**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.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS SECOND AMENDED COMPLAINT

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In his Second Amended Complaint, ECF 18, Plaintiff asks this Court to order Defendants to set an election in 2022, though district plans based on the 2020 Census data have not been established and Defendants have no authority to establish district plans. Furthermore, Defendants have no statutory authority to schedule a general election. Defendants have not waived sovereign immunity. The Eleventh Amendment to the United States Constitution bars suit against Defendants—the Governor, all State Elections Officers, and the state agency that oversees elections—because these state actors lack the authority to establish district plans and lack the authority to set a general election. Accordingly, Plaintiff's Second Amended Complaint fails on all counts.

STATEMENT OF FACTS

1. Plaintiff's suit names the following defendants: Ralph S. Northam (Governor Northam), in his official capacity as the Governor of Virginia; the State Board of Elections (SBE); Robert H. Brink, John O'Bannon, Jamilah D. LeCruise, in their official capacities as the Chairman, Vice-Chairman, and Secretary, respectively, of the SBE; and Christopher E. Piper, in his official

capacity as the Commissioner of the Virginia Department of Elections (the SBE members and the Commissioner are collectively referenced as the State Elections Officers).

2. Article V, Section 7 of the Virginia Constitution establishes the executive and administrative powers of the Governor of the Commonwealth, including being commander-in-chief of the armed forces of the Commonwealth, interacting with foreign states, and fill[ing] vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision[1].

3. No provision of the Virginia Constitution or the Virginia Code grants the Governor the authority to establish district plans or to set a general election.

4. The SBE and Chairman Brink, Vice-Chairman O'Bannon, and Secretary LeCruise 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," as well as prescribe regulations and forms for voter registration and elections. Va. Code § 24.2-103(A).

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5. No provision of the Virginia Constitution or the Virginia Code grants the SBE or its members the authority to establish district plans or to set any election.

6. Commissioner Piper is the "principal administrative officer" of the Virginia Department of Elections (ELECT). Va. Code § 24.2-102(B).

7. ELECT conducts the State Board of Elections' administrative and programmatic operations and discharges the board's duties consistent with delegated authority.

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[1] There are no vacancies in offices in question in the current suit. Further, gubernatorial appointments to fill vacancies in offices which are filled by election by the General Assembly or by appointment by the Governor which is subject to confirmation by the Senate or the General Assembly, made during the recess of the General Assembly, shall expire at the end of thirty days after the commencement of the next session of the General Assembly. Va. Const. Art. V, sec. 7.

8. Among those duties, ELECT is authorized to establish and maintain a statewide automated voter registration system to include procedures for ascertaining current addresses of registrants, to require cancellation of records for registrants no longer qualified, to provide electronic application for voter registration and absentee ballots, and to provide electronic delivery of absentee ballots to eligible military and overseas voters.

9. No provision of the Virginia Constitution or the Virginia Code grants the Commissioner or ELECT the authority to establish district plans or to set any election.

10. In Count One of his Second Amended Complaint, Plaintiff claims that Defendants have violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, ECF 18 at ¶¶ 121-134, even though none of the Defendants have the authority to alter the status quo with respect to establishing districts or scheduling elections.

11. Plaintiff asserts that Defendants are proper parties. *Id.* at ¶ 127.

12. In Count Two of his Second Amended Complaint, Plaintiff claims that Defendants have failed to adopt the "required redistricting plan" under the Virginia Constitution. ECF 18 at ¶ 136.

13. Plaintiff does not allege that any such redistricting plan exists or that Defendants even have the authority to establish such a redistricting plan. *Id.* at ¶¶ 135-142.

14. Plaintiff asks this Court to declare Defendants to be in violation of the Constitution of the United States and the Virginia Constitution, to limit to one year the term of those candidates elected at the November 2, 2021 election, and to set an election for the House of Delegates in November 2022. *Id.* at p. 13.

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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 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:

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> 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).

