IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Paul Goldman,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:21-CV-420**
	)	
Ralph Northam, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiff's Amended Complaint, ECF No. 3, clearly states that his only interest in this matter is as a potential voter and a possible candidate for the Virginia House of Delegates. Neither of these interests demonstrate that Plaintiff has a concrete and particularized injury-in-fact, nor does Plaintiff demonstrate that his requested relief will redress his alleged injury. Accordingly, Plaintiff lacks standing and this matter should be dismissed for a lack of subject matter jurisdiction. Even if Plaintiff had standing in this matter, the Amended Complaint otherwise fails to state any cognizable claim.

STATEMENT OF FACTS

1. "The Commonwealth shall be reapportioned into electoral districts in accordance with this section and Section 6-A in the year 2021 and every ten years thereafter." Va. Const. Art. 2, sec. 6.

2. Plaintiff is a qualified voter in the 68th General Assembly District. Am. Compl. ¶ 22.

3. Plaintiff is "considering a run for the House of Delegates." *Id.* at ¶ 23.

4. The deadline to file qualification of candidacy forms for the House of Delegates

was June 8, 2021. Va. Code §§ 24.2-503 and 24.2-507.[1]

5. Plaintiff does not allege that he filed any candidate qualification forms to appear as a candidate on the November 2, 2021 ballot as a candidate for the Virginia House of Delegates.

6. Defendant Ralph Northam is the Governor of Virginia.

7. Defendant Virginia State Board of Elections ("SBE") and Defendant members of the SBE Robert Brink, John O'Bannon, and Jamilah D. LeCruise, the Chairman, Vice-Chairman, and Secretary, respectively, must "supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections." Va. Code § 24.2-103(A).

8. Defendant Christopher E. Piper is the Commissioner of the Virginia Department of Elections.[2]

9. Defendant Jessica Bowman is no longer employed by the Commonwealth.[3]

10. On June 28, 2021, Plaintiff filed this action.

STANDARD OF LAW

"Federal Rule of Civil Procedure 12(b)(1) permits a party to move to dismiss an action for lack of subject matter jurisdiction." *Allen v. College of William & Mary*, 245 F. Supp. 2d 777, 782 (E.D. Va. 2003). A Rule 12(b)(1) challenge "assert[s] that, as a factual matter, the plaintiff cannot meet the burden of establishing a jurisdictional basis for the suit." *Id*. (citing *Adams v. Bain*, 697

[1] Chapter 239 of the Acts of Assembly enacted during the 2021 Special Assembly amended Virginia Code § 24.2-503 and § 24.2-507(1). On July 1, 2021, candidacy paperwork must be filed on the third Tuesday in June. Because the amendments did not become effective until after the June 2021 filing deadlines, Plaintiff was required to file the requisite candidate paperwork by the second Tuesday in June – June 8, 2021.

[2] Plaintiff's Complaints (ECF No. 1, 3) identify Piper as the "Commissioner of the State Board of Elections." Piper's actual title is Commissioner of the Virginia *Department* of Elections.

[3] Plaintiff's Complaints (ECF No. 1, 3) identify Jessica Bowman as the "Deputy Commissioner of the State Board of Elections." Bowman is no longer employed by the Commonwealth.

F.2d 1213, 1219 (4th Cir. 1982)). Once the issue of the court's subject matter jurisdiction is raised, "the plaintiff bears the burden of proof to preserve jurisdiction." *U.S. ex rel. Willoughby v. Collegiate Funding Servs., Inc.*, No. 3:07-cv-290, 2010 U.S. Dist. LEXIS 139989, at *19 (E.D. Va. Sept. 21, 2010) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). "[T]he evidentiary standard depends upon whether the challenge is a facial attack on the sufficiency of the pleadings, or an attack on the factual allegations that support jurisdiction." *Allen*, 245 F. Supp. 2d at 782-83 (internal quotation omitted). As explained by the Fourth Circuit:

> When a defendant makes a facial challenge to subject matter jurisdiction, "the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration. In that situation, the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction. In the alternative, the defendant can contend—as the Government does here—that the jurisdictional allegations of the complaint [are] not true. The plaintiff in this latter situation is afforded less procedural protection: If the defendant challenges the factual predicate of subject matter jurisdiction, "[a] trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations, without converting the motion to a summary judgment proceeding. In that situation, the presumption of truthfulness normally accorded a complaint's allegations does not apply, and the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction.

Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009) (internal quotes and citations omitted).

Pursuant to Rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss under Rule 12(b)(6), the Court "accept[s] as true all well-pleaded allegations and view[s] the complaint in the light most favorable to the plaintiff." *Philips v. Pitt County Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). But the complaint's factual allegations "must be enough to raise a right to relief above the speculative level" and "to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court "'need not

accept the [plaintiff's] legal conclusions drawn from the facts,' nor need it 'accept as true unwarranted inferences, unreasonable conclusions, or arguments.'" *Phillips*, 572 F.3d at 180 (quoting *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 616 n.26 (4th Cir. 2009)). The plaintiff must "provide the 'grounds' of his 'entitlement to relief'" which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (internal citation omitted). Finally, "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement fail to constitute well pled facts for Rule 12(b)(6) purposes." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250, 255 (4th Cir. 2009).

ARGUMENT

I. Plaintiff Lacks Standing

Article III of the United States Constitution limits the role of the federal judiciary to resolving cases and controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). Standing is a core component of this Article III requirement that must be established by litigants before a court may exercise jurisdiction over their claims. *Id.* at 560. The doctrine of standing requires (1) that the plaintiff must have suffered an injury-in-fact; (2) that there must be a causal connection between the injury and the conduct complained of; and (3) that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560-561. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Because standing is "an essential component of [the] case of controversy requirement of federal jurisdiction," a defendant may challenge a plaintiff's standing by moving to dismiss pursuant to Rule 12(b)(1). *Marshall v. Meadows,* 105 F.3d 904, 906 (1997) (citing *Allen v. Wright*,

468 .S. 737, 751 (1984); *Lujan*, *supra*, at 560)).

A. Plaintiff does not demonstrate an injury in fact

"The injury-in-fact requirement requires a plaintiff to show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo* at 1543 (quoting *Lujan*, *supra*, at 560). "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Since Plaintiff does not demonstrate a concrete or particularized injury, he has not suffered an injury-in fact, and therefore lacks standing in this matter.

Indeed, Plaintiff's alleged injury does not exist, as census data has not yet been received by the Defendants from the U.S. Census Bureau and the November 2021 election has not occurred. A "concrete" injury must be "de facto"; that is, it must actually exist. *Spokeo* at 1548. "[A] plaintiff cannot merely allege a 'bare procedural violation, divorced from any concrete harm' and 'satisfy the injury-in-fact requirement of Article III.'" *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 252 (4th Cir. 2020).

While Plaintiff alleges that he is a voter in the 68th District,[4] he does not show that his vote will actually be affected by the data that is returned by the U.S. Census Bureau. Any supposition as to that fact is conjecture. Plaintiff himself simply "*believe[s]* that the 68th District will undergo meaningful change" when redistricting is complete. Am. Compl. ¶ 74 (emphasis added). The U.S. Census Bureau stated that "states are expected to receive redistricting data by August 16, and the

[4] Am. Compl. ¶ 22.

full redistricting data with toolkits for ease of use will be delivered by September 30."[5] Once it receives the redistricting data, the Virginia Redistricting Committee must establish maps for new districts within 45 days. Va. Const. Art. II, Sec. 6-A(d). Plaintiff fails to allege and provides no evidence that he will be injured by redistricting in his locality that occurs after the November election.

Plaintiff also fails to establish standing by claiming that he is "considering a run for the House of Delegates." Am. Compl. ¶ 23. Plaintiff alleges that he should be allowed to run in 2022, instead of being "forced to wait until 2023." *See* Am. Compl. ¶ 104.

