STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 15903
SABRA FAIRES, BENNETT COTTON, and DIANE P. LAHTI, Plaintiffs, vs. STATE BOARD OF ELECTIONS; A. GRANT WHITNEY, Jr., Chair, and RHONDA K. AMOROSO, JOSHUA D. MALCOLM, MAJA KRICKER, and JAMES L. BAKER, members of the State Board (in their official capacities only); and KIM WESTBROOK STRACH, Executive Director of the State Board (in her official capacity only), Defendants.	DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOW COME the State Board of Elections ("SBOE"), A. Grant Whitney, Jr., Chair of the SBOE, Rhonda K. Amoroso, Joshua D. Malcolm, Maja Kricker, and James L. Baker, members of the SBOE, and Kim Westbrook Strach, Executive Director of the SBOE (in their official capacities) (cumulatively, "defendants") by and through counsel, and hereby file this brief in opposition to plaintiffs' motion for summary judgment. In support of its opposition to plaintiffs' motion, defendants show the Court the following:

PROCEDURAL BACKGROUND

Plaintiffs brought this action against the defendants on 30 November 2015. Plaintiffs' complaint challenges the constitutionality of N.C. Session Law 2015-66, including what plaintiffs purport to claim is a denial of a right to vote for those seeking a seat on our State Supreme Court, and the denial of a right to vote on a constitutional amendment. (Pls Br p 5)

On 30 December 2015 defendants filed their answer. Plaintiffs filed a motion for summary judgment along with affidavits and a supporting brief on 25 January 2016. Defendants served their brief in opposition to plaintiffs' motion on 8 February 2016. Oral arguments have been scheduled before the three-judge panel on 16 February 2016.

STANDARD OF REVIEW

"Summary judgment is properly granted when the forecast of evidence 'reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.'" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (*quoting Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. A defendant party is entitled to summary judgment if it is shown that the claimant cannot prove the existence of an essential element of the claim or the claim would be barred by an affirmative defense. *Id.*

UNDISPUTED MATERIAL FACTS

This case is appropriate for summary judgment because there are no facts that constitute genuine issues of material fact. In fact, this case presents few facts that are actually *material* to the legal issues posited by plaintiffs' complaint.

ARGUMENT

I. Plaintiffs Lack Standing To Bring This Action.

Plaintiffs must have standing in order for this Court to have subject matter jurisdiction over them. *Spoor v. Barth,* No. COA15-172, 2016 N.C. App. Lexis 41 (Jan. 5, 2016) (Subject matter jurisdiction cannot be waived at any time or in any manner.). *In re J.T.*, 363 N.C. 1, 3, 672 S.E.2d 17, 18 (2009) ("It is well settled that a challenge to a court's jurisdiction over the

subject matter of an action cannot be waived at any point in the proceedings. *See id.* § 1A-1, Rule 12(h)(3) (2007). This is because 'the proceedings of a court without jurisdiction of the subject matter are a nullity.' *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (citing *High v. Pearce*, 220 N.C. 266, 17 S.E.2d 108 (1941)").

Plaintiff Faires lacks standing because there is no constitutional right to run for a particular office. *Penny v. Salmon*, 217 N.C. 276, 7 S.E.2d 559 (1940). Plaintiffs Cotton and Lahti lack standing because there is no constitutional right to vote for a particular candidate. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). In addition, there is no property right to either be a candidate for election to a specific office or to vote for a particular office. *Penny*, 217 N.C. at 279, 7 S.E.2d at 561; *Mial v. Ellington*, 134 N.C. 131, 149, 46 S.E. 961, 967 (1903). Because the right to hold office is not a property right, there is no vested right to prevent the General Assembly from modifying it as public policy necessitates. *Penny*, 217 N.C. at 279, 7 S.E.2d at 561.

Even if there were a property right to either become a candidate for office or vote for a particular candidate, plaintiffs have failed to allege any way in which they have suffered a *constitutional* deprivation. Disappointment does not equate to being legally aggrieved. *Penny*, 217 N.C. 276, 7 S.E.2d 559.

II. Presumption In Favor Of Constitutionality.

Constitutional questions are reviewed *de novo*. *State ex rel. McCrory v. Berger*, No. 113A15, 2016 S.E. Lexis 33 (Jan. 29, 2016). To that end, the Court must presume that S.L. 2015-66 is constitutional unless plaintiffs can show that it is unconstitutional *beyond reasonable doubt*. *See Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("In determining the constitutionality of a statute we are guided by the following principle: '[e]very presumption

favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.'" (emphasis added) (*quoting Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)); *see also In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997) ("Therefore, this Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute."). If there is "any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." *Baker*, 330 N.C. at 338, 410 S.E.2d at 891. Any constitutional violation must be plain and clear. *McCrory*, 2016 N.C. Lexis 33. "To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Id.* at *9. Similarly, where the meaning is clear from the words used in the constitution, it is not necessary to search for meaning elsewhere. *Id.*

