UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LIGHTHOUSE FELLOWSHIP CHURCH,

Plaintiff,

v.

RALPH NORTHAM, in his official capacity as Governor of the Commonwealth of Virginia,

Defendant.

Civil No. 2:20cv204

ORDER

Pending before the Court is Defendant Governor Ralph Northam's Motion to Dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Mot. to Dismiss, ECF No. 50. For the following reasons, Defendant's Motion to Dismiss the Complaint (ECF No. 50) is **GRANTED**. A hearing on this Motion is not required as the facts and legal arguments are adequately presented in the briefing on the Motion. Fed. R. Civ. P. 78; E.D. Va. Local R. 7(J).

I. BACKGROUND

This case arises from the response from the Governor of the Commonwealth of Virginia to the COVID-19 pandemic. Plaintiff's lawsuit challenges a series of Executive Orders issued by Governor Ralph Northam to combat the spread of COVID-19 in the Commonwealth of Virginia ("the Executive Orders"). *See* Exs. A–C to V. Compl.,

ECF Nos. 1-1, 1-2, 1-3. Plaintiff Lighthouse Fellowship Church ("Lighthouse") alleges that the Executive Orders impermissibly discriminate against religious institutions.

In March 2020, through Executive Order 53, Governor Northam suspended "all public and private in person gatherings of more than 10 individuals" and closed most public businesses and establishments. Executive Order 53, Ex. B to V. Compl., ECF No. 1-3. "Essential" retail businesses, including grocery stores, pharmacies, liquor stores, gas stations, banks, and laundromats and dry cleaners, were exempted from these restrictions. *Id.* Other brick-and-mortar businesses were permitted to remain open if they limited in-person shopping to ten people or fewer. *Id.* Professional businesses were also permitted to remain open but were directed to implement telework options for employees wherever feasible and to adhere to social distancing recommendations and enhanced sanitation practices. *Id.*

Executive Order 55 followed shortly thereafter and directed "[a]ll individuals in Virginia [to] remain at their place of residence," subject to certain exceptions. Ex. C to Compl., ECF No. 1-4. These exceptions, in part, allowed persons to travel to obtain food, beverages, goods, and services identified in Executive Order 53; to seek medical, law enforcement, or emergency services; and visit one's place of worship. *Id.* Executive Order 55 reiterated that "[a]ll public and private in-person gatherings of more than ten individuals [were] prohibited. This includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor. This restriction [did] not apply . . . [t]o the operation of businesses not required to close to the public

under Executive Order 53; or . . . [t]o the gathering of family members living in the same residence." *Id.*

On Sunday, April 5, 2020, a Town of Chincoteague Police Officer visited the Lighthouse Fellowship Church to inquire whether it planned to host a religious service that day. V. Compl. at 11, ECF No. 1. The Officer informed a member of Lighthouse's Board of Directors that it was not permitted to have more than ten people in attendance and that all attendees must be spaced six feet apart. *Id.* at 12. Despite this warning, Lighthouse held a Sunday worship service that violated the Executive Orders by having 16 people in attendance. *Id.* at 11. The Pastor of Lighthouse Fellowship Church was issued a criminal citation and summons. *Id.* at 12–13; Ex. F to V. Compl., ECF No. 1-7. The Pastor inquired whether he would be further criminally cited if the church held a religious worship service on Easter Sunday. V. Compl. at 13, ECF No. 1. Officers informed him that should Lighthouse host any gathering with more than ten people in attendance, every person in attendance would be given a criminal citation for violating the Executive Orders. *Id.*

Plaintiff filed a Verified Complaint on April 24, 2020. *Id.* Plaintiff asserts that the Executive Orders violate: (1) the right to free exercise of religion under the First Amendment to the United States Constitution; (2) the right to peaceable assembly under the First Amendment; (3) the right to freedom of speech under the First Amendment; (4) the establishment clause of the First Amendment; (5) the right to equal protection under the Fourteenth Amendment; (6) the right to a republican form of government under the Guarantee Clause of Article IV, § 4 of the United States

Constitution; (7) the right to free exercise of religion under Article I, Section 16 of the Constitution of Virginia; (8) the right to freedom of speech and assembly under Article I, Section 12 of the Constitution of Virginia; (9) the right to have laws suspended only by the Virginia General Assembly under Article I, Section 7 of the Constitution of Virginia; (10) the federal Religious Land Use and Institutionalized Persons Act; and (11) the Virginia Act for Religious Freedom. V. Compl. at 23–44, ECF No. 1. Plaintiff requests injunctive and declaratory relief. *Id.* at 45–46.

