IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMY LAMARCA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No.: 1:11-cv-01255-AJT-JFA
v.	)	
	)	
VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' RULE 12(b) MOTIONS TO DISMISS

Defendants file this Reply to Plaintiffs' Opposition to Defendants' Rule 12(b) Motions to Dismiss and herein urge the Court to dismiss Plaintiffs' Complaint for the reasons stated in its Motions to Dismiss and supporting Memorandum of Points and Authorities, filed December 5, 2011, (Docs. 10 and 11) and as set forth below.

I. INTRODUCTION AND FACTS

The complaint was filed on November 16, 2011, by six Virginia residents who are registered to vote in the Commonwealth (the Plaintiffs), seeking the convening of a three-judge court and declaratory, injunctive, and other relief. (Doc. 1 at 1-2, 7). The complaint premised Plaintiffs' entitlement to this relief on the theory that the current districts are mal-apportioned in violation of the United States Constitution, that the General Assembly has failed to reapportion in the time allotted it by the Virginia Constitution or in the time available under the preclearance process, that the Defendants intend to proceed with the elections using the mal-apportioned congressional districts, and that judicial redrawing of the congressional districts is thus necessary "to ensure that congressional districts that comply with the United States Constitution are in

place for the 2012 election." (Doc. 1 at 3, 4-5, 6, 7). Defendants responded on December 5, 2011, by filing Rule 12(b) Motions to Dismiss, with supporting Memorandum of Points and Authorities. (Docs. 10 and 11). In the motions and memorandum, Defendants set forth reasons why the Court should dismiss the complaint, i.e., because there is no present, justiciable case or controversy, and, as to certain defendants, the claims are barred by sovereign immunity. (Doc. 11 at 2-4).

Although Local Civil Rule 7(F)(1) requires the filing of a "response brief . . . within eleven (11) days after service" of the motion, Plaintiffs filed their Opposition to Defendants' Rule 12(b) Motions to Dismiss on December 19, 2011, and requested that the Court deny Defendants' Motions to Dismiss and grant Plaintiffs' Motion to Convene a Three-Judge Court. *See* Local Civil Rule 7(F)(1). (Doc. 28 at 20). In their opposition, Plaintiffs premise their arguments for ripeness upon an erroneous understanding of the Virginia Constitution, in arguing for *Ex parte Young* jurisdiction, misconstrue the Attorney General's enforcement responsibilities, and, in responding to the 12(b)(6) motion, miss the import of Defendant Palmer's Declaration. As further demonstrated below, Defendants' motions should be granted and the action dismissed for lack of jurisdiction and for failure to state a claim upon which relief may be granted.

II. LAW AND ARGUMENT

In considering whether a complaint survives a Fed. R. Civ. P. 12(b)(1) motion to dismiss for want of jurisdiction, it must be remembered that "[t]he plaintiff has the burden of proving that subject matter jurisdiction exists." *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *see Miller v. Brown*, 462 F.3d 312, 316, 319 (4th Cir. 2006) (holding that "[t]he party attempting to invoke federal jurisdiction bears the burden of establishing standing" and "[t]he burden of proving ripeness" is also on "the party bringing suit"). Accordingly, "'the district court

is to regard the pleadings as mere evidence on the issue [of subject-matter jurisdiction], and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *Evans*, 166 F.3d at 647 (quoting *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)).

