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.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.

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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Attorneys for Defendant Cooper

This the 31st day of March, 2023.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas

EXHIBIT A

(b) The persons whose terms expire in 2017 shall continue to serve until 2018. In ~~the 1985 municipal election,~~ 2018 and biennially thereafter, the two persons receiving the highest numbers of votes shall be elected to four-year terms on the board of ~~commissioners. The three persons~~ commissioners, and the person receiving the next highest ~~numbers~~ number of votes shall be elected to a two-year ~~terms~~ term on the board of commissioners.

(c) The persons whose terms expire in 2019 shall continue to serve until 2020. In ~~1987~~ 2020, and biennially thereafter, the two persons receiving the highest numbers of votes shall be elected to four-year terms on the town board of commissioners, and the person receiving the next highest number of votes shall be elected to a two-year term on the board of commissioners.

(d) Elections in the Town of East Bend shall be governed by Chapter 163 of the General Statutes. Elections shall be conducted and the results shall be determined using the nonpartisan plurality method set out in Section 163-292 of the General Statutes."

SECTION 4. No elections shall occur in the Towns of Jonesville, Boonville, or East Bend in 2017. Municipal elections shall next occur in the Towns of Jonesville, Boonville, and East Bend in 2018.

SECTION 5. This act is effective when it becomes law and applies to elections held on or after that date.

In the General Assembly read three times and ratified this the 27th day of June, 2017.

Session Law 2017-57 **S.B. 257**

AN ACT TO MAKE BASE BUDGET APPROPRIATIONS FOR CURRENT OPERATIONS OF STATE DEPARTMENTS, INSTITUTIONS, AND AGENCIES, AND FOR OTHER PURPOSES.

The General Assembly of North Carolina enacts:

PART I. TITLE OF ACT AND INTRODUCTION

TITLE OF ACT

SECTION 1.1. This act shall be known as the "Current Operations Appropriations Act of 2017."

INTRODUCTION

SECTION 1.2. The appropriations made in this act are for maximum amounts necessary to provide the services and accomplish the purposes described in the budget in accordance with the State Budget Act. Savings shall be effected where the total amounts appropriated are not required to perform these services and accomplish these purposes, and the savings shall revert to the appropriate fund at the end of each fiscal year, except as otherwise provided by law.

PART II. CURRENT OPERATIONS AND EXPANSION GENERAL FUND

CURRENT OPERATIONS AND EXPANSION/GENERAL FUND

SECTION 2.1. Appropriations from the General Fund of the State for the maintenance of the State departments, institutions, and agencies, and for other purposes as enumerated, are made for the fiscal biennium ending June 30, 2019, according to the following schedule:

Current Operations – General Fund	**FY 2017-2018**	**FY 2018-2019**
EDUCATION		
Community Colleges System Office	$ 1,121,815,001	$ 1,141,757,845
Department of Public Instruction	9,046,403,622	9,425,109,426
Appalachian State University	134,672,993	134,672,993

member was alleged to be acting within the course and scope of his office, employment, service, agency or authority, which was alleged to be a proximate cause of the injury or damage complained of, the Attorney General is hereby authorized to defend such employee through the use of a member of his staff or, in his discretion, employ private counsel, subject to the provisions of Article 31A of Chapter 143 of the General Statutes and ~~G.S. 147-17.~~ G.S. 147-17(a) through (c) and (d). Any judgment rendered as a result of said civil action against such member of the Highway Patrol or other State law-enforcement officer, for acts alleged to be committed within the course and scope of his office, employment, service, agency or authority shall be paid as an expense of administration up to the limit provided in the Tort Claims Act."

