

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)**

Wicomico County Branch of the
National Association for the
Advancement of Colored People, *et al.*,

Plaintiffs,

v.

Wicomico County, Maryland, *et al.*,

Defendants.

Civil Action No. 23-cv-03325-MJM

PLAINTIFFS' OPPOSITION TO
DEFENDANTS BOARD OF EDUCATION OF WICOMICO COUNTY AND
INDIVIDUAL BOARD OF EDUCATION MEMBERS'
MOTION TO DISMISS

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INTRODUCTION

Eight years ago, the Defendants named in this action – including moving Defendants Wicomico County Board of Education and its members (“School Board Defendants”) – collaborated together to convert Wicomico’s gubernatorially-appointed School Board into an locally-elected Board. To effectuate this change, Defendants collectively initiated state legislation changing the Board to an elective body using a five single member district and two at-large structure (the “5-2 system”) employed by Wicomico County to maintain white control over local government, despite two decades of complaints from Wicomico County Black residents that use of this system inflicts racially discriminatory vote dilution. That bill was placed as a referendum on the 2016 ballot before Wicomico’s majority-white electorate, which approved the measure. Throughout this process, Black residents, including Plaintiffs NAACP and Dr. Eddie Boyd, vocally opposed use of the 5-2 system for School Board elections, as racially discriminatory and unlawful. To no avail.

Predictably, since the 5-2 system was first used in School Board elections in 2018, it has transported the persistent dilution of Black votes in County Council elections to School Board elections, unlawfully confining Black voters to one of the seven Board seats. This gross discrimination comes as the K-12 student population has become increasingly diverse – over 62 percent of the public school population are students of color.

Plaintiffs challenged the 5-2 system as unlawful both with respect to County Council elections and School Board elections, seeking relief directly under Section 2 of the Voting Rights Act as well as seeking further relief under 42 U.S.C. §1983. While not in any way contesting the merits of Plaintiffs’ discrimination claims, the School Board and its members now seek dismissal, proclaiming a nonsensical lack of interest in this matter and invoking an Eleventh Amendment

defense that has been rejected (repeatedly) as statutorily waived – by Maryland’s highest court, this Court, and the Fourth Circuit. The motion is meritless and should be denied in full.

APPLICABLE LEGAL STANDARD

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction challenges a court’s authority to hear the matter brought by a complaint. *See Davis v. Thompson*, 367 F.Supp.2d 792, 799 (D.Md.2005). With respect to a facial challenge such as that asserted here, a court will grant a motion to dismiss for lack of subject matter jurisdiction only “where a claim fails to allege facts upon which the court may base jurisdiction.” *Id.* at 799. When addressing a facial challenge, “the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.” *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir.2009) (*quoting Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982)).

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. To withstand a challenge under Rule 12(b)(6), “a complaint must set forth ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court reviewing a motion to dismiss under Rule 12(b)(6) must “accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff.” *Skyline Restoration, Inc. v. Church Mut. Ins. Co.*, 20 F.4th 825, 829 (4th Cir. 2021) (*quoting King v. Rubenstein*, 825 F.3d 206, 212 (4th Cir. 2016)).

Finally, pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, a case may be dismissed for “failure to join a party under Rule 19.” A Rule 12(b)(7) motion proceeds by a two-step inquiry. First, the court must ask “whether a party is necessary to a proceeding because of its relationship to the matter under consideration pursuant to Rule 19(a).” *Owens–Ill., Inc. v.*

Meade, 186 F.3d 435, 440 (4th Cir.1999) (citation and internal quotation marks omitted). Second, if the party is necessary, it will be ordered into the action unless it destroys the court's jurisdiction. *Id.* The burden is on the moving party to "show that the entity who was not joined is needed for a just adjudication." *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005). "Courts are loath to dismiss cases based on nonjoinder of a party, so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Ill., Inc.*, 186 F.3d at 441.

ARGUMENTS

I. This Action is not Barred by the Eleventh Amendment.

The cornerstone of the School Board Defendants' motion is its erroneous contention that it and its members are immune from any and all liability in this action – both for damages and from injunctive and declaratory relief. ECF 52-1 at 7-10.