A. Plaintiffs' Claims Are Not Justiciable.

The complaint is barred from judicial review by a number of jurisdictional hurdles. First, Plaintiffs lack standing to obtain an adjudication of Article II, § 6 of the Virginia Constitution, as their assertions with respect to that provision constitute only an "undifferentiated, generalized grievance about the conduct of government"--"that the law . . . has not been followed." *See Lance v. Coffman*, 549 U.S. 437, 441-42 (2007) (per curiam) (holding that plaintiff-voters lacked standing to challenge a state judicial reapportionment as violating the Elections Clause, U.S. Const. art. I, § 4, cl. 1, "by depriving the state legislature of its responsibility to draw congressional districts" (internal quotation marks omitted)). In seeking a judicial declaration that the General Assembly, by not passing a congressional redistricting plan in 2011, will violate Article II, § 6 of the Virginia Constitution, Plaintiffs present a question that is not only academic at present, as it remains 2011, but is one of common concern to the rights of all Virginia citizens, and not personal as to Plaintiffs. Having shown no "particularized injury" by the non-passage of a redistricting plan in 2011, as opposed to early 2012, Plaintiffs lack standing to challenge the Virginia General Assembly's alleged non-compliance with Virginia Constitution Article II, § 6. Plaintiffs further are without standing to challenge the lack of a new redistricting plan with regard to districts 2, 5, 6, 8, and 9, districts in which none of the Plaintiffs reside. *See Wilkins v. West*, 264 Va. 447, 460-61, 571 S.E.2d 100, 107 (2002).

Moreover, Plaintiffs have not alleged an injury ripe for judicial review. Ripeness, contrary to Plaintiffs' contentions, *see* (Doc. 28 at 8), is judged at the time the complaint is filed, and cannot ripen with the passage of time. *See Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409, 414-15 (11th Cir. 1995) (in determining justiciability, courts "look to the state of affairs as of the filing of the complaint; a justiciable controversy must have existed at that time"; subsequent events do not cause an unripe action to ripen while the matter is pending (internal quotation marks omitted)); *Int'l Med. Prosthetics Research Assocs., Inc. v. Gore Enter. Holdings, Inc.*, 787 F.2d 572, 575 (Fed. Cir. 1986) ("The burden is on [plaintiff] to establish that jurisdiction over its declaratory judgment action existed at . . . the time the complaint was filed."); *Energy Recovery, Inc. v. Hague*, 133 F. Supp. 2d 814, 817 (E.D. Va. 2000) ("The plaintiff in a declaratory judgment action has the burden of proving by a preponderance of the evidence that an actual controversy existed from the time of filing throughout the pendency of the suit."); *CAE Screenplates, Inc. v. Beloit Corp.*, 957 F. Supp. 784, 788 (E.D. Va. 1997) ("The declaratory judgment plaintiff bears the burden of establishing by a preponderance of the evidence that an actual controversy existed not only at the time of the complaint's filing but also throughout the pendency of the suit."). Thus, the Court must determine whether Plaintiffs have carried their burden to show that on November 16, 2011, their claims for declaratory and injunctive relief were "fit for judicial decision": that "the issues [we]re purely legal and . . . the action in controversy [wa]s final and not dependent on future uncertainties." *Miller*, 462 F.3d at 319. The Plaintiffs have not, and cannot, meet this standard.

In their opposition, Plaintiffs rest their claim to a ripe injury on the ground that "the General Assembly certainly will fail to redraw the existing congressional districts on or before December 31, 2011." (Doc. 28 at 2). That, of course, would not matter for ripeness purposes

except for the fact that Plaintiffs make the extravagant claim that if the General Assembly has not reapportioned by December 31, 2011, it "will be powerless to act" thereafter to reapportion Virginia's congressional districts. (Doc. 28 at 2). Thus, under Plaintiffs' view of the case, whether or not they state an injury ripe for judicial review rises and falls upon the meaning this Court is to give Virginia Constitution, Article II, § 6.

Under Plaintiffs' idiosyncratic understanding of the Virginia Constitution, non-compliance with the terms of Article II, § 6's direction that "[t]he General Assembly shall reapportion the Commonwealth into electoral districts . . . in the year 2011" means that, by not passing redistricting legislation before January 1, 2012, the General Assembly is deprived of the legislative prerogative to reapportion "until 2021." And so "it will fall to the judiciary to draw new congressional districts in its stead." (Doc. 28 at 2, 8-9). Along with the obvious implausibility of the General Assembly having intended such a result when it drafted the language at issue, the erroneousness of Plaintiffs' construction may be seen by recurrence to first principles of State power and through a long line of controlling decisions of the Supreme Court of Virginia. *See Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law'" and enjoys "the prerogative . . . to say what [the State's] law is," a prerogative that "merits respect in federal forums" (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975))).