SECTION 6.7.(e) G.S. 143B-30.1(g) reads as rewritten:

"(g) In the discretion of the Commission, G.S. 114-2.3 and G.S. 147-17(a) through ~~(e)~~ (c1) shall not apply to the Commission if the Commission is being sued by another agency, institution, department, bureau, board, or commission of the State, whether such body is created by the Constitution or by statute. The chairman, upon approval of a majority of the Commission, may retain private counsel to represent the Commission to be paid with available State funds to defend such litigation either independently or in cooperation with the Department of Justice. If private counsel is to be so retained to represent the Commission, the chairman shall designate lead counsel who shall possess final decision-making authority with respect to the representation, counsel, or service for the Commission. Other counsel for the Commission shall, consistent with the Rules of Professional Conduct, cooperate with such designated lead counsel."

SECTION 6.7.(f) G.S. 143C-6-9 reads as rewritten:

"**§ 143C-6-9. Use of lapsed salary savings.**

(a) Lapsed salary savings may be expended only for nonrecurring purposes or line items.

(b) Lapsed salary savings shall not be used to pay for litigation services provided by private counsel. As used in this subsection, litigation services and private counsel are as defined in G.S. 147-17(c1) and G.S. 114-2.3(d)."

SECTION 6.7.(g) G.S. 120-32.6(a) reads as rewritten:

"(a) Use of Private Counsel. – ~~G.S. 114-2.3 and G.S. 147-17~~ G.S. 114-2.3, 143C-6-9(b), and 147-17 (a) through ~~(e)~~(c1) shall not apply to the General Assembly."

SECTION 6.7.(h) G.S. 116-11 is amended by adding a new subdivision to read:

"**§ 116-11. Powers and duties generally.**

The powers and duties of the Board of Governors shall include the following:

…

(13b) Subject to the approval required in G.S. 114-2.3(a) and G.S. 147-17(a), the Board may authorize the expenditure of funds to hire private counsel to represent the Board, The University of North Carolina, and any constituent institution. G.S. 114-2.3(d), 143C-6-9(b), and 147-17(c1) shall not apply to these expenditures.

…."

SECTION 6.7.(i) G.S. 1-72.2 reads as rewritten:

"**§ 1-72.2. Standing of legislative officers.**

(a) It is the public policy of the State of North Carolina that in any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina. It is the public policy of the State of North Carolina that in any action in any federal court in which the validity or constitutionality of an act of the

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

(b) The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice, including private counsel, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution. ~~The procedure for interventions at the trial level in State court shall be that set forth in Rule 24 of the Rules of Civil Procedure. The procedure for interventions at the appellate level in State court shall be by motion in the appropriate appellate court or by any other relevant procedure set forth in the Rules of Appellate Procedure.~~Intervention pursuant to this section shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding. Notwithstanding any other provision of law to the contrary, the participation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate in any action, State or federal, as a party or otherwise, shall not constitute a waiver of legislative immunity or legislative privilege of any individual legislator or legislative officer or staff of the General Assembly."

SECTION 6.7.(j) G.S. 1A-1, Rule 19, is amended by adding a new subsection to read:

"(d) Necessary Joinder of House of Representatives and Senate. – The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law."

SECTION 6.7.(k) G.S. 1A-1, Rule 24(c), reads as rewritten:

"(c) Procedure. – A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure. Intervention as of right by both the Speaker of the House of Representatives and the President Pro Tempore of the Senate pursuant to G.S. 1-72.2 shall be effected upon the filing of a notice of intervention of right in the trial or appellate court in which the matter is pending regardless of the stage of the proceeding."

SECTION 6.7.(*l*) G.S. 120-32.6, as amended by subsection (g) of this section, reads as rewritten:

"**§ 120-32.6. Certain employment authority.**

(a) Use of Private Counsel. – G.S. 114-2.3, 143C-6-9(b), and 147-17(a) through (c1) shall not apply to the General Assembly.