After Plaintiff filed the Complaint, Virginia began a phased easing of COVID-related restrictions.[1] Exec. Order 61 (2020), *available at* https://www.governor.virginia.gov/executive-actions/. Virginia has been operating under Phase Three since August 2020. Exec. Order 67 (2020), *available at* https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-SIXTH-AMENDED-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Further-Adjusting-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf. Under Phase Three, gatherings of more than 25 people are prohibited, but "[i]ndividuals may attend religious services of more than 25 people" if: they remain "six feet apart when seated" and "practice proper social distancing at all times"; religious

[1] The Court may take judicial notice of items in the public record without converting a motion to dismiss to a motion for summary judgment. *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986); *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004). Executive orders are matters of public record. *Dennis v. United States*, 339 U.S. 162, 169 (1950) (remarking that the President's executive order could "[o]f course . . . be the subject of judicial notice"); *see also Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977) (noting that state statutes, city charters, and city ordinances are all public records).

institutions "mark seating and common areas where attendees may congregate in six-foot increments"; frequently touched surfaces are routinely disinfected before and after all religious services; signage is posted prohibiting anyone with a fever or symptoms from attending the religious service in-person; "[a]ny items used to distribute food or beverages [are] disposable" and are "used only once"; and all attendees wear face masks. *Id.* at 11–12. Phase Three was amended on December 10, 2020, after a surge in infections in the Commonwealth. Exec. Order 72 (2020), *available at* https://www.governor.virginia.gov/media/governorvirginiagov/executive-ations/EO-72-and-Order-of-Public-Hea-lth-Emergency-Nine-Common-Sense-Surge-Rstrictions-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf. Under this most recent order, religious services are permitted to operate without numerical limits if the services adhere to social distancing, sanitization and hygiene, signage, and face covering limitations. *Id.* at 12–13. Plaintiff has never amended the Complaint to address with specificity the issuance of Executive Orders 67 and 72.

Governor Northam moves to dismiss the Complaint. Mot. to Dismiss, ECF No. 50. He argues that the Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and Rule 12(b)(6) for failure to state a claim. *Id.* Specifically, he argues that this Court lacks jurisdiction over Plaintiff's claims because Governor Northam, the only defendant, is immune from suit under the Eleventh Amendment. *Id.* at 6–8. And even if he were not immune, Governor Northam asserts that Plaintiff has failed to state its claims adequately because the temporary

gathering restrictions no longer apply to religious services. *Id.* at 8–10. The Motion to Dismiss is fully briefed and ripe for resolution.

II. LEGAL STANDARDS

A. Rule 12(b)(1) Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's jurisdiction over the subject matter of the complaint. The Constitution's "Eleventh Amendment is a matter of jurisdiction . . . ." *Carpenters Pension Fund of Balt. v. Md. Dept. of Health and Mental Hygiene*, 721 F.3d 217, 223 (4th Cir. 2013) (citing *In re NVR, LP*, 189 F.3d 442, 452 (4th Cir. 1999) ("The Eleventh Amendment . . . [is] simply the jurisdiction of federal courts.")). Assertions of immunity under the Eleventh Amendment are evaluated under Rule 12(b)(1). *See Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 746–48 (4th Cir. 2018) (affirming a district court's dismissal order on Eleventh Amendment immunity grounds under Rule 12(b)(1)).

"A challenge under Rule 12(b)(1) may be facial or factual." *Edley-Worford v. Va. Conf. of United Methodist Church*, 430 F. Supp. 3d 132, 137 (E.D. Va. 2019) (citing *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009)). In a facial challenge, such as this one, the defendant "contend[s] that [the] complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Kerns*, 858 F.3d at 192 (quotation omitted). In such challenges, "the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6)" challenge. *Id.* (quotation omitted). That is, "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." *Id.*

B. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint. Rule 12(b)(6) permits a defendant to seek dismissal of a complaint based on a plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss for failure to state a claim should be granted if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that [the] defendant" is liable. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Facts that are 'merely consistent with' liability do not establish a plausible claim to relief." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013). The "'factual allegations must be enough to raise [the] right to relief above the speculative level,' thereby 'nudging [the plaintiff's] claims across the line from conceivable to plausible.'" *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013) (quoting *Twombly*, 550 U.S. at 555) (alterations omitted).

At this stage, "(1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B Charles A.

Wright Et Al., Federal Practice & Procedure § 1357 & n.11 (3d ed.) (collecting cases); *accord Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012). But courts are not bound by "legal conclusions drawn from the facts" and "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). A threadbare recitation of the "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); *see also Iqbal*, 556 U.S. at 663 (noting that "mere conclusory statements" are insufficient).