Any future election, including the 2023 election, is too far in the future for Plaintiff's claims to be more than speculative. A candidate may not begin to circulate the necessary petition papers to qualify as a primary candidate or as an independent candidate until January 1 of the year in which the election will occur. *See* Va. Code § 24.2-506 (independent candidates); § 24.2-521 (primary candidates). "Considering a run," (Am. Compl. ¶ 23), is merely a hypothetical possibility and not a substitute for concrete steps required by law to qualify as a candidate for office.[6]

In light of the foregoing, Plaintiff's claims should be dismissed for failure to demonstrate a concrete injury cause by Defendants.

B. Plaintiff demonstrates no particularized injury

Plaintiff fails to demonstrate that he particularly will be impacted by any redistricting after

[5] United States Census Bureau, *2020 Census Apportionment Results Delivered to the President* (last visited July 26, 2021) https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html.

[6] Plaintiff also does not gain standing by claiming that he is a candidate in the 2021 House of Delegates election. He makes no allegation that he filed any candidate qualification forms to appear as a candidate on the November 2, 2021 ballot. It is too late for him to qualify now. Candidate qualification papers for the November 2021 election were required to be filed on or before June 8, 2021. *See* Va. Code § 24.2-503 (prior to July 1, 2021). Accordingly, any argument that Plaintiff possesses standing as a candidate with respect to the 2021 election is moot.

the November 2021 election. As noted, *supra*, Plaintiff did not allege that he qualified as a candidate for the November 2021 House of Delegates election and it is far too soon to qualify as a candidate for the 2023 election. Plaintiff did not file candidacy forms to qualify to be a candidate, and the candidate qualification deadline passed almost two months ago. *See* Va. Code § 24.2-503 (prior to the 2021 amendment).

For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Spokeo* at 1548 (quoting *Lujan*, at 558, n.1).[7] Plaintiff fails to provide any specific information to substantiate the claims that he will be affected as a potential candidate by any redistricting in the 68th District. All redistricting data required from the U.S. Census Bureau will be supplied not later than August 16, 2021. Any claims relating to the composition of districts at a future point in time are purely speculative, as there is no firm basis on which to make such claims.

Accordingly, there is no official basis to conclude that Plaintiff will be personally affected based on his residential address. Plaintiff does not demonstrate a particularized injury, and his claim should be dismissed.

C. Plaintiff does not show that any alleged injury will be redressed by a favorable decision

Plaintiff does not establish an injury that may be redressed by the current case, given that there is no injury present. "If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to

[7] *See also*, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 342 (2006) ("plaintiff must allege personal injury"); *Whitmore v. Arkansas*, 495 U. S. 149, 155 (1990) (holding that an alleged injury must be "distinct"); *Allen v. Wright*, 468 U. S. 737, 751 (1984) (holding that an injury must be "personal"); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982) (holding standing requires that the plaintiff "personally has suffered some actual or threatened injury'"); *United States v. Richardson*, 418 U. S. 166, 177 (1974) (holding that an injury must not be "undifferentiated"); *Public Citizen, Inc. v. National Hwy. Traffic Safety Admin.*, 489 F. 3d 1279, 1292-1293 (CADC 2007).

resolve." *TransUnion,* at 2190 (internal citations omitted).

As of the date of filing, there has been no injury caused by the Defendants, as stated *supra*. Thus, there is no case or controversy for this Court to resolve. The U.S. Census Bureau has not provided census data, and, as such, any redistricting of the 68th District or any other district in the Commonwealth is merely speculative. Any claims relating to how districts may be reapportioned are mere conjecture without evidence to support those claims. There has been no injury to Plaintiff that may be redressed by a decision of this Court.

II. Eleventh Amendment Immunity Prohibits Plaintiff's Suit

It is well-established that the Eleventh Amendment bars suit in federal court by a private citizen against any non-consenting state, as states are generally immune from suit in federal court. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). This bar from suit, or immunity, is not limited to the state itself, but extends to arms of the state, including a state's agencies, divisions, departments, and officials. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984). In general, state officers sued in their official capacities—in this case, the Governor, *see* Am. Compl. p. 1,[8] Robert Brink, John O'Bannon, Jamilah D. LeCruise, Christopher Piper, and Jessica Bowman, *see* Am. Compl. ¶¶ 26-30—are "entitled to Eleventh Amendment protection" because such a suit "'is not a suit against the officer but rather is a suit against the officer's office.'" *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001) (quoting *Will*, 491 U.S. at 71).