While states, as well agencies that are arms of the state, such as some boards of education, are generally protected under the Eleventh Amendment from federal court suits brought by the state's own citizens, *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990), there are exceptions. *Lee-Thomas v. Prince George's County Public Schools*, 666 F.3d 244, 249 (4th Cir. 2017). One of the most common exceptions is waiver: where a state waives its immunity by statute, the Eleventh Amendment does not bar the suit. *Id.* As discussed below, Maryland has enacted a statute waiving county boards of education's Eleventh Amendment immunity "for all claims in the amount of \$400,000 or less." Md.Code Ann., Cts. & Jud. Proc. § 5-518(c) (West 2018). Because of this, the School Board's arguments as to monetary relief, ECF 52-1 at 7-8, are wrong and the motion should be denied.

Another common exception is injunctive relief. Suits against state officials to enjoin them from continuing to enforce allegedly unconstitutional state laws are not deemed against the state,

and hence are not barred by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123, 166 (1908). Because of this, the School Board’s argument that claims for injunctive and declaratory relief must be dismissed, ECF 52-1 at 8-9, are wrong and the motion should be denied.

A third exception is abrogation – “Congress may abrogate the States’ Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority.” *Lee-Thomas*, 666 F.3d at 249 (citation omitted). In the Voting Rights Act, Congress abrogated state immunity, and because of this, the School Board’s argument that claims under the Voting Rights Act must be dismissed, ECF 52-1 at 9-10, are wrong and the motion should be denied.

A. Plaintiffs’ Claims for Equitable Relief and Nominal Damages are Proper Because, Pursuant to State Statute, the School Board Has Waived Eleventh Amendment Immunity to Plaintiffs’ Claims

The School Board’s argument that it and its members have immunity from damages claims because they are “state” entities and accordingly are protected by the Eleventh Amendment and not subject to Section 1983 liability, ECF 52-1 at 7-9, is a familiar argument that Maryland School Boards have for years attempted in both state and federal courts as a defense to civil rights cases of numerous types. This argument fails to address that Maryland Code §5-518(c) waives Eleventh Amendment immunity of School Boards and School Board members for *all claims* under \$400,000. For this reason, the immunity defense has been definitively rejected, by the Maryland Supreme Court, *Board of Educ. of Balt. County v. Zimmer-Rupert*, 409 Md. 200 (Md. 2009) (Maryland Code §5-518(c) waives Eleventh Amendment immunity for all claims, at the relevant time, under \$100,000),¹ the Fourth Circuit, *Lee-Thomas*, 666 F.3d at 244 (as determined by

¹ The statute originally effected a waiver of claims under \$100,000, a limit the Maryland General Assembly raised to \$400,000 in 2016, with full knowledge of the Maryland Supreme Court’s construction of the provision as a waiver of immunity. 2016 Md. Laws, Ch. 680 §§ 1, 3.

Maryland's highest court, Maryland state statute waives School Board's Eleventh Amendment immunity for federal civil rights claims), and this Court, *M.A.B. v. Bd. of Educ. of Talbot County*, 286 F.Supp.3d 704 (D.Md. 2018). Defendants fail to distinguish nor even acknowledge these controlling authorities.

As each of these Courts explain, and as Plaintiffs have explicitly articulated in the Amended Complaint (ECF 25 ¶ 16), Maryland statutory law waives any Eleventh Amendment immunity for civil rights claims for equitable relief and damages up to \$400,000 that local School Boards might otherwise enjoy as joint state-local entities. Specifically, §5-518(c) states:

Sovereign immunity; cap on liability

(c)(1) Except as provided in paragraph (2) of this subsection, a county board of education *may not raise the defense of sovereign immunity to any claim of \$400,000 or less.*

In keeping with the plain meaning of this provision, the Wicomico School Board may not raise Eleventh Amendment immunity here. As Judge Russell of this Court has explained in rejecting precisely the argument (indeed, made by the same counsel representing the Board here):

The Maryland legislature enacted a statute that waived a county board of education's Eleventh Amendment immunity "for all claims in the amount of \$100,000 or less." Md. Code. Ann., Cts. & Jud. Proc. §5-518(c) (West 2018). As interpreted by the Court of Appeals of Maryland, §5-518(c) waives a county board of education's Eleventh Amendment immunity to suit from a plaintiff's discrimination claim under a federal law. *Bd. of Educ. v. Zimmer-Rubert*, 409 Md. 200, 973 A.2d 233, 243 (2009).