As the parties challenging the constitutionality of S.L. 2015-66, plaintiffs bear the burden of establishing that it does not pass constitutional muster. *See In Re House of Raeford Farms, Inc. v. Brooks*, 63 N.C. App. 106, 109, 304 S.E.2d 619, 621 (1983), *disc. rev. denied*, 310 N.C. 153, 311 S.E.2d 291 (1984). The presumption of constitutionality is further founded on another constitutional principle, the separation of powers. As the Declaration of Rights provides, "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Thus, the Court may not substitute its views for those of the Legislature, which have been ratified in S.L. 2015-66. *See Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946) ("We have no power to review a statute with respect to its political propriety as long as it is

within the legislative discretion and has a reasonable relation to the end sought to be accomplished."); *City of Asheville v. State*, 192 N.C. App. 1, 43, 665 S.E.2d 103, 133 (2008) ("It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures." (alterations omitted)), *disc. rev. denied*, 363 N.C. 123, 672 S.E.2d 685 (2009). This is so because the acts of the General Assembly are effectively the acts of the people. *State ex rel. Martin v. Preston*, 325 N.C. at 448-49, 385 S.E.2d at 748. *See also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests "with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution.*") (citation omitted) (emphasis added)). "[I]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." *Baker*, 330 N.C. at 338, 410 S.E.2d at 891. The legislative enactment here does not conflict with the constitution. Rather, it facilitates the constitutional mandate for the election of supreme court justices.

III. Certain Assertions Contained in Plaintiffs' Brief Should Be Stricken.

Listed below are specific statements tendered in support of Plaintiffs' motion for summary judgment that should be disregarded by the Court as they constitute, at best, unsworn factual allegations:

> "The drafters of the 1868 constitution did not discuss and could not have intended to allow judges to be "elected" by retention referendum, nor could they have even contemplated the idea." (Pls Br p 7).

> "As Professor Drennan of the UNC School of Government states in reporting that history: 'That time never came. The report of the full Committee included no provision for any change in the selection of appellate or general jurisdiction judges.' James C. Drennan, 'Judicial Reform in North Carolina,' in *Judicial Reform in the States* 19, 23 (Champagne & Haydel, eds., 1993)" (Pls Br p 8).

"The first version of the proposed constitutional amendment did not receive legislative approval, for reasons other than the selection method recommended. But the version that did pass in 1961 provided for election of all judges. That proposed amendment was approved by the people at the general election in 1962, and the window of opportunity for those who sought change had shut. Elections were the only constitutionally approved method of selecting judges. The significance of the closing of that window is that judicial selection became for future reformers a constitutional issue. And that meant that moving away from elections would require a 3/5's vote of the membership of each house (not just those present and voting) to put the issue before the people in the form of a referendum. Drennan, at 23." (Pls Br p 9).

"The commissions knew a constitutional amendment was needed. 'The Commission's deliberations have led it to conclude that in each of these three areas – selection, discipline and removal, and retirement – major legislation would be beneficial. In each instance a constitutional amendment is required.' Report of the Courts Commission to the North Carolina General Assembly 1971, at 2." (Pls Br p 9).

"Drennan served as commission staff. The commission recognized, yet again, the need for a constitutional amendment: 'No change of the magnitude recommended here can be done without a constitutional amendment, and that will require a vote of the people.' Report of Judicial Selection Study Commission to the Governor, Chief Justice Attorney General and the 1989 General Assembly of North Carolina, at 8 (Feb. 15, 1989)" (Pls Br p 10).

"'The second problem facing the reformers is that they are dealing with a constitutional issue. To get to the point where they begin worrying about how the public will vote on a referendum, they have to obtain a 3/5's majority of each house.' – Drennan, at 37." (Pls Br p 11).

"'Second, the proponents of judicial reform are dealing with a constitutional issue, meaning they will have to convert more than a mere majority of the General Assembly to their viewpoint. Before an issue may be put before the public, three fifths of the General Assembly must approve a constitutional amendment. Hence, a two-fifths minority can effectively block any proposal. Even if the measures pass the General Assembly, a referendum still would have to be approved by a majority of the public.' --- Grimes, at 2324." (Pls Br p 11).

"As House Bill 222 came to the floor in 2015, members were warned a final time, by one of their own, of the need to amend the constitution. Just before the vote a veteran lawyer legislator, Rep. Paul "Skip" Stam, the speaker pro tem, circulated a memorandum to House members questioning the constitutionality of the act. B. Smith, "House Passes Retention Election Bill for Judges," Carolina Journal Online, John Locke Foundation, Raleigh, Apr. 22, 2015. Unfortunately, members ignored

what they had known for half a century." (Pls Br p 12).