In *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court recognized a limited exception to the general rule of immunity that permits federal courts to grant prospective relief against a state officer when that officer acts in violation of federal law. As the Court explained, that doctrine is

[8] The caption of the Amended Complaint names the Governor in his official capacity, see Am. Compl. p.1, but does not otherwise name the Governor in his official capacity, *see id*. at ¶ 24.

based on the "fiction" that an officer who acts unconstitutionally is "stripped of his official or representative character" and may therefore be "subject[]" to "the consequences of his individual conduct" in federal court. *Id*. at 159–60.

Although *Ex Parte Young* provides an avenue for plaintiffs seeking injunctive and declaratory relief against States, "[t]he purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional [law] is not aided by enjoining the actions of a state official not directly involved in enforcing the subject [law]." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 332 (4th Cir. 2001). Accordingly, the *Ex Parte Young* exception is limited to situations where a plaintiff can show: (1) a "special relation" between the officer sued and the challenged policy; and (2) that the officer has "acted or threatened" to enforce the policy. *McBurney v. Cuccinelli*, 616 F.3d 393, 399, 402 (4th Cir. 2010). These requirements ensure both that "the appropriate party is before the federal court, so as not to interfere with the lawful discretion of state officials" and that "a federal injunction will be effective with respect to the underlying claim." *South Carolina Wildlife Fed. v. Limehouse*, 549 F.3d 324, 333-34 (4th Cir. 2008).

A. The Fourth Circuit has repeatedly found actions against a State's Governor fail to satisfy the *Ex Parte Young* prerequisites.

In *Gilmore*, the Fourth Circuit dismissed Virginia's Governor from a case alleging constitutional infirmity with five statutes involving the transportation and disposal of municipal solid waste. "[A]lthough Governor Gilmore [was] under a general duty to enforce the laws of Virginia by virtue of his position as the top official of the state's executive branch," the Court explained, "he lack[ed] a specific duty to enforce the challenged statutes." 252 F.3d at 331 (emphasis added). In *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018), the Fourth Circuit likewise declined to apply the *Ex Parte Young* exception to a suit against North Carolina's Governor,

explaining that when a plaintiff sues "to enjoin the enforcement of an act alleged to be unconstitutional, the exception applies only where a party defendant in [such] a suit . . . has some connection with the enforcement of the Act." *Id*. at 355 (quotation marks omitted). Numerous other decisions from within this circuit also reject attempts to sue governors under *Ex Parte Young*. *See, e.g.*, *Kobe v. Haley*, 666 Fed. Appx. 281, 300 (4th Cir. 2016); *Lighthouse Fellowship Church v. Northam*, 2020 WL 2614626, at *4-*5 (E.D. Va. May 21, 2020); *Virginia Uranium, Inc. v. McAuliffe*, 147 F. Supp. 3d 462, 467-68 (W.D. Va. 2015); *Harris v. McDonnell*, 988 F. Supp. 2d 603, 606 (W.D. Va. 2013); *North Carolina State Conference of NAACP v. Cooper*, 397 F. Supp. 3d 786, 800-02 (M.D.N.C. 2019).

Similarly, these precedents preclude not only Plaintiff's claims against the Governor in this matter, but the claims against Robert Brink, John O'Bannon, Jamilah LeCruise, in their official capacities as the Chairman, Vice-Chairman, and Secretary of the State Board of Elections, respectively, Christopher Piper, in his official capacity as the Commissioner, and Jessica Bowman, who has not served as Deputy Commissioner of the Department of Elections since January 2021 and who is no longer employed by the Commonwealth.[9] None of the individual defendants are charged with requirements relating to redistricting under either Title 24.2 of the Virginia Code or the Virginia Constitution. While the individual defendants, except for Bowman, in their official capacities are charged with, "supervis[ing] and coordinat[ing] the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections," *see* Va. Code § 24.2-103(A), they are not assigned enforcement authority under the redistricting process.

[9] As noted, *supra*, Jessica Bowman is no longer employed by the Commonwealth despite the statement in the Amended Complaint to the contrary. *See Am. Compl.* ¶ 30.

