share the political views necessary to "associate." *See Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). Second, and by extension, Common Cause cannot represent their members who are unaffiliated voters in a facial challenge because those members lack a shared ideology or set of common interests and are not a defined group whose members will accrue some benefit from the relief sought by Common Cause. Consequently, Common Cause cannot appropriately assume representational status, and under *Hunt*, cannot sue on behalf of unaffiliated voters.

Moreover, even if Plaintiffs could somehow demonstrate an injury-in-fact, they still do not have standing to sue Governor Cooper because he lacks authority under the statute to grant the relief that Plaintiffs seek. Specifically, Section 163-19 prescribes that the chairs of the two largest political parties, not Governor Cooper, compile the lists of party-affiliated candidates from which the Governor may appoint State Board members. *Id.* at § 163-19(b). Because the statute limits Governor Cooper to simply appointing Board members from the list of candidates submitted to him by the party chairs, he is unable to provide the demanded remedy, and should therefore be dismissed from this action.

II. PLAINTIFFS FAIL TO ARTICULATE A VIABLE FIRST AMENDMENT CLAIM.

A. *Elrod-Branti*, Not *Anderson-Burdick*, Controls Here Because Appointment to the State Board of Elections is Distinct from the Right to Vote.

In his brief in support of his motion to dismiss, the Governor noted that because this case deals with political affiliation requirements for government employment, the *Elrod-Branti* test applies. Despite *Elrod-Branti*'s clear applicability to the issue at the center of this case, Plaintiffs nevertheless insist that the *Anderson-Burdick* test for election laws should instead be utilized. (Pls.' Resp., Doc. 36, at 6). Again, Plaintiffs are mistaken.

First, the constitutionality of a statute governing appointments to public office is determined using the *Elrod-Branti* standard. Indeed, the *Elrod-Branti* test was designed to allow elected officials to ensure that their policies are carried out by appointees with common views. *See McCaffrey v. Chapman,* 921 F.3d 159, 164 (4th Cir. 2019); *see also Jones v. Dodson*, 727 F.2d 1329, 1336 (4th Cir. 1984).

Second, contrary to Plaintiffs' assertion, this case involves neither voter franchise rights, nor a candidate's ability to be represented on the ballot. Rather, this case centers upon the criteria and qualifications that govern potential candidate appointments to the State Board of Elections. Accordingly, that narrow issue falls outside the scope of the *Anderson-Burdick* test, which is used to evaluate regulations on the right to vote. *See Burdick v. Takushi,* 504 U.S. 428, 438–39 (1992) (ban on write-in ballots); *Anderson*, 460 U.S. at 790 (early filing deadlines); *Wash. State Grange v. Wash. State Republican Party*,

552 U.S. 442, 451–52 (2008) (blanket primaries). Stated another way, the *Elrod-Branti* test for patronage is the operative governing principle for this case.

B. Section 163-19 Is Constitutional Under Either Test.

Regardless of whether the Court applies *Elrod-Branti* or accepts Plaintiffs' argument that *Anderson-Burdick* controls, Section 163-19 survives constitutional scrutiny. As noted in the Governor's opening brief, Section 163-19's party affiliation requirement comfortably passes constitutional muster under *Elrod-Branti* because members of the State Board are primarily policymakers for whom political affiliation is a legitimate requirement.

Section 163-19 also withstands the more stringent *Anderson-Burdick* standard because the statute's burden on Plaintiffs' constitutional rights is nonexistent and the qualification requirements for appointment to the State Board is reasonable. Under *Anderson-Burdick*, courts considering a challenge to a state election law must balance "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden." *Burdick*, 504 U.S. at 434.

Additionally, because voting regulations are necessary, *Burdick* created a sliding scale of scrutiny under which "severely" burdensome regulations must meet strict scrutiny, while "reasonable" ones are subject to a lower level of scrutiny. *See id.* More importantly, as the Supreme Court explained in *Burdick,* "the mere fact that a State's system creates barriers tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny." *Burdick,* 504 U.S. at 434 (internal quotations omitted). Furthermore, imposing qualifications for who may serve on the State Board – particularly

when there are good reasons for doing so – is far less burdensome than rules limiting who may be a candidate, which was the issue in *Burdick.*

Applying the *Anderson-Burdick* test first involves identification of the constitutional right which has been burdened. Thereafter, courts make a determination of whether the burden is "severe" enough to warrant strict scrutiny, or "reasonable" enough for lower scrutiny. The court then must consider the state interest justifying the regulation and assess whether that state interest satisfies the appropriate level of scrutiny.