(b) General Assembly ~~as Client of Attorney General by Operation of Law.~~ Acting on Behalf of the State of North Carolina in Certain Actions. – Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, ~~if the General Assembly hires outside counsel to represent the General Assembly in connection with that action, the General Assembly shall also be~~ the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties and shall be deemed to be a client of the Attorney General for purposes of that action as

a matter of ~~law. Nothing herein shall (i) impair or interfere with the rights of other named parties to appear in and to be represented by the Attorney General or outside counsel as authorized by law or (ii) impair the right of the Governor to employ counsel on behalf of the State pursuant to G.S. 147-17.~~ law and pursuant to Section 7(2) of Article III of the North Carolina Constitution. In such cases, the General Assembly shall be deemed to be the State of North Carolina to the extent provided in G.S. 1-72.2(a) unless waived pursuant to this subsection. Additionally, in such cases, the General Assembly through the Speaker of the House of Representatives and President Pro Tempore of the Senate jointly shall possess final decision-making authority with respect to the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution. In any such action, the General Assembly, through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, may waive such representation and decline to participate in the action by written notice to the Attorney General.

(c) General Assembly Counsel Shall Be Lead Counsel. – In those instances when the General Assembly employs counsel in addition to or other than the Attorney General, the Speaker of the House of Representatives and the President Pro Tempore of the Senate may jointly designate the counsel employed by the General Assembly as lead counsel ~~for the General Assembly.~~ in the defense of the challenged act of the General Assembly or provision of the North Carolina Constitution. The lead counsel so designated shall possess final decision-making authority with respect to the representation, counsel, or service for the General Assembly. Other counsel for the General Assembly shall, consistent with the Rules of Professional Conduct, cooperate with such designated lead counsel.

(d) The rights provided by this section shall be supplemental to those provided by any other provision of law.

(e) Notwithstanding any other provision of law, the participation of the Speaker of the House of Representatives and the President Pro Tempore of the Senate in any action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law, as a party or otherwise, shall not constitute a waiver of legislative immunity or legislative privilege of any individual legislator or legislative officer or staff of the General Assembly."

SECTION 6.7.(m) G.S. 114-2 reads as rewritten:

"**§ 114-2. Duties.**

~~It~~ Pursuant to Section 7(2) of Article III of the North Carolina Constitution, it shall be the duty of the Attorney General:

…

(9) To notify the Speaker of the House of Representatives and the President Pro Tempore of the Senate whenever an action is filed in State or federal court that challenges the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law.

(10) Pursuant to G.S. 120-32.6, to represent upon request and otherwise abide by and defer to the final decision-making authority exercised by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, in defending any State or federal action challenging the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution. If for any reason the Attorney General cannot perform the duty specified herein, the Attorney General may recuse personally from such defense but shall appoint another attorney employed by the Department of Justice to act at the direction of the Speaker of the House of Representatives and the President Pro Tempore of the Senate."

SECTION 6.7.(n) The President Pro Tempore of the Senate and the Speaker of the House of Representative continue to have the authority to represent and articulate the

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JAMES R. ADAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 20-1680-MN
	)	
THE HON. JOHN CARNEY, Governor of the State of Delaware,	)	
	)	
Defendant.	)	

STIPULATED CONSENT JUDGMENT AND ORDER

The Court, upon the consent and request of Plaintiff James R. Adams ("Plaintiff") and Defendant The Honorable John C. Carney ("Governor Carney"), hereby issues the following Stipulated Consent Judgment and Order:

STIPULATIONS OF THE PARTIES

1. Article IV, Section 3 of the Delaware Constitution grants to the Governor of the State of Delaware, subject to the consent of the Senate of the State of Delaware, the power to appoint certain judicial officers:

> The Chief Justice and Justices of the Supreme Court, the Chancellor and Vice-Chancellors of the Court of Chancery, the President Judge and Judges of the Superior Court, the Chief Judge and Judges of the Family Court, the Chief Judge and Judges of the Court of Common Pleas, and the Chief Magistrate of the Justice of the Peace Court shall be appointed by the Governor, by and with the consent of a majority of all the members elected to the Senate, for a term of 12 years each, and the persons so appointed shall enter upon the discharge of the duties of their respective offices upon taking the oath of office prescribed by this Constitution.

2. Article IV, Section 3 of the Delaware Constitution sets forth several paragraphs that impose limitations on the party affiliation of candidates for judicial office. Three of those paragraphs are listed below.