Further, Bowman, in her official capacity when she was the Deputy Secretary of Administration, had no authority with respect to enforcing the redistricting process, nor does Plaintiff allege that Bowman, as the Deputy Secretary of Administration, was charged with enforcing the redistricting process.

B. Plaintiff has not demonstrated a reasonable expectation or demonstrated probability that the challenged redistricting action will be enforced against him by Defendants

As in *McBurney*, the second *Young* requirement is also lacking here because Plaintiff has failed to allege—much less demonstrate—that the Governor or the other named Defendants "have . . . acted or threatened to act" to enforce the challenged redistricting against anyone, let alone against Plaintiff. 616 F.3d at 402. The Fourth Circuit has been clear that *Ex Parte Young* involves two discrete inquiries: whether the officer sued has a "special relation" to the challenged law, and whether he has "acted or threatened" to enforce that law. *McBurney*, 616 F.3d at 401–02. Plaintiff makes no allegation and cannot show that there is a demonstrated probability that any future redistricting will affect him either as a voter or as a candidate; nor does Plaintiff allege how each Defendant has acted or threatened to act.

C. Sovereign immunity further bars Plaintiff's state law claims

But the sovereign immunity problems with Plaintiff's claims do not end there. Plaintiff's Amended Complaint avers that Article II, Section 6 and 6-A of the Virginia Constitution require new districts to be drawn every ten years and that elections for House of Delegates to be held under such maps in the same year. Any such requirement under the Virginia Constitution is state law, not federal law. Plaintiff cannot use *Ex Parte Young* to enforce compliance with state law. *Antrican v. Odom*, 290 F.3d 178, 187 (4th Cir. 2002); *see also Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 296 (4th Cir. 2001) (rejecting effort to use *Ex Parte Young* exception "to compel a State

official to comply with the State's law"). Accordingly, Count II of Plaintiff's Amended Complaint fails against all Defendants.

III. Plaintiff otherwise fails to state a claim under Rule 12(b)(6)

Under the standards established by *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), compliance with Rule 8(a)(2) of the Federal Rules of Civil Procedure requires more than "labels and conclusions," and a complaint must "state a claim to relief that is plausible on its face." *Id*. Facts that are merely consistent with a defendant's liability are insufficient to state a plausible claim. *Id*. In order to survive a motion to dismiss, the "factual allegations must be enough to raise a right to relief above the speculative level" and "state a claim to relief that is plausible on its face." *Philips v. Pitt Mem. Hosp*., 572 F.3d 176, 180 (4th Cir. 2009) (citing *Bell Atl. Corp.v. Twombly*, 550 U.S. 544 (2007)).

This Court must "determine whether it is plausible that the factual allegations in the complaint are enough to raise a right to relief above the speculative level." *Monroe v. City of Charlottesville*, 579 F.3d 380, 386 (4th Cir. 2009) (quoting *Andrew v. Clark*, 561 F.3d 261, 266 (4th Cir. 2009)) (internal quotation marks omitted). In sum, the "plausibility" standard set forth in *Twombly* requires more than a mere possibility that a defendant acted unlawfully. *Twombly* at 556.

While Plaintiff makes allegations regarding how redistricting may or may not affect him as a voter and a potential candidate, any such predictions are conclusory and purely speculative, given that no census data has been provided by the U.S. Census Bureau. Accordingly, Plaintiff fails to state a claim and this action is barred under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

CONCLUSION

First, Plaintiff fails to allege and cannot demonstrate standing in this matter because there is neither an injury in fact nor an injury to redress by decision of this Court. Second, Defendants are immune from this action pursuant to the Eleventh Amendment. Finally, the Amended Complaint offers conclusory allegations based on mere speculation and thus it otherwise fails to state a cognizable claim. Defendants respectfully request that this case be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on August 3, 2021, I electronically filed the Memorandum in Support of Defendants' Motion to Dismiss with the Clerk of Court using the CM/ECF system. A true copy of said Memorandum in Support of Defendants' Motion to Dismiss was also sent, via first class mail, to:

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