Beginning with first principles: "The legislature of the State possesses all legislative power not prohibited in express terms or by necessary implication by the State Constitution or the Constitution of the United States." *Albemarle Oil & Gas Co. v. Morris*, 138 Va. 1, 7, 121 S.E. 60, 61 (1924); *accord Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008); *cf.* Va. Const. art. IV, § 1. That being so, "[i]n doubtful cases, the limitation, by a

State Constitution, of the power of the legislature is to be strictly construed, and the courts should resolve all doubts in favor of the constitutionality of the act," or the claim of legislative power. *Albemarle Oil*, 138 Va. at 7, 121 S.E. at 61; *accord Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 435, ___ S.E.2d ___, ___ (2011). The construction pressed by Plaintiffs runs headlong into this presumption, the strongest "known to the law," *see FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 590, 701 S.E.2d 795, 799 (2010), by seeking to radically restrict the legislative prerogatives of the Virginia General Assembly. *See* Va. Const. art. IV, § 14. And, with respect to this particular context, the Supreme Court of Virginia has long recognized "that reapportionment 'is, in a sense, political, and necessarily wide discretion is given to the legislative body.'" *Jamerson v. Womack*, 244 Va. 506, 510, 423 S.E.2d 180, 182 (1992) (quoting *Brown v. Saunders*, 159 Va. 28, 36, 166 S.E. 105, 107 (1932)).

Turning to the Supreme Court of Virginia's case law, we find that, far from being "novel" (Doc. 28 at 15), it has long been held that "[a] statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute." *Nelms v. Vaughan*, 84 Va. 696, 699, 5 S.E. 704, 706 (1888). The *Nelms* Court noted that "[g]enerally the rule is where a statute specifies a time within which a public officer is to perform an act regarding the rights and duties of others, it will be considered as merely directory, unless the nature of the act to be performed or the language shows that the designation of time was intended as a *limitation of* power." *Id.* at 699-700, 5 S.E. at 706 (approving "Lord Mansfield's rule . . . that whether the statute was mandatory or not depended upon whether the thing directed to be done was the essence of the thing required"); *accord Huffman v. Kite*, 198 Va. 196, 200, 93 S.E.2d 328, 331 (1956) (noting that the "general rule most certainly is, that where a statute directs a public officer to do a thing

within a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be regarded as merely directory, and not as a limitation upon his authority" (internal quotation marks omitted)). A still earlier decision of the Supreme Court of Virginia opined that "[t]hose directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute." *Redd v. Supervisors of Henry Cnty.*, 72 Va. (31 Gratt.) 695, 700-01 (1879).

As long ago recognized by the United States Supreme Court, "statutory requisitions intended for the guide of officers . . . generally are . . . designed to secure order, system, and dispatch in proceedings, . . . a disregard of which the rights of parties interested cannot be injuriously affected" and thus "are not usually regarded as mandatory . . . ." *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872); *see also, United States v. Montalva-Murillo*, 495 U.S. 711, 717-18 (1990) (citing *French*, 80 U.S. (13 Wall.) at 511) ("reject[ing] the contention that if there has been a deviation from the time limits of the statute," "the Government's authority" has been "defeat[ed]"). The Supreme Court of Virginia has more recently applied this rule of construction to a hearing under the Sexually Violent Predators Act to conclude that certain language in Va. Code § 37.2-907(A) was directory. *See Hood v. Commonwealth*, 280 Va. 526, 541-42, 701 S.E.2d 421, 429-30 (2010) (noting that "the use of the term 'shall' in a statute is generally construed as directory rather than mandatory").