In their response, Plaintiffs insist that their First Amendment right to free association—in the form of their right to register as unaffiliated voters—is burdened by the statute. (Pls.' Resp., Doc. 36 at 10). However, the statute makes no impact upon their right to register as unaffiliated voters, to vote unaffiliated, or to run for elected office while unaffiliated to any party. Instead, to the extent the statute hinders any right, it is the right to be appointed to the State Board of Elections. Even then, however, there exists no constitutional right to hold public office. *See, e.g., Snowden v. Hughes*, 321 U.S. 1, 7 (1944). Therefore, because Section 163-19 does not impede the ability to exercise the franchise or run for elected office, the statute's burden on Plaintiffs' constitutional rights is, at most, *de minimis*.

Even if it is assumed that the statue does burden Plaintiffs' right to associate for political purposes, the minimal burden is reasonable.[1] Indeed, as detailed in the Governor's

[1] The same source plaintiffs cite for the proposition that *Anderson-Burdick* should apply to appointment criteria for state boards concludes that entities with structures like the North Carolina State Board of Elections do not burden associational rights to "the high level of severity" required for strict scrutiny under *Anderson-Burdick*. *See* Andrew C.

opening brief, there are a litany of legitimate government interests furthered by the statute. (Defendant's Mot. to Dismiss, Doc. 35, at 20–21). For example, the statute protects against political abuses by preventing a single party from seizing control of the Board. This reason alone is sufficient to meet the rational basis standard required under *Anderson-Burdick*. Consequently, and despite their contrary contentions, the statute simply does not burden Plaintiffs' constitutional rights under *Anderson-Burdick*, and even if it did, that minimal level of hinderance manifestly passes the requisite level of means-ends scrutiny.

C. Plaintiffs' Ballot Access Cases are Inapplicable Here Because Unaffiliated Voters are Not a Political Party.

In support of their arguments that strict scrutiny should apply in this case, Plaintiffs rely on ballot access cases that describe the support thresholds for new political parties to appear on the ballot. Plaintiffs argue that unaffiliated voters are like a third political party and, therefore, entitled to eligibility for State Board service. (Pls.' Resp., Doc. 36 at 14). This argument fails for two main reasons: (1) unaffiliated voters are not a political party, and (2) the right to appear on the ballot is fundamentally different than the right to be appointed to a state board.

First, Plaintiffs argue that "if unaffiliated voters were treated like a third party, they would have passed the point of deserving recognition—and representation on the State Board—many years ago." (Pls.' Resp., Doc. 36, at 15). Yet, likening unaffiliated voters to

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Maxfield, *Litigating the Line Drawers: Why Courts Should Apply Anderson-Burdick to Redistricting Commissions*, 87 U. Chi. L. Rev. 1845, 1888 (2020).

a third political party is clearly misplaced because a collection of disparate unaffiliated voters does not constitute a third political party.

Indeed, unaffiliated voters do not have a party organization, nor do they field candidates for office. They are not an "identifiable political group" that share a "particular viewpoint, associational preference, or economic status" that the Supreme Court has defined as groups worthy of protection under the ballot-access cases. *See Anderson*, 460 U.S. at 793. A diffuse population of voters whose only common trait is a *lack* of political affiliation is a far cry from a political party and is insufficient to legitimately claim entitlement to party status. *See, e.g.*, *Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 90 (D.C. Cir. 1987) ("In this case, North Carolina's registered unaffiliated voters are not a 'discrete, stable group of persons with a definable set of common interests.'").

Second, the ballot access cases are inapplicable here because ballot access is distinct from eligibility for appointment to a public office. Unlike the right to vote or to run for public office, there is no right to be appointed to a government office. *See Snowden,* 321 U.S. at 7.

III. PLAINTIFFS BEAR THE BURDEN OF PERSUASION FOR FACIAL CHALLENGES, MAKING DISMISSAL AT THE PLEADING STAGE APPROPRIATE.

Finally, plaintiffs argue that dismissal of their claims at the pleading stage is inappropriate because strict scrutiny places the burden of persuasion on the government. (Pls.' Resp., Doc. 36, at 14). This argument is wholly without merit. First, as explained above, strict scrutiny does not apply to political appointment cases. *See Burdick*, 504 U.S. at 434. Second, the burden of proving a facial constitutional challenge lies with the

challenger, making dismissal for plaintiffs' failure to state a cognizable claim appropriate at this stage.[2]

CONCLUSION

For all the foregoing reasons, and for all the reasons detailed in the Governor's opening brief, plaintiffs do not have standing to bring this action, and they have failed to plead a valid claim for relief under the First or Fourteenth Amendments.

WHEREFORE, Governor Cooper respectfully requests that this Court grant his Motion to Dismiss, enter an order dismissing Plaintiffs' action with prejudice, and grant such other and further relief as it deems proper.

Respectfully submitted, this 13th day of June, 2023.

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[2] Plaintiffs must show 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).

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 reply brief, heading and footnotes, and contains no more than 3,125 words as indicated by Word, the program used to prepare the brief.

Respectfully submitted this the 13th day of June, 2023.

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