M.A.B., 286 F.Supp. at 711. *Accord, Heyward v. Board of Education of Anne Arundel Co.*, 2023 WL 6381498, *31 (D. Md. 2023) (§5-518(c) waives Eleventh Amendment immunity for federal civil rights claims up to \$400,000). "Because §5-518 (c) waives a county board of education's Eleventh Amendment immunity from discrimination claims under federal law and the constitution," the Court concluded, "such immunity does not apply" to the Plaintiffs' claims

against them under Title IX of the Civil Rights Act, the Constitution, and 42 U.S.C. §1983. *M.A.B.*, 286 F.Supp. at 711.² The same is true here, meaning the School Board and its members are treated like local government entities for purposes of this action, subject to suit the same way the County Defendants are, including Plaintiffs claims for nominal damages under 42 U.S.C. §1983.

B. The Claims for Declaratory and Injunctive Relief, including under the Voting Rights Act, are Enforceable Against State Actors, including the Board and its Members.

The School Board Defendants raise two other arguments that all claims as to declaratory and injunctive relief must be dismissed – both are wrong.

First, the School Board Defendants contend that they are not subject to the Voting Rights Act. ECF 52-1 at 9-10. State and local entities and officials are routinely subject to suit under the Voting Rights Act. While the Board has cited two district court cases questioning this established principle, the Supreme Court has applied the Voting Rights Act to State actors in dozens of cases, and the appellate courts that have addressed the issue have uniformly rejected Defendants’ argument, finding that Congress clearly and validly abrogated sovereign immunity in its enactment of the Voting Rights Act. *See, e.g., Rome v. United States*, 446 U.S. 156, 179-80 (1980) (“Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act . . . [which represents] an expansion of federal power and an intrusion on state sovereignty”); *Alabama State Conf. of Nat’l Ass’n for the Advancement of Colored People v. Alabama*, 949 F.3d 647, 650 (11th Cir. 2020), *cert. granted, judgment vacated as moot sub nom.*

² For similar reasons, the School Board Defendants’ argument that they are not “persons” for purposes of Section 1983 liability is unavailing; the decisions cited (*Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989)) expressly note that Section “1983 does not override a State’s Eleventh Amendment immunity.” But here the Eleventh Amendment immunity has been waived. *See, e.g., Heward v. Bd. of Educ. Of Anne Arundel Co.*, D. Md. No. 1:23-cv-195-ELH (“the statutory provision waives both State sovereign immunity and Eleventh Amendment immunity, in federal and state courts, subject to a cap of \$400,000”)

Alabama v. Alabama State Conf. of NAACP, 141 S. Ct. 2618 (2021) (It is “difficult to conceive of any reasonable interpretation of Section 2 that does not involve abrogation of the state’s immunity”); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) (“The VRA, which Congress passed pursuant to its Fifteenth Amendment enforcement power, validly abrogated state sovereign immunity. The immunity from suit that Texas and its officials otherwise enjoy in federal court offers it no shield here.”); *Mixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir. 1999) (same).

Second, the School Board Defendants more broadly contend that they are not subject to claims for declaratory and injunctive relief “as a matter of law.” ECF 52-1 at 8-9. As a matter of law, School Board members sued for declaratory and prospective injunctive relief in their official capacities, may be properly joined as parties under *Ex Parte Young*, 209 U.S. 123 (1908) (federal court properly exercises jurisdiction over federal questions raised under 42 U.S.C. §1983 when brought against individual state actors in their official capacities.). Suits against state officials to enjoin them from continuing to enforce allegedly unconstitutional state laws are not deemed against the state, and hence are not barred by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. at 166 (state’s attorney general enjoined from enforcing unconstitutional state rate-setting scheme for railroad companies).

The School Board Defendants also contend that they “have no role whatsoever in the electoral process” and are “incapable of providing any of the relief sought.” ECF 52-1 at 8-9. Both of these assertions are contrary to the allegations of the complaint, and in any event, are disputed. For example, each of the individual Board Members Defendants stood for election as candidates in elections conducted under the discriminatory 5-2 system, has “an interest in [a] legal challenge to the structure of election by which they are elected”; further, the requested injunction would prohibit them from participating in elections in a 5-2 system in the future. ECF 25 ¶ 17;

Prayer for Relief B & C. Moreover, as alleged in the Complaint, the “Board initiated [the] change” from an appointed board to the 5-2 system in 2016. ECF 25 ¶ 16.

Indeed, Voting Rights Act cases are routinely brought against State officials sued in their official capacities. Accordingly, the Board’s contention that it and its members cannot be sued under the Voting Rights Act or under 42 U.S.C. §1983 must be rejected.