Notwithstanding Plaintiffs' arguments, (Doc. 28 at 15-16) this rule of construction has been applied with equal force to the Virginia Constitution. *See Albemarle Oil*, 138 Va. at 10, 121 S.E. at 62. In *Albemarle Oil*, the Supreme Court of Virginia reviewed a situation where there had been non-compliance with a constitutional provision directing "[t]hat the General Assembly, *at the request of the any city or town made in a manner provided by law*, may grant to it any special form of organization and government . . . ." 138 Va. at 5-6, 121 S.E. at 61 (quoting Subsection C of § 117 of the Virginia Constitution of 1902). The City of Charlottesville had failed to request approval from the legislature in the manner provided prior to the enactment of a particular form of government that the General Assembly, by the above-quoted provision, had been otherwise empowered to authorize upon request. *Id.* However, the Supreme Court of Virginia held that this non-compliance did "not invalidate [the] act granting a charter" to the City, noting that "[c]onstitutional provisions are directory and not mandatory where they refer to matters merely procedural . . . ." *Id.* at 10, 121 S.E. at 62. Outside of Virginia, the mandatory/directory analysis has been applied to state constitutional provisions for many years, as recognized by the Supreme Court of the United States. *See Mahomet v. Quackenbush*, 117 U.S. 508, 511 (1886) (noting that certain provisions of state constitutions had "been decided to be mandatory, and not directory only"). Plaintiffs' citation to *Thomson v. Robb*, 229 Va. 233, 328 S.E.2d 136 (1985), is unavailing, as that case, at most, stands for the unextraordinary proposition that when the Virginia Constitution identifies the General Assembly as the department of government to exercise a particular power, the Constitution intends to have regular order apply to that action, i.e., "a majority vote of the members of each house of the General Assembly" was necessary to the election of members of the State Corporation Commission. *See*

229 Va. at 239, 243, 328 S.E.2d at 139, 142. Who will exercise a power is quite another matter from the precise time in which it must be exercised.

Whether a provision is directory turns on "the nature, context, and purpose" of the provision in question. *Huffman*, 198 Va. at 202, 93 S.E.2d at 332. "[T]he nature, context, and purpose" of the relevant portion of Article II, § 6, *Huffman*, 198 Va. at 202, 93 S.E.2d at 332, is the direction that "[t]he General Assembly shall reapportion the Commonwealth into electoral districts . . . in the year 2011 and every ten years thereafter;" an obvious reference to the year in which the decennial census data becomes available for reapportionment. The clear purpose of this provision is to provide a trigger for the General Assembly to consider, in view of the Census data, the extent to which redistricting is required to ensure that each "electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." Va. Const. art. II, § 6. As Plaintiffs recognize, "[t]he constitution must be viewed and construed as a whole . . . ." *Cnty. Sch. Bd. of Prince Edward Cnty. v. Griffin*, 204 Va. 650, 659, 133 S.E.2d 565, 571 (1963) (quoting *Dean v. Paolicelli*, 194 Va. 219, 226, 72 S.E.2d 506, 511 (1952)). (Doc. 28 at 14). There is nothing in the Virginia Constitution to support the proposition that redistricting in 2011 was the primary purpose of that provision and that redistricting by the General Assembly was secondary so as to make the timing requirement mandatory rather than directive.

Although parts of Article II, § 6 have been held to be mandatory, as Plaintiffs' note, those parts deal with the requirement "that electoral districts 'shall be' compact and contiguous." *Wilkins*, 264 Va. at 462, 571 S.E.2d at 108. Those parts do not govern timing or the manner of proceeding by the General Assembly, only the result of redistricting, and thus are not subject to the rule of construction requiring that the timing provision be deemed directory. As neither the

nature of the timing provision, nor its context or purpose evince any intent other than "to secure order, system, and dispatch in proceedings," *French*, 80 U.S. (13 Wall.) at 511, "[t]he general rule" must govern: language directing "a public officer to do a thing *within a certain time*, without any negative words restraining him from doing it afterwards, [must] be regarded as merely directory, and not as a limitation upon his authority." *Huffman*, 198 Va. at 200, 93 S.E.2d at 331 (internal quotation marks omitted). Plaintiffs, under the guise of advancing the provision's plain meaning, would have the Court, in effect, add the following italicized language to Article II, § 6: "[t]he General Assembly shall reapportion the Commonwealth into electoral districts . . . in the year 2011 and every ten years thereafter *or not at all*." The Court should decline this invitation. *See Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) ("Courts cannot add language to the statute the General Assembly has not seen fit to include. Nor are they permitted to accomplish the same result by judicial interpretation." (internal citation and quotation marks omitted)).

