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,	REPLY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS TO PLAINTIFF'S OPPOSITION TO THE 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 submits its reply to the Plaintiff's opposition to the State Board's Motion to Dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) & (6) of the Federal Rules of Civil Procedure.

I. THE ELEVENTH AMENDMENT BARS THE COMPLAINT.

Contrary to the Plaintiff's assertion, his complaint is barred by the Eleventh Amendment to the United States Constitution due to the fact that he has sued 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).

Although the Plaintiff cites the *Ex parte Young* doctrine and quotes *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010), the doctrine does not apply herein because the Plaintiff did not sue a state officer. Rather, the Plaintiff brought suit against the State Board, which is an agency of the State of North Carolina. Because the Plaintiff has sued a State agency in Federal Court, the relief requested in the Complaint is irrelevant. The claims against the State Board are barred by the Eleventh Amendment. The State Board 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, it should still be dismissed for failing to state a cognizable claim.

A. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) does not apply to this case.

In his Complaint and in his Opposition, the Plaintiff cites to *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) and asserts that it supports his claims. However, the facts and claims in *Raleigh Wake Citizens* are wholly different from those asserted by the Plaintiff herein. The plaintiffs in *Raleigh Wake Citizens* asserted that newly created single-member districts violated the one-person, one-vote guarantees of the federal and state constitutions because the districts were not equal in population. *Id.* at 339-40. The plaintiffs also contended their constitutional right to equal protection was violated because "race predominated in determining the boundaries,

shape, and composition of that district without narrow tailoring to serve a compelling state interest." *Id.* at 352.

Unlike the plaintiffs in *Raleigh Wake Citizens*, the Plaintiff herein has not challenged the drawing of district lines. Rather, he asserts that there are no districts and insists that districts should be drawn. Furthermore, the Plaintiff in this matter insists that districts be drawn based on race so that more white candidates may be elected to the Hoke County Board of Commissioners even though the majority of Hoke County's population is white. Moreover, the Plaintiff in this matter has asserted a vote dilution equal protection claim in the context of an at-large district, not a one person, one vote claim.

The facts and legal claim at issue herein were directly addressed by the United States Supreme Court in *Rogers v. Lodge.* In that case the black voters of Burke County, GA asserted that their vote was being diluted by the at-large voting system for the Burke County Board of Commissioners in violation of their right to equal protection. *Rogers v. Lodge*, 458 U.S. 613, 614 (1982). As such, *Rogers v. Lodge* is directly applicable to this matter. There is no merit to the Plaintiff's assertion that *Rogers v. Lodge* "is irrelevant and intended to deceive." Opposition at 3. It remains valid and binding.

B. The Plaintiff does not assert that he is in the minority, which is necessary to state a claim cognizable under applicable law.

The Plaintiff misreads and misunderstands the analysis in *Rogers v. Lodge* and as discussed in the State Board's Motion to Dismiss. *Rogers v. Lodge* is not limited to

instances in which African-American voters challenge an at-large voting system. The Court does not use the word "minority" as a synonym for "African-American," and did not intend any racial connotation whatsoever. Rather, the Court is clear that "minority" refers to any grouping that is smaller than another grouping within a given area. The Court clarified as follows:

> 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.

Rogers v. Lodge, 458 U.S. at 616 (emphasis added). The Court reiterated this need for "minority" status in *Thornburg v. Gingles.*

> The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may "'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). *See also Rogers v. Lodge*, 458 U.S. 613, 617 (1982);*White v. Regester*, 412 U.S., at 765;*Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971). The theoretical basis for this type of impairment is that **where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority,** will regularly defeat the choices of minority voters.

Thornburg v. Gingles, 478 U.S. 30, 47-48 (1986)(emphasis added). [1]

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[1] The Plaintiff herein has not asserted a violation under Section 2 of the Voting Rights Act. However, court opinions analyzing vote dilution equal protection claims under Section 2 provide insight into the allegations and proof that would be needed for such a claim. The Plaintiff still fails to state a claim cognizable under Section 2.

The Complaint herein fails to state a claim because the Plaintiff has not asserted that he is in the minority in Hoke County, whether it be a racial, ethnic, economic, or political minority. Rather, he specifically alleges that whites constitute the majority in Hoke County.

C. The Plaintiff does not assert any purposeful discrimination against whites, which is necessary to state a claim cognizable under applicable law.

Similarly, the Plaintiff is required to allege that the existing at-large voting system was established or maintained 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). An allegation of race-based motivations would still be required even if this court was to apply *Raleigh Wake Citizens* to this matter as urged by the Plaintiff.

> To successfully challenge the constitutionality of an electoral district under the Equal Protection Clause, a plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."

Raleigh Wake Citizens, 827 F.3d at 352, *quoting*, *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267, 191 L. Ed. 2d 314 (2015). However, the Plaintiff has specifically stated in his Opposition that he "did not allege that the existing at-large voting system was established to discriminate against white voters." Opposition at 3. The Plaintiff therefore fails to state a claim upon which relief can be granted, and the Complaint is subject to dismissal.

D. Plaintiff's attempt to amend the complaint fails to cure its deficiencies and further amendment is futile.

The Plaintiff has filed an Amended Complaint, and the State Board does not oppose that amendment, but the Eleventh Amendment still bars the Complaint against the State. Moreover, the Amended Complaint still fails to state a claim. Any further amendments to the Complaint will also be futile for the reasons discussed herein and in the Memorandum in Support of the Motion to Dismiss.

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 6th day of April, 2017.

JOSH STEIN
Attorney General

/s/ James Bernier, Jr.
James Bernier, Jr.
Assistant Attorney General
N.C. Bar No. 45869
Special Litigation Section
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629
Tel.: (919) 716-6900
Fax: (919) 716-6763
jbernier@ncdoj.gov

CERTIFICATE OF SERVICE

I certify that on 6 April 2017, I electronically filed the foregoing REPLY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS PLAINTIFF'S OPPOSITION TO THE MOTION TO DISMISS with the Clerk of Court using the CM/ECF system, and served the following non-registered party by U.S. Mail:

Russell F. Walker, *Pro Se*
176 Quewhiffle Rd.
Aberdeen, NC 38315

This the 6th day of April, 2017.

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