Even if the foregoing statements had been made under oath, they do not constitute admissible evidence because they are either hearsay, legal conclusions that may only be decided by this Court, or are statements for which the declarant could not have personal knowledge. N.C. R. Civ. P. 56(e). *Williamson v. Bullington*, 139 N.C. App. 571, 534 S.E.2d 254 (2000), *aff'd* 353 N.C. 363, 544 S.E.2d 221 (2001). Similarly, the "facts" offered by plaintiffs are not sufficiently established such that they are proper for submission under the concept of judicial notice. N.C. R. Evid. 201.

IV. Plaintiffs' Characterization Of S.L. 2015-66 As A "Retention Referendum" Is Misleading.

Plaintiffs' argument relies upon the legal fiction that S.L. 2015-66 establishes a retention "referendum." The North Carolina Constitution generally provides for the election of justices. S.L. 2015-66 provides for retention elections of Supreme Court justices. The clear meaning of S.L. 2015-66 supports no other conclusion than a retention election is an "election," even if there is only one candidate, as voters are voting to either retain a particular justice, or voting to vacate that office. The suggestion that S.L. 2015-66 disenfranchises citizens by stripping them of their electoral voice is unfounded.

By necessity, plaintiffs' baseless characterizations disregard the plain meaning of S.L. 2015-66, which clearly describes and identifies the possible retention of a Supreme Court justice, who may be subject to an election. S.L. 2015-66 neither refers to a "referendum," nor does it describe a "referendum." *See* definition of "referendum"—"The process of referring to the electorate for approval . . . of a law passed by the legislature (statutory referendum). Black's Law Dictionary (Fifth Ed. 1979). The mere fact that plaintiffs consistently refer to the retention election provided for by S.L. 2015-66 as a "referendum" does not, in fact, make it a referendum.

V. S.L. 2015-66, In Establishing A Retention Election For Justices Of The State Supreme Court, Does Not Violate Any North Carolina Constitutional Provisions.

Notwithstanding plaintiffs' mischaracterization that S.L. 2015-66 establishes a retention "referendum," plaintiffs have claimed that upholding S.L. 2015-66 will result in "a complete dismantling of the democratic form of government in North Carolina." (Pls Br p 6). Although quite dramatic, Plaintiffs' argument is wholly unsupported, and bears no impact upon the issues proposed by their complaint. Similarly, plaintiffs' reliance on precedent from other states that purportedly "use the retention method for some or all judges" is not relevant to the inquiry here. The structure of other state constitutions, and the language found therein, does not advance their challenge in the present case because the Court will undoubtedly rely upon the clear language of our Constitution. The Court need not search for a meaning elsewhere. *McCrory,* 2016 N.C. Lexis 33.

In addition, plaintiffs engage in a lengthy, yet conjectural dissertation surmising the intent of the drafters of various amendments to the North Carolina constitution. Nevertheless plaintiffs' argument, to the extent that it purports to provide legislative history based on the subsequent observations of legal scholars, fails to illuminate their argument that S.L. 2015-66 is unconstitutional. Plaintiffs even concede in the midst of their contentions that other states' posture on retention elections does not mean that an amendment is required. (Pls Br p 13). On one hand plaintiffs assert that it is instructive that a number of states have pursued constitutional amendments to address retention elections. On the other hand plaintiffs note that the Tennessee Supreme Court has upheld legislative action addressing retention elections, but contend such authority is not instructive because the Tennessee constitution is worded differently from North Carolina's. *State ex rel. Higgins v. Dunn*, 396 S.W.2d 480 (Tenn. 1973). This approach is not

only incongruous, it reveals the fundamental flaw in plaintiffs' argument. First, plaintiffs are incorrect that the Tennessee constitution differs in any material way from North Carolina's constitution. Neither constitution defines "elect," "election," or "elected." The only difference germane to the discussion here is that the Tennessee constitution also refers to "election" to describe voting opportunities to ratify certain actions of the government such as the issuance of bonds. This is merely a matter of semantics and does not support plaintiffs' argument challenging the constitutionality of S.L. 2015-66.