As the Fourth Circuit has reiterated, the defense of sovereign immunity is a jurisdictional bar, as "sovereign immunity deprives federal courts of jurisdiction to hear claims, and a court

finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." *Cunningham v. Gen. Dynamics Info. Tech.*, 888 F.3d 640, 649 (4th Cir. 2018); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."); *Bodin v. Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006) ("[Sovereign] immunity deprives federal courts of subject matter jurisdiction." (citing *Chapa v. U.S. Dep't of Justice*, 339 F.3d 388, 389 (5th Cir. 2003)).

ARGUMENT

I. The Eleventh Amendment Prohibits Plaintiff's Count I Federal Law Claims

A. The SBE Is Immune From Plaintiff's Federal Law Claims Under The Eleventh Amendment

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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). "A suit against the State Board of Elections is . . . functionally equivalent to a suit against the Commonwealth of Virginia, and the State Board of Elections is entitled to the same protections of sovereign immunity as the Commonwealth itself." *Libertarian Party of Va. v. Va. State Bd. of Elections*, No. 1:10-cv-615 (LMB/TCB), 2010 U.S. Dist. LEXIS 97177, at *12-14 (E.D. Va. Sep. 16, 2010).

The SBE is a state agency and has not waived its sovereign immunity; thus the SBE is not subject to this Court's jurisdiction.[2] Even if the SBE was not afforded the same protections of sovereign immunity as the Commonwealth itself, the SBE does not possess the authority to grant the relief that Plaintiff seeks. Accordingly, Plaintiff's Second Amended Complaint must be dismissed on all counts as to the SBE under the Eleventh Amendment to the Constitution of the United States.

B. The State Officer Defendants Are Immune From Suit Under The Eleventh Amendment

In general, state officers sued in their official capacities—in this case, the Governor, the Chairman, Vice-Chairman, and Secretary of the SBE, and the Commissioner of ELECT—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 v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (citations omitted)).

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Plaintiff may attempt to claim that the state officer defendants are subject to suit because *Ex Parte Young* creates an exception to the Eleventh Amendment immunity of government officials, but *Ex Parte Young* clearly dictates otherwise. 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 injunctive relief against a state officer when that officer acts in violation of federal law. As the Court explained, that doctrine is based on the "fiction" that an officer who acts unconstitutionally is "stripped of his official or representative character" and may

[2] The *Ex Parte Young* exception, discussed *infra*, does not apply to state agencies: "the legal fiction of the *Ex parte Young* doctrine only allows suit for injunctive or declaratory relief against individual officers or officials of a state or local government, not against a state or state agencies." *Lighthouse Fellowship Church v. Northam*, 2020 WL 2614626, at *14 (E.D. Va. May 21, 2020).

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) (emphasis added). 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).

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1. Governor Northam is Immune From Suit

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).

Here, Plaintiff has named Governor Northam as a defendant without alleging, much less demonstrating, that Governor Northam has any special relation to the election provisions in question. Like Governor Gilmore, Governor Northam's general duty to enforce the laws of the Commonwealth does not amount to a specific duty or even authority to enforce the statutory election provisions complained of by Plaintiff. Nowhere in the Virginia Constitution or the Virginia Code is Governor Northam given authority to regulate the time, place, manner, conduct and administration of elections or establish voting districts. *See* Va. Const. Art. 2 §§ 4, 6, and 6A (outlining the procedures for setting elections and establishing voting districts). The *only* electoral authority of the Governor specifically with respect to elections is to postpone an election in the event of a state of emergency[3] and to set a special election when vacancies in office occur.[4] Plaintiff asks for relief that the Governor does not have the authority to grant. Additionally, Plaintiff does not—and cannot—allege that Governor Northam "has . . . acted or threatened to act" to enforce a challenged policy. *McBurney*, 616 F.3d at 402.

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[3] Va. Code § 24.2-603.1.
[4] Va. Code § 24.2-207, -209, and -216.

Accordingly, the *Ex Parte Young* exception does not apply, and Governor Northam is immune from suit pursuant to the Eleventh Amendment on all counts of Plaintiff's Second Amended Complaint.