"The General Assembly is presumed to be aware of the decisions of [the Virginia Supreme] Court when enacting legislation," *Waterman v. Halverson*, 261 Va. 203, 207, 540 S.E.2d 867, 869 (2001). Hence, it must be presumed that when the General Assembly drafted the timing requirement for submission as an amendment to the Virginia Constitution, 2003 Va. Acts 957; 2004 Acts 873, 981, it understood that the requirement would be deemed directory and not mandatory in any legal proceeding.

Plaintiffs have placed all of their jurisdictional eggs in the mandatory basket because all claims of future harm asserted here are conjectural. But it gets even worse for Plaintiffs because absent any other harm, their interest in redistricting in 2011 instead of 2012 is indistinguishable

from the interest of every other citizen in seeing that what is alleged to be the law is followed. There is simply no justiciable case before the Court.

B. Plaintiffs' Claims Are Barred By Sovereign Immunity.

Plaintiffs fail to challenge Defendants' contention that sovereign immunity bars the action against Robert F. McDonnell, William T. Bolling, and the Virginia State Board of Elections, merely pointing to cases to show that "[p]arties like those named as defendants here are regularly named as defendants in voting rights and redistricting cases." (Doc. 28 at n.2). That proves nothing because state sovereign immunity can be waived in federal court. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 481 (4th Cir. 2005) (noting that "[l]ike personal jurisdiction, . . . Eleventh Amendment immunity need not be raised by a court *sua sponte*, and may be waived by the State altogether," and that "the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so" (internal citations and quotation marks omitted)). Hence, Plaintiffs are without a rejoinder to the previously demonstrated proposition that those defendants should be dismissed. (Doc. 11 at 4). As to Attorney General Cuccinelli, "that the Attorney General is integral to the administration of elections in Virginia" does not prove that he has any duty with respect to the reapportionment of congressional districts or whether any particular congressional districting is used to conduct an election. In fact, pursuant to Article II, § 6, he has no role in the legislative drawing of districts.[1] Therefore, under the facts alleged and the claims made, the Attorney General, along with the Governor and Lieutenant Governor, lack any "special relation" to the redistricting process that Plaintiffs challenge. *See McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010).

[1] Given that the Attorney General plays no role in the legislative drawing of districts, the question arises as to the what the Court would order him to do or refrain from doing were it to grant Plaintiffs' claims.

C. Plaintiffs' Claims Fail the Plausibility Standard.

Finally, Plaintiffs' claims fail the plausibility standard for pleading a claim upon which relief may be granted. *See* Fed. R. Civ. P. Rule 12(b)(6). Putting aside the failed timing argument for redistricting, Plaintiffs' only arguable claim to present nonconjectural injury is premised on the wholly implausible allegations that Virginia plans to conduct elections in the old lines. But as Donald Palmer's Declaration makes abundantly clear, "neither the Virginia State Board of Elections nor its officers or agents intend to proceed with an election under the congressional lines established by Va. Code § 24.2-302.1." (Doc. 11, Ex. D). Thus, their claims are insufficient under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). *See* (Doc. 11, Ex. A at 3-4 n.3) (opinion of U.S. District Court for the Western District of Virginia, dismissing redistricting case and noting "that the complaint could be dismissed for failure to state a claim upon which relief can be granted" under *Twombly*).

III. CONCLUSION

For the foregoing reasons, the Court should grant the Defendants' Motions to Dismiss.

Respectfully submitted,

VIRGINIA STATE BOARD OF ELECTIONS, CHARLES JUDD, KIMBERLY BOWERS, DON PALMER, ROBERT F. MCDONNELL, BILL BOLLING, and KENNETH T. CUCCINELLI, II, in their official capacities

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record for Plaintiff:

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I further certify that some of the participates in the case are not registered CM/ECF users. I have mailed one copy of the foregoing document by First-Class Mail to the following non-CM/ECF participant:

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