II. The School Board and Its Members Are Necessary Parties to this Case

As noted above, the School Board Defendants are wrong when they contend that they have no “role whatsoever in the electoral process” (among other things, they participate as candidates in the election, and initiated the changes to adopt the 5/2 structure) and are “incapable of providing any of the relief sought by Plaintiffs” (they would be barred from participating in future 5/2 elections). ECF 52-1 at 8-9. Indeed, the School Board Defendants acknowledge elsewhere in their motion that “they will be substantially impacted by any decision” rendered by the Court in this matter. ECF 52-1 at 10. In any event, they are necessary parties to this action because Maryland law requires that the Board and its members be joined as parties to the case. Under Maryland law where declaratory relief is sought, any impacted entity must be joined as a party. Md. Ann. Code, Cts. Jud. Proc. Art. §3-405 (“If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration shall be made a party”).

Plaintiffs’ claims with respect to the School Board seek declaratory, injunctive and nominal monetary relief through a challenge to the Maryland statute that establishes the manner by which the School Board is elected, including the manner in which its current members were elected. The School Board Defendants’ contention that they have no interest in this matter nor any responsibility for their own election system simply makes no sense: the prospects of the School Board Defendants as candidates in future election will depend on whether a 5/2 map is retained or the School Board is ordered to adopt a seven-district map. Maryland law is clear that necessary

parties to an action seeking declaratory relief include all parties whose interests might be impacted, and that such action may not proceed without them:

§3-405. Necessary parties to declaratory relief

Persons with interest affected by declaration

(a)(1) If declaratory relief is sought, a person who has or claims *any interest* which would be affected by the declaration, *shall be made a party*.

(2) Except in a class action, the *declaration may not prejudice the rights of any person not a party to the proceeding*.

Md. Cts. & Jud. Proc. §3-405 (emphasis added)

For instance, in 1988, Talbot County brought suit against the state and local boards of elections for declaratory judgment that a provision in the county's charter permitting voter-initiated legislation violated the Maryland Constitution. *Maryland State Admin. Bd. of Election L. v. Talbot Cnty.*, 316 Md. 332, 332 (1988). The Maryland Court of Appeals explained that state and local election boards are necessary parties because they have an interest that would be affected by the declaration, specifically the requested relief was an injunction against placement of the voter initiative on the Talbot County ballot. *Talbot County*, 316 Md. At 344. Similarly here, the Wicomico County Board of Education's interests will be affected by the declaration because plaintiffs seek to enjoin the Board from holding elections under the unlawful 5-2 system. Accordingly, the School Board Defendants are necessary parties to this case.

III. Plaintiffs Have Sued All Necessary Parties.

Finally, the School Board Defendants contend that under Rule 12(b)(7) the action should be dismissed because Plaintiffs failed to name the State of Maryland, which School Board Defendants contend is a necessary and indispensable party. ECF 52-1 at 10-12. In making this argument, the School Board Defendants fail to acknowledge (i) that they previously raised this argument in their initial motion to dismiss (ECF 19 at 10-12), and (ii) in response, the Plaintiffs

amended the complaint to add the relevant state parties – the State Administrator of Elections and the members of the State Board of Elections. ECF 25 at ¶¶ 19-20.

As defendants subject to injunctive and declaratory relief in this action, the Maryland State Administrator of Elections and the Maryland State Board of Elections, represented by the Maryland Attorney General, have filed an Answer to the Amended Complaint and raised no affirmative defenses. Suing these Defendants is the equivalent of suing the State of Maryland, and it suffices under the law. *See generally Ex Parte Young*, 209 U.S. at 166 (to enjoin illegal action by the state, the proper mechanism is to seek an injunction against state officials from engaging in illegal conduct). As this Court has recognized, “to avoid an Eleventh Amendment bar to suit on this basis, the complaint must be lodged against a state official, and it must allege an ongoing violation of federal law and seek relief properly characterized as prospective.” *Courthouse News Serv. v. Harris*, No. CV ELH-22-0548, 2022 WL 17850125, at *20 (D. Md. Dec. 22, 2022) (internal citation omitted).

Finally, nowhere in their brief do School Board Defendants identify any reason why individual State of Maryland officials Defendants are not sufficient to address the various contentions they raise as to indispensable parties. Having failed to address why the joinder of State of Maryland election officials does not moot this argument, the School Board’s Rule 12(b)(7) motion should be denied.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied.

Dated: July 29, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2024 a true and correct copy of the foregoing Opposition to Motion to Dismiss was served via the Court's electronic filing system upon all counsel of record in the above captioned action.

Dated: July 29, 2024
Washington, DC

/s/ John A. Freedman

John A. Freedman