2. The State Elections Officer Defendants Are Also Immune from Suit

The remaining defendants, the State Elections Officers, are also immune from suit because the *Ex Parte Young* exception does not apply to them. Like Governor Northam, the State Elections Officers do not have authority to execute the remedies sought by Plaintiff. The State Elections Officers are charged with, in the case of the SBE officers, "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 authorized to establish district plans or set elections. Similarly, the Commissioner of ELECT is responsible for carrying out the electoral administrative and programmatic operations in the Commonwealth. Va. Code § 24.2-102. No provision of either the Virginia Constitution or Virginia Code permits the Commissioner to establish district plans or set elections.

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The State Elections Officers are not authorized to establish district plans nor can they set elections. Accordingly, the *Ex Parte Young* exception does not apply, and the State Elections Officers are immune from suit pursuant to the Eleventh Amendment on all counts of Plaintiff's Second Amended Complaint.

II. Count Two of the Second Amended Complaint is also Barred by Sovereign Immunity.

Plaintiff fails to establish that this Court has jurisdiction with respect to the matters alleged in Count Two of his Second Amended Complaint. Plaintiff avers that Virginia's Constitution requires that new district plans be established every ten years and elections for House of Delegates be held using the new district plans in the same year. ECF 18 ¶¶ 78-82. In Count Two of his Second Amended Complaint, Plaintiff claims that Defendants have failed to adopt the "required

redistricting plan" under Article II, Sections 6 and 6-A of the Virginia Constitution. *Id.* ¶ 136. Plaintiff does not allege that any such district plan exists or that Defendants even have the authority to establish such a redistricting plan. *Id.* ¶¶ 135-142. Plaintiff alleges that the failure to *ultra vires* establish district plans and set a new election is a violation of the Virginia Constitution on the part of the State Elections Officer Defendants.

Setting aside the fact that the named State Elections Officer Defendants do not have the authority to *sua sponte* redraw the Commonwealth's district plans and set a new election as they please, any requirement under the Virginia Constitution is *state*, 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"). Further, the Commonwealth has not in any way waived its Eleventh Amendment immunity, nor does the Plaintiff allege or demonstrate that this Court has jurisdiction over a claim relating to state law. Accordingly, Count Two of Plaintiff's Second Amended Complaint fails against all Defendants.

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CONCLUSION

Plaintiff asks the Court to require the Defendants to set a general election in November 2022, though Defendants have no authority under the Virginia Constitution or Virginia Code to set such an election. Plaintiff further asks this Court to require Defendants to set such an election when district plans have not yet been established to govern the November 2022 election and Defendants do not have authority to establish such district plans. Moreover, this Court lacks subject matter jurisdiction, given that the relief requested by Plaintiff to have this federal court enforce a state law clearly violates both the Eleventh Amendment to the Constitution of the United

States and is not permissible under the *Ex Parte Young* exception. In light of the foregoing, Defendants respectfully request that this case be dismissed with prejudice.

Respectfully submitted,

By: *__/s/Carol L. Lewis___*

Counsel

Mark R. Herring
Attorney General of Virginia

Erin B. Ashwell
Chief Deputy Attorney General

Donald D. Anderson
Deputy Attorney General

Heather Hays Lockerman
Senior Assistant Attorney General

Calvin C. Brown (VSB #93192)*
Assistant Attorney General
Carol L. Lewis (VSB #92362)*
Assistant Attorney General
Brittany A. McGill (VSB #92401)*
Assistant Attorney General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
804-692-0558 (telephone)
804-692-1647 (facsimile)
clewis@oag.state.va.us
* *Attorneys for Ralph Northam, Robert H. Brink, John O'Bannon, Jamilah D. LeCruise, and Christopher E. Piper, in their official capacities, and the Virginia State Board of Elections*

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on September 23, 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:

Paul Goldman
PO Box 17033
Richmond, VA 23226
Pro se Plaintiff

/s/ Carol L. Lewis
Carol L. Lewis (VSB #92362)*
Assistant Attorney General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
804-692-0558 (telephone)
804-692-1647 (facsimile)
clewis@oag.state.va.us
**Attorney for Ralph Northam, Robert H. Brink, John O'Bannon, Jamilah D. LeCruise, and Christopher E. Piper, in their official capacities, and the Virginia State Board of Elections*

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