C. Motions Made Under Rules 12(b)(1) and 12(b)(6)

Where a defendant moves to dismiss a complaint under Rule 12(b)(6) *and* Rule 12(b)(1), the court should first address the motion under Rule 12(b)(1). *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 483 (4th Cir. 2005). If the court determines that the complaint should be dismissed for lack of jurisdiction, it should decline to address whether the plaintiff has stated a claim. *Id.* ("Only if the Eleventh Amendment does not bar these claims shall we proceed to determine whether the allegations in [the] complaint state claims for relief . . . .").

III. ANALYSIS

A. The Governor is Immune from Suit on the Federal Constitutional Claims

The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit

in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This Amendment has been interpreted by the United States Supreme Court to mean that a state may not "be sued as defendant in any court in this country without [its] consent . . . ." *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) (quoting *Cunningham v. R.R. Co.*, 109 U.S. 446, 451 (1883)).

In *Ex parte Young*, the Supreme Court clarified that "a suit against individuals, for the purpose of preventing them, as officers of a state, from *enforcing* an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the [Eleventh] Amendment." 209 U.S. 123, 154 (1908) (emphasis added) (citation omitted).

> If the act which [a state officer] seeks to enforce [is] a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159–60. Accordingly, "federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective." *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998).

But "[t]he exception is narrow: it applies only to prospective relief, [and] it does not permit judgments against state officers declaring that they violated federal law in the past . . . ." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139,

146 (1993). "[C]onjecture regarding discrete future events . . . is insufficient" to establish "a continuing governmental practice or an ongoing violation." *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999).

There is no ongoing violation of federal law in this case. The Orders on which Plaintiff bases its Complaint are no longer in effect. They have been replaced by Executive Orders 67 and 72, both of which permit religious organizations to host religious services that exceed the gathering limits imposed by the orders (25 and 10 people, respectively). Exec. Order 67 (2020), *available at* https://www.governor.virginia.gov/executive-actions/; Exec. Order 72 (2020), available at https://www.governor.virginia.gov/executive-actions/. Plaintiff has not amended its Complaint to challenge Executive Orders 67 and 72. The Complaint references Executive Orders 51, 53, and 55 only.

Thus, the alleged violation—the enforcement or threatened enforcement of Executive Orders 53 and 55—is a "past event that is not itself continuing." *Jemsek v. Rhyne*, 662 F. App'x 206, 211 (4th Cir. 2016) (quoting *Paraguay*, 134 F.3d at 628). The violation cannot be continuing because the challenged Orders are no longer in effect. To whatever extent the Governor's enforcement or threatened enforcement of these Orders may have violated federal law, if any at all, those possible violations are "completed, not presently ongoing violations of federally protected rights." *Paraguay*, 134 F.3d at 627. Plaintiff concedes as much in its Response in Opposition to the Motion to Dismiss: "Lighthouse's challenge exists as to the Governor's regime . . . *as it*

was applied in the past."[2] Resp. in Opp'n at 2, ECF No. 53. Granting the relief Plaintiff seeks would amount to a declaration that Governor Northam violated federal law in the past by enforcing or threatening to enforce Executive Orders 53 and 55. Such relief falls outside of the narrow *Ex parte Young* exception.

---

[2] Plaintiff asserts that it also challenges "the Governor's regime in place today." *Id.* Plaintiff has failed to amend its Complaint to reflect this challenge. Although the request for relief asks the Court to require "[t]he Commonwealth [to] permit Lighthouse the opportunity to comport their behavior to any further limitations or restrictions that the Commonwealth may impose *in any future modification, revision, or amendment of* the gathering orders or similar legal directive," this is insufficient for the Court to find that the Complaint challenges Orders 67 and 72, as neither the fact sections nor the claims address these orders.

Assuming that one could read the unamended Complaint as somehow challenging Executive Orders 67 and 72—which did not exist at the time the Complaint was filed—it is unclear what prospective injunctive relief Plaintiff seeks in relation to Executive Orders 67 and 72. Plaintiff requests a permanent injunction ordering the Commonwealth to "apply the Gathering Orders in a manner that treats Lighthouse's religious gatherings on equal terms as gatherings for or in so-called 'essential businesses' and non-religious entities" and to "permit religious gatherings [without numerical limits] so long as they comply with the same social distancing and personal hygiene recommendations pursuant to which the Commonwealth allows so-called 'essential' commercial and non-religious entities . . . to accommodate gatherings of persons without numerical limit . . . ." Verified Compl. at 45–46, ECF No. 1.