Notably, in *State ex rel. Hooker v Thompson*, 249 S.W.3d 331 (1996 Tenn. LEXIS 839), the Tennessee Court again revisits the issue of whether a retention election that is decided on a yes/no vote is constitutional under Tennessee's constitution. The Court expressly left the ruling in *Dunn* undisturbed, and again upheld the use of a retention election. *Id.*

In addition, plaintiffs omit from their analysis the well-established principle that Courts recognize that legislatures have some inherent authority to respond to potential deficiencies in the electoral process, so long as the legislative response is a reasonable one that does not significantly impinge on the constitutional rights of the people. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986); *Libertarian Party of North Carolina v. State*, 200 N.C. App. 323, 688 S.E.2d 700 (2009) (Court upholding legislative enactment requiring independent political parties to demonstrate voter support as a prerequisite to appear on the ballot), *aff'd in part, modified in part*, 365 N.C. 41, 707 S.E.2d 199 (2011); *State v. Dunn*, 496 S.W.2d 480 (1973) (Court recognizing that even where constitutional provisions are self-executing, the legislature may enact legislation to facilitate the power granted by the constitution.); *McLean v. Durham County*, 222 N.C. 6, 21 S.E.2d 842 (1942) (Court recognizing the legislature's power to adopt reasonable means to regulate elections and to

prevent an indiscriminate scramble for office and the wholesale filing of petitions for nominations).

Again, plaintiffs' characterization that *Dunn* distinguishes between an election and a referendum is not supported by the *Dunn* decision itself or by any other precedent cited by plaintiffs. At best, plaintiffs' argument has demonstrated a policy preference for how retention elections are conducted. Plaintiffs, however, have failed to make any colorable argument that S.L. 2015-66 is constitutionally unsound.

VI. S.L. 2015-66 Does Not Add An Additional Qualification For Office By Allowing An Incumbent To Seek Re-Election Through A Retention Election.

Finally, plaintiffs contend that S.L. 2015-66 is constitutionally unsound because it adds incumbency to the list of qualifications for an office holder as provided in N.C. Const. art. VI, § 6. Article VI, § 6 states that, "[e]very qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office." Article IV, § 22, adds the qualification that "[o]nly persons duly authorized to practice law in North Carolina shall be eligible for election or appointment as a Justice of the Supreme Court . . ." Nothing in S.L. 2015-66 adds qualifications for a judicial office holder. A qualification for office refers to eligibility to hold the office. N.C. Const. art. IV, § 22. If S.L. 2015-66 did add a qualification for office, then *no* non-incumbent would *ever* be able to run for or be appointed to a seat on the Supreme Court. This is simply not the case in this matter. Any individual who is authorized to practice law in the courts of this State is eligible to run for a seat on the Supreme Court and there exists no additional qualification for the position.

In support of their contrary argument plaintiffs cite *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 413 S.E.2d 541 (1992), and assert that the "*Moore* decision is directly on point." Pls Br, p 15. *Moore* is, however, distinguishable both in terms of the statutory language at issue in

that opinion as well as the legal analysis employed by the Court. The Court in *Moore* addressed whether a "resign to run" statute violated Article VI, § 6 because it imposed an additional qualification for elective office. The Court considered the plain language of the challenged statute, which provided that "[n]o individual may *qualify as a candidate for elective public office* who holds another elective office . . . more than 40 days of the term of which runs concurrently with the term of office for which he seeks to qualify without resigning from such office . . ." Moore, 331 N.C. at 6, 413 S.E.2d at 544 (emphasis added). Here S.L. 2015-66 does not attempt to place any extraneous or additional qualifications on either the candidacy for office or an election itself. Rather, plain language of the session law makes it clear that its intent is to alter the options for re-election of those State Supreme Court Justices by providing a retention election.

Plaintiffs claim that S.L. 2015-66 serves to disqualify a distinct category of individuals who wish to run for the office and amounts to a "much larger and more insidious category than in *Moore,*" because the category includes every person who is not the sitting justice on the Court. (Pls Br p 16) Plaintiffs' position is untenable from both a legal and practical perspective. First, plaintiffs grossly overstate the category by ignoring other Supreme Court qualifications that distinguish that office from the general public. Second, without any substantiation, plaintiffs disingenuously and bizarrely assert that there exists some unlimited class of persons who wish to run for the office of Supreme Court Justice. There is simply no evidence in the record to support plaintiffs' far-fetched proposition. Moreover, as set out herein, even if such a class of individuals existed, that class of individuals still possess no constitutional right to run for office. *Penny.*

CONCLUSION

For the foregoing reasons, plaintiffs have failed to meet their significant burden of showing S.L. 2015-66 is unconstitutional. Therefore, defendants respectfully request that plaintiffs' summary judgment be denied, and that summary judgment be granted in favor of the defendants.

This the 8th day of February, 2015.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT in the above titled action upon all parties to this cause by:

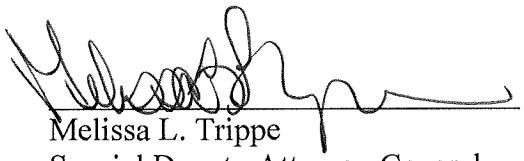
[ ] Hand-delivering a copy hereof to each said party or to the attorney thereof in open court;

[X] Transmitting a courtesy copy hereof to each said party via email; or

[X] Depositing a copy hereof, first-class postage pre-paid, in the United States mail, properly addressed to:

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This the 8th day of February, 2015.



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