> First, three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party.
>
> Second, at any time when the total number of Judges of the Superior Court shall be an even number not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.
>
> Third, at any time when the total number of the offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors shall be an even number, not more than one-half of the members of all such offices shall be of the same major political party; and at any time when the total number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party; the remaining members of the Courts above enumerated shall be of the other major political party.

3. These paragraphs impose two different types of limitations on the appointment power of the Governor of the State of Delaware. The first will be referred to herein as the "bare majority" requirement. As set forth in paragraph "First" and paragraph "Second" listed above, for both the Delaware Supreme Court and the Delaware Superior Court, there cannot be more than a "bare majority" of judicial officers on those courts of the same political party. Additionally, as set forth in paragraph "Third," there cannot be more than a bare majority of judicial officers

from one political party in the total number of judicial officers on the Delaware Supreme Court, the Delaware Court of Chancery, and the Delaware Superior Court combined.

4. The second type of limitation on the appointment power of the Governor of the State of Delaware, set forth in the final clause of each of paragraphs First, Second and Third, above, provides that, in addition to the "bare majority" requirement, all other judicial officers on the Delaware Supreme Court, the Delaware Court of Chancery, and the Delaware Superior Court be of a "major political party." This second form of restriction will be referred to herein as the "major political party" restriction.

5. A "bare majority" requirement has been a part of the Delaware Constitution since 1897. The drafters of the 1897 Constitution included language aimed at ensuring that the judiciary "not be dominated by appointees of one political party." *See* Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., Judiciary Article IV, in *The Delaware Constitution of 1897: The First One Hundred Years* at 134 (1997). The Constitution as adopted in 1897 provided, at Article IV, Section 2, for the appointment of six State judges, consisting of one Chancellor, and five law judges, one of whom would be the Chief Justice:

> The said appointments shall be such that no more than three of the said five law judges, in office at the same time, shall have been appointed from the same political party.

6. The "major political party" restriction upon the Governor of the State of Delaware's ability to appoint judges was adopted by a constitutional amendment enacted by the Delaware Legislature in 1951. 48 Del. Laws, 116th, Chapter 109 (1951). Accordingly, the "bare majority" requirement was an element of the Delaware Constitution for more than fifty years before the addition of the "major political party" restriction that is imposed upon three of the courts by the final clause of each of paragraphs First, Second and Third of Article IV, Section 3.

7. Additionally, as set forth in two paragraphs in Article IV, Section 3 of the Constitution of the State of Delaware, following the paragraphs quoted above, a "bare majority" requirement is currently applicable to the Family Court and to the Court of Common Pleas, but without any corresponding "major political party" restriction.

8. On February 21, 2017, Plaintiff filed an action against Governor Carney in his official capacity as Governor of the State of Delaware, not in Governor Carney's individual capacity, challenging the constitutionality of both the "bare majority" requirements and the "major political party" restriction of the Delaware Constitution. The United States District Court for the District of Delaware and the United State Court of Appeals for the Third Circuit both issued rulings generally in favor of Plaintiff. *Adams v. Carney*, 2017 WL 6033650 (D. Del. Dec. 6, 2017), *aff'd in part, rev'd in part*, 922 F.3d 166 (3d Cir. 2019). On December 10, 2020, the United States Supreme Court held that Plaintiff lacked standing to challenge either provision of the Delaware Constitution. *Carney v. Adams,* 141 S.Ct. 493 (2020), *reversing* 922 F.3d 166 (3d Cir. 2019).

9. On December 10, 2020, Plaintiff brought this action against Governor Carney in his official capacity as Governor of the State of Delaware, not in the Governor Carney's individual capacity, challenging the constitutionality of the "major political party" restriction of the Delaware Constitution.

10. On September 23, 2022, the U.S. District Court for the District of Delaware denied Governor Carney's motion to dismiss for Plaintiff's lack of standing and the Court's lack of subject matter jurisdiction. *Adams v. Carney*, 2022 WL 4448196 (D. Del. Sept. 23, 2022).