Current Orders except religious worship services from numerical gathering restrictions, if there is compliance with social distancing and hygiene requirements. Plaintiff's pleadings fail to assert the prospective injunctive relief sought as it relates to the Governor's "existing regime." Plaintiff's claims fail to satisfy the requirements of the *Ex parte Young* exception as they relate to Executive Orders 67 and 72.

If Plaintiff intended to prohibit Governor Northam from enforcing future orders that are similar to Executive Orders 53 and 55, such relief is unavailable under the *Ex Parte Young* exception. Any injunction of this kind would target the enforcement of hypothetical executive orders not yet promulgated. *See Debauche*, 191 F.3d at 505 (finding no ongoing violation where plaintiff alleged she had been excluded from a debate in 1997 and that she *would be* excluded from future debates). And the Court is not permitted to enjoin the promulgation of an Order, as *Ex parte Young* authorized the Court to enjoin the *enforcement* of unconstitutional laws. 209 U.S. at 154.

Even if the Court concluded that there was some ongoing violation of federal law, the *Ex parte Young* exception would be inapplicable to Governor Northam. In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, such officer must have some connection with the *enforcement* of the act; otherwise the officer is merely a party as a representative of the state, and the naming of the officer is an attempt to make the state a party. *Ex parte Young*, 209 U.S. at 157 (emphasis added).

That the Governor is "the executive of the state" and is, "in a general sense, charged with the execution of all its laws," is insufficient to bring him within the *Ex parte Young* exception. *Id.* at 192. Although that would be a "convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals," it would be inconsistent "with the fundamental principle that [states] cannot, without their assent, be brought into any court at the suit of private persons." *Id.*

The United States Court of Appeals for the Fourth Circuit has applied the *Ex parte Young* doctrine in holding that "the governor's duty to uphold state law [is] not sufficient to impose the required 'special relation' to enforce the law so as to make him a proper defendant." *Wright v. North Carolina*, 787 F.3d 256, 262 (4th Cir. 2015) (citing *McBurney v. Cuccinelli*, 616 F.3d 393, 400–02 (4th Cir. 2010)); *see also Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) ("[A]though Governor Gilmore is 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, he lacks a specific duty to

enforce the challenged statutes . . . . The fact that he has publicly endorsed and defended the challenged statutes does not alter our analysis."); *see also Allen v. Cooper*, 895 F.3d 337, 355 (4th Cir. 2018) (noting "that a governor cannot be enjoined by virtue of his general duty to enforce the laws"). A greater connection with enforcement is required. *See, e.g.*, *Bostic v. Schaefer*, 760 F.3d 352, 371 n.3 (4th Cir. 2014) (holding that a state circuit court clerk has sufficient enforcement authority to create an *Ex parte Young* exception because the clerk was responsible for granting and denying applications for marriage licenses).

"The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute." *Waste Mgmt.,* 252 F.3d at 331. Accordingly, Governor Northam may be subject to suit under *Ex parte Young* only if: (1) there is a special connection between the Governor and *the enforcement* of challenged Orders that goes beyond his general duty under the Virginia Constitution to enforce the laws of the Commonwealth; and (2) the Governor has acted or threatened to enforce the policy. *See McBurney*, 616 F.3d at 399, 402. Plaintiff has failed to show that Governor Northam is subject to suit under either factor.

As an initial matter, the Court notes that the Verified Complaint conflates the Governor with the Commonwealth in its prayer for relief, demonstrating that what Plaintiff seeks is an injunction against the Commonwealth. Plaintiff requests that the Court issue an injunction "so that . . . *the Commonwealth* will not apply the gathering orders in any manner as to infringe Lighthouse's constitutional and statutory

rights"; "*the Commonwealth* will apply the Gathering Orders in a manner that treats Lighthouse's religious gatherings on equal terms as gatherings for or in so-called 'essential' businesses and non-religious entities"; "*the Commonwealth* will permit religious gatherings so long as they comply with the same social distancing and personal hygiene recommendations pursuant to which *the Commonwealth* allows so-called 'essential' commercial and non-religious entities . . . to accommodate gatherings of persons without numerical limit"; "*the Commonwealth* will permit Lighthouse to comport [its] behavior to any further limitations or restrictions that *the Commonwealth* may impose in any future modification, revision, or amendment of the gathering orders"; and "*the Commonwealth* will not bring any further enforcement, criminal, or other public health actions against Lighthouse as threatened in Governor Northam's public statements and citations issued to Pastor Wilson"; and the suit is brought to declare that "the gathering orders both on their face and as applied *by the Commonwealth* are unconstitutional . . . ." Verified Compl. at 46, ECF No. 1 (emphases added).

