IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:17-CV-078

RUSSELL F. WALKER, Plaintiff, v. NORTH CAROLINA STATE BOARD OF ELECTIONS AND HOKE COUNTY BOARD OF ELECTIONS, Defendants,	MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS (FED. R. CIV. P. 12(b))

NOW COMES the Defendant, The North Carolina State Board of Elections ("State Board"), by and through its undersigned counsel, and hereby respectfully submits this memorandum of law in support of its Motion to Dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) & (6) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The Plaintiff is a resident of Hoke County and brings this action *pro se* to challenge the process by which county commissioners are elected in Hoke County. *See* Complaint at ¶ 1. Currently, there are five members on the Hoke County Board of Commissioners and they are all elected "at large." *See* Complaint at ¶¶ 8 & 9. The Plaintiff asserts that there are "4 non-white County Commissioners and one white County Commissioner," and argues that there should be more white commissioners because "the population of Hoke County is approximately 51% white, and 49% non-white."

Complaint at ¶¶ 10, 12, 15, & 16. The Plaintiff asserts that "the Board of Commissioners is racially skewed due to racial block voting in the City of Raeford and political organizations deriving their power and influence from several colored Church congregations." Complaint at ¶ 15.

According to the Plaintiff, his "right to vote has been debased and diluted to the point of effective denial through the 'democratic' process." Complaint at ¶ 17. He then asks this Court to declare, among other things, that the "'at large' method of election constitutes a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment," and to enjoin use of the "at large" system of voting. Complaint at ¶¶ 22 & 24. In sum, the Plaintiff wants Hoke County to be divided into five election districts with each district electing one commissioner. *See* Complaint at ¶ 27

The Plaintiff wants this Court to require the North Carolina General Assembly to draw the five districts, and that if the General Assembly fails to act, then "the Hoke County Board of Commissioners itself [should] adopt a districting plan." Complaint at ¶ 25 On the other hand, the Plaintiff also "prays that the defendant Boards of Elections be ordered to set up 5 election districts with each election district in Hoke County being represented by one representative County Commissioner." Complaint at ¶ 27

STANDARD OF REVIEW

The standard of review for a lack of subject matter jurisdiction pursuant to a motion to dismiss under Rule 12(b)(1) is set forth generally in *Adams v. Bain*, 697 F.2d

1213, 1219 (4th Cir. 1982). The Plaintiff bears the burden of showing that jurisdiction is appropriate. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999).

In considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, all well-pled allegations are presumed to be true and must be viewed in the light most favorable to the Plaintiff. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). However,"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). A plaintiff must plead facts sufficient to raise a right to relief above the speculative level. *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013).

ARGUMENT

The State Board is entitled to dismissal of the Complaint against it. The Eleventh Amendment to the United States Constitution bars this suit against the State Board. To the extent that the suit is not barred, the Plaintiff failed to state a claim against the State Board cognizable under the applicable law.

I. THE ELEVENTH AMENDMENT BARS THE COMPLAINT.

The Eleventh Amendment protects a State, State agencies, and State officials from suit in federal court by one of the State's citizens or the citizen of another state. *California v. Deep Sea Research*, 523 U.S. 491, 501 (1998). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Hans v. Louisiana*, 134 U.S. 1 (1890). The State Board is entitled to Eleventh Amendment immunity because it is an agency of the State

of North Carolina. "It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. . . . This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). It is true that ―when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). However, such a waiver by Congress pursuant to its Fourteenth Amendment authority requires "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst State School and Hospital v. Halderman*, 465 U.S. at 99 (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979)). The Supreme Court has made clear "that a State is not a 'person' within the meaning of §1983" and "[t]hat Congress, in passing §1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65, 66 (1989).

As such, the State Board is entitled to Eleventh Amendment immunity and this Court lacks jurisdiction over the State Board. It should therefore be dismissed from the Complaint.

II. THE PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Even if this Court finds that the Eleventh Amendment does not bar the Complaint against the State Board, the Complaint should still be dismissed for failing to state a claim upon which relief can be granted.

A. The Plaintiff's claim is not cognizable under applicable law.

The Complaint fails to include sufficient factual and legal assertions to support a vote dilution equal protection claim. Specifically, the Plaintiff fails to assert that he is in a minority group, that the challenge law was a result of intentional discrimination, and that a history of discrimination exists in Hoke County against the Plaintiff's racial group. In *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court established that these elements are necessary to succeed on a voter dilution claim in an at-large voting system.

> At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines. While multimember districts have been challenged for "their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party," this Court has repeatedly held that they are not unconstitutional per se. The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population. Cases charging that multimember districts unconstitutionally dilute the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection

> Clause cases. *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), made it clear that in order for the Equal Protection Clause to be violated, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."

Rogers v. Lodge, 458 U.S. at 616-17 (internal citations omitted)

In the instant matter, the Plaintiff fails to allege that whites are a minority group in Hoke County. Rather, he specifically alleges that whites constitute the majority in Hoke County; and reasons that because they constitute the majority of the Hoke County population, they should have a seat on the County's Board of Commissioners. Similarly, the Plaintiff fails to allege that the existing at-large voting system was established to purposely discriminate against white voters or to otherwise dilute the votes of white voters.

> a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim . . . .
>
> …
>
> [the] ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the districting plan under attack exists because it was intended to diminish or dilute the political efficacy of that group.

Rogers v. Lodge, 458 U.S. at 621 (internal citations omitted). Furthermore, the Plaintiff fails to allege that white voters have less opportunity to participate in the political process due to a history of discrimination. *See Rogers v. Lodge*, 458 U.S. at 624 ("The District Court began by determining the impact of past discrimination on the ability of blacks to participate effectively in the political process.") The only substantive factual assertions in

the Complaint are that one of the five commissioners is white and that this distribution differs from the general population of Hoke County. These allegations, however, are not sufficient to establish purposeful discrimination or to otherwise support a clam for vote dilution

> Under our cases, however, such facts are insufficient in themselves to prove purposeful discrimination absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice.

Rogers v. Lodge, 458 U.S. at 624.

B. The Plaintiff lacks standing.

The Plaintiff also fails to establish that he has standing to bring this claim. He does not allege that he is a member of any racial or minority group. He also does not allege that he is registered to vote, or has voted in any election. As such, the Plaintiff lacks standing to assert a vote dilution claim.

> [B]ecause Plaintiff has failed to allege that she is a registered voter, she cannot have suffered a constitutional injury in fact by having her vote diluted. Having failed to allege her status as a registered voter, Plaintiff has not alleged facts that show she has standing to make her claim. *Williams v. Bolivar County*, No. 2:04cv282,2007 U.S. Dist. LEXIS 6715, at *8-9 (N.D. Miss. Jan. 29, 2007) (no standing where plaintiff not a registered voter); *Chen v. City of Houston*, 9 F. Supp. 2d 745, 750 (S.D. Tex. 1998) (no standing where plaintiff not registered to vote); *Fairley v. Forrest County*, 814 F. Supp. 1327, 1329 (S.D. Miss. 1993) (plaintiff not registered voter and could not "complain of election results from an election in which she was not qualified to participate because of her own inaction")

Perry-Bey v. City of Norfolk, 678 F. Supp. 2d 348, 364 (E.D. Va. 2009).

The Complaint lacks all of the necessary elements for a vote dilution equal protection claim. The Plaintiff therefore fails to state a claim upon which relief can be granted, and the Complaint is subject to dismissal.

CONCLUSION

For the foregoing reasons and authorities, the State Board respectfully requests that this honorable Court grant its Motion to Dismiss, with prejudice, dismissing all of the Plaintiff's claims against it.

This the 17th day of March, 2017.

JOSH STEIN
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CERTIFICATE OF SERVICE

I certify that on 17 March 2017, I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS with the Clerk of Court using the CM/ECF system, and served the following non-registered party by U.S. Mail:

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This the 17th day of March, 2017.

/s/ James Bernier, Jr.
James Bernier, Jr.
Assistant Attorney General