11. Plaintiff in this action does not challenge or seek any judicial relief regarding the "bare majority" requirement for any court, because without a corresponding "major political

party" restriction, a "bare majority" requirement imposes no limit on the ability of the Governor of the State of Delaware to appoint more than a majority of applicants for judicial office to a particular court who are not members of one of the two major political parties; and the "bare majority" requirement, in the absence of the "major political party" restriction, does not place any limits on the number of applicants who are not members of a major political party who could be appointed to sit on any court subject to the "bare majority" requirement.

12. Governor Carney maintains that the State of Delaware has a vital and longstanding interest in avoiding partisan domination of its judiciary, and that the "bare majority" requirements of Article IV, Section 3 are narrowly tailored to serve that interest, and can operate to serve that interest without risk of violating the United States Constitution's protections afforded to candidates for judicial office affiliated with third parties or not affiliated with any political party. In this action, Plaintiff is not challenging that position of Governor Carney.

CONSENT JUDGMENT AND ORDER

Accordingly, based upon a review of the claims and defenses asserted in this action, and upon the Stipulations of the Parties set forth above, and upon consent and request of the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. This Court has subject matter jurisdiction over this action and personal jurisdiction over all of the parties to this action.

2. The "major political party" restriction upon the judicial appointment power of the Governor of the State of Delaware, found in the final clause of each of the three paragraphs in Article IV, Section 3 of the Delaware Constitution set forth above, is in violation of the rights under the First Amendment as applicable to the state through the Fourteenth Amendment to the United States Constitution of potential applicants for judicial office on the Supreme Court, the

Superior Court and/or the Court of Chancery who are unaffiliated with either major political party. Accordingly, the "major political party" restriction upon the judicial appointment power of the Governor of the State of Delaware is unenforceable to the extent it would preclude a person unaffiliated with a major political party from becoming a member of one of the foregoing courts.

3. The "bare majority" requirements of Article IV, Section 3 of the Delaware Constitution remain enforceable. Accordingly, appointments: (i) for Justices of the Supreme Court of the State of Delaware; (ii) for Judges of the Superior Court of the State of Delaware; and (iii) for the total number of offices of the Justices of the Supreme Court, the Judges of the Superior Court, the Chancellor and all the Vice-Chancellors, shall be such that there shall not be in office at the same time more than a bare majority of appointments from the same political party.

4. Nothing in this Consent Judgment and Order shall be interpreted to affect in any way or be deemed a waiver of any arguments regarding the constitutionality of the "bare majority" requirements.

5. Nothing in this Consent Judgment and Order shall be interpreted to affect in any way or be deemed a waiver of any arguments Governor Carney might make in the future regarding his discretionary authority in selecting judges independent of the mandatory requirements of Article IV, Section 3 of the Delaware Constitution.

6. This Consent Judgment and Order operates as *res judicata* to the same extent as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties and those in privity with them.

7. In accordance with this Order and 42 U.S.C. §1988, Plaintiff is awarded his costs and reasonable attorneys' fees in the amount of $27,389.00.

8. Plaintiff waives any current or future claims based on Article IV, Section 3 of the Delaware Constitution, except to the extent necessary to enforce this Consent Judgment and Order.

9. This Consent Judgment and Order shall resolve this above-captioned action.

10. The Clerk of the Court is directed to enter this Judgment.

Dated: January 30, 2023

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Attorneys for The Hon. John C. Carney

SO ORDERED this 30th day of January 2023.

The Honorable Maryellen Noreika
United States District Judge

EXHIBIT C

SESSION LAWS

OF THE

STATE OF NORTH CAROLINA

REGULAR SESSION 2018

Session Law 2018-1 **S.B. 308**

AN ACT TO APPOINT PERSONS TO VARIOUS PUBLIC OFFICES UPON THE RECOMMENDATION OF THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND TO CORRECT A TERM IN THE 2017 APPOINTMENTS BILL.

The General Assembly of North Carolina enacts:

SECTION 1. Haywood Edwin White III of New Hanover County is appointed to the Board of Trustees of the University of North Carolina at Wilmington for a term expiring on June 30, 2019, to fill the unexpired term of Christopher J. Leonard.

SECTION 2. Harvey "Keith" Purvis of Pitt County is appointed to the North Carolina Agriculture Finance Authority for a term expiring on June 30, 2019, to fill the unexpired term of Anthony L. Gordon.

SECTION 3. Heather S. VunCannon of Randolph County is appointed to the Charter School Advisory for a term expiring on June 30, 2019, to fill the unexpired term of Anthony Helton.

SECTION 4. Frank A. Stewart of Gaston County is appointed to the North Carolina State Ports Authority for a term expiring on June 30, 2018, to fill the unexpired term of Daniel L. Gurley.

SECTION 5. Susan D. Neeley of Gaston County is appointed to the North Carolina Institute of Medicine for a term expiring January 1, 2020, to fill the unexpired term of Kevin Sowers.

SECTION 6. Section 2.2 of S.L. 2017-213 reads as rewritten:

"**SECTION 2.2.** Effective July 1, 2017, Bradford T. Smith of Brunswick County is appointed to the Ferry Transportation Authority Board of Trustees for a term expiring on ~~June 30, 2020.~~June 30, 2018."

SECTION 7. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 10th day of January, 2018.

Session Law 2018-2 **H.B. 90**

AN ACT TO PROVIDE ADDITIONAL FUNDS TO SCHOOLS LOCATED IN COUNTIES THROUGH WHICH THE ATLANTIC COAST PIPELINE RUNS; TO PHASE IN CLASS SIZE REQUIREMENTS OVER FOUR YEARS; TO CREATE AN ALLOTMENT FOR PROGRAM ENHANCEMENT TEACHERS; TO MODIFY TRANSFER REQUIREMENTS FOR THE CLASSROOM TEACHER AND PROGRAM ENHANCEMENT TEACHER ALLOTMENTS; TO PHASE IN FUNDING OF PROGRAM ENHANCEMENT TEACHERS STARTING IN 2018-2019; TO MAKE CHANGES TO PERSONAL EDUCATION

recipients awarded scholarship funds in subsequent fiscal years. Any funds remaining on the card at the end of the fiscal year may be carried forward to the next fiscal year if the card is renewed. Any funds remaining on the card if an agreement is not renewed shall be returned to the Authority."

SECTION 6.(d) G.S. 115C-595(a)(2) reads as rewritten:

"(2) Unless the student is ~~an eligible student pursuant to G.S. 115C-591(3)a.7., a~~ part-time eligible student, release a local education agency in which the student is eligible to attend under G.S. 115C-366 of all obligations to educate the eligible student while the eligible student is receiving scholarship funds under this Article. A parent of a student, ~~other than a student who is an eligible student pursuant to G.S. 115C-591(3)a.7.,~~other than a part-time eligible student, who decides to enroll the student into the local education agency or other North Carolina public school during the term of the agreement shall notify the Authority to request a release from the agreement and shall return any unexpended funds to the Authority."

SECTION 6.(e) Notwithstanding G.S. 115C-592(a), for the 2018-2019 school year only, the State Education Assistance Authority shall give priority in award of scholarships to applicants with one or more of the following disabilities:

(1) Autism.
(2) Developmental disability.
(3) Hearing impairment.
(4) Moderate or severe intellectual disability.
(5) Multiple, permanent orthopedic impairments.
(6) Visual impairment.

PART VII. NC PRE-K STATUTORY APPROPRIATION

SECTION 7. Chapter 143B of the General Statutes is amended by adding a new section to read:

"**§ 143B-168.10B. NC Prekindergarten Program Funds.**

The General Assembly finds that due to the continued growth and ongoing need in this State to provide early childhood services and education to North Carolina children from birth to five years, it is imperative that the State provide an increase in funds to the General Fund for two fiscal years for the NC Prekindergarten (NC Pre-K) program. To that end, there is appropriated from the General Fund to the Department of Health and Human Services, Division of Child Development and Early Education, the following amounts each fiscal year to provide funds for NC Pre-K slots for the NC Pre-K program:

Fiscal Year	Appropriation
2019-2020	$82,001,394
2020-2021 and each subsequent fiscal year thereafter	$91,351,394

When developing the base budget, as defined by G.S. 143C-1-1, for each fiscal year specified in this section, the Director of the Budget shall include the appropriated amount specified in this section for that fiscal year."

PART VIII. 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

SECTION 8.(a) The General Assembly finds that the legislative intent in the enactment of S.L. 2017-6 and establishment of the Bipartisan State Board of Elections and Ethics Enforcement was to continue the practice of having an independent, quasi-judicial body for elections and ethics enforcement for the State and consolidate those bodies under a single entity. The General Assembly finds that the entity enforcing these laws 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. As such, by amending the section of the General Statutes establishing the membership of the State Board enacted in S.L. 2017-6, the purpose of this legislation is to implement the decision of the North Carolina Supreme Court on January 26, 2018, in *Cooper V. Berger* (No. 52PA17-2) to give the Governor executive control over the Bipartisan State Board of Elections and Ethics Enforcement and to provide for representation on the State Board by unaffiliated and third-party voters.

SECTION 8.(b) G.S. 163A-2 reads as rewritten:

"**§ 163A-2. Membership.**

(a) The State Board shall consist of ~~eight~~ nine individuals registered to vote in North Carolina, appointed by the Governor, as follows:

(1) ~~four of whom shall be of~~Four individuals registered with the political party with the highest number of registered ~~affiliates~~ affiliates in the State, from a list of six nominees submitted by the State party chairs of that party.

(2) ~~and four of whom shall be of~~ Four individuals registered with the political party with the second highest number of registered ~~affiliates,~~affiliates in the State, from a list of six nominees submitted by the State party chairs of that party.

(3) One individual not registered with either the political party with the largest number of registered affiliates in the State or of the political party with the second-largest number of registered affiliates in the State, from a list of two nominees selected by the other eight members of the State Board.

The number of registered affiliates shall be as reflected by the latest registration statistics published by the State Board. ~~The Governor shall appoint four members each from a list of six nominees submitted by the State party chairs of the two political parties with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board.~~ The Governor shall make all appointments promptly upon receipt of the list of nominees from each nominating entity and in no instance shall appoint later than 30 days after receipt of the list.

(a1) Within 14 days of appointment by the Governor of the eight members appointed under subdivisions (1) and (2) of subsection (a) of this section, the eight members shall hold an initial appointment selection meeting for the sole purpose of selecting two nominees who meet the qualifications for appointment under subdivision (3) of subsection (a) of this section and shall promptly submit those names to the Governor. No additional actions, other than the oath of office, shall be taken by the eight members appointed under subdivisions (1) and (2) of subsection (a) of this section at the appointment selection meeting.

…

(c) ~~Members shall be removed by the Governor from the State Board only for misfeasance, malfeasance, or nonfeasance. Violation of G.S. 163A-3(d) shall be considered nonfeasance.~~Members may be removed from the State Board by the Governor, acting in the Governor's discretion. Vacancies created on the State Board by removal from office by the Governor shall be filled in accordance with subsection (d) of this section.

(d) Any vacancy occurring on the State Board shall be filled by an individual ~~affiliated with the same political party of~~meeting the same appointment criteria under subsection (a) of this section as the vacating member. Any vacancy occurring in the State Board shall be filled by the Governor, and the person so appointed shall fill the unexpired term. The Governor shall fill vacancies as follows:

(1) For a vacancy for an appointment under subdivision (1) or (2) of subsection (a) of this section, ~~The~~ the Governor shall fill the vacancy from a list of two names submitted by the State party chair of the political party with which the vacating member was affiliated if that list is submitted within 30 days of the occurrence of the vacancy.