Plaintiff argues that despite this language in its prayer for relief, its suit is proper because because the Virginia Constitution and Virginia Code provide the Governor with special enforcement authority during times of emergency. Plaintiff references Article V, §§ 1 and 7 of the Virginia Constitution. Resp. in Opp'n at 4, ECF No. 53. These sections provide that the Governor possesses "[t]he chief executive power of the Commonwealth" and that he "shall . . . enforce the execution of the laws."

But this is the general enforcement power that the Fourth Circuit has found insufficient by itself to subject the Governor to the *Ex parte Young* exception. *Waste*

Mgmt., 252 F.3d at 331 (finding that the Virginia Governor's general duty to enforce the laws is insufficient to abrogate Eleventh Amendment immunity).

Plaintiff also asserts that the Governor has exclusive and specific statutory authority to issue and enforce emergency executive orders. Resp. in Opp'n at 5, ECF No. 53, citing Virginia Code § 44-146.17. *Id.* That provision authorizes the Governor to *issue* executive orders that have the force and effect of law in response to an emergency, not *enforce* them. Va. Code § 44-146.17 (stating that the Governor has the power in an emergency to "*proclaim and publish* such rules and regulations and *to issue such orders* as may, in his judgment, be necessary to accomplish the purposes of this chapters," and that such "[e]xecutive orders . . . shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor"). "The power to promulgate law is not the power to enforce it." *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (citing *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) (distinguishing between the Secretary of Labor's "powers to promulgate and to enforce national health and safety standards"). Applicability of the *Ex parte Young* exception turns on who has the *prospective* authority to *enforce* the law, not on who had *retrospective* authority to *create* the law.

Plaintiff argues that the Governor has a special authority to enforce the Executive Orders because the statute provides that "[h]e shall take such action from time to time as is necessary for the adequate promotion and coordination of state and local emergency services activities relating to the safety of the Commonwealth in time of disasters." Va. Code § 44-146.17. Emergency services is defined by the statute as "the

preparation for and the carrying out of functions . . . to prevent, minimize, and repair injury and damage resulting from disasters, . . . includ[ing] . . . police services . . . and other functions related to civilian protection." Va. Code § 44-146.16. But the duty to coordinate police and other emergency services is not the same as the power to enforce the laws of the Commonwealth against specific individuals.

The same section of the Virginia Code provides that the enforcement authority for the Executive Orders rests elsewhere. Under Virginia Code § 44-147.16, violations of the Executive Orders are punishable as Class 1 misdemeanors. The Orders themselves confirm this. *See* Exec. Order 53 (2020) ("Violations of paragraphs 1, 3, 4, and 6 of this Order shall be a Class 1 misdemeanor pursuant to § 44-146.17 of the *Code of Virginia*."); Exec. Order 55 (2020) ("Violations of paragraphs 2, 3, 4, and 5 of this Order shall be a Class 1 misdemeanor pursuant to § 44-146.17 of the *Code of Virginia*."); Exec. Order 67 (2020) ("Violations of Section B paragraphs 1, 2, and 3 of this Order shall be a Class 1 misdemeanor pursuant to § 44-146.17."); Exec. Order 72 (2020) ("Violations of section II, subsection B, paragraphs 1 and 3 of this Order shall be a Class 1 misdemeanor pursuant to § 44-146.17 of the *Code of Virginia*. Any law enforcement officer as defined in § 9.1-101 of the *Code of Virginia* including the Virginia Department of State Police may enforce these restrictions."). The Virginia Code establishes that the prosecution of misdemeanor offenses resides within the discretion of Commonwealth's Attorney. Va. Code § 15.2-1627(B) (providing that the Commonwealth's Attorney "shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and

powers imposed upon him by general law, including the duty of prosecuting . . . Class 1 . . . misdemeanors"). The Governor lacks the special enforcement authority required to subject him to this lawsuit under the *Ex parte Young* exception.

Furthermore, assuming *arguendo* that the Governor has some special enforcement authority beyond his general duty to enforce the law of the Commonwealth, the Court "cannot apply *Ex parte Young* because [Plaintiff has not alleged that the Governor] . . . acted or threatened to act" to enforce the Executive Orders. *McBurney*, 616 F.3d at 402. Plaintiff has not alleged that the Governor specifically directed the enforcement of his Orders against it or any other individual or entity, nor has it presented evidence that the Governor "participated in the decisionmaking process" of state and local law enforcement agencies regarding the enforcement of the Governor's Orders against the congregation of Lighthouse. *Id.* at 401–02 (finding that the Attorney General had not "acted or threatened to act" to enforce a statute where he had "neither personally denied any of the Appellants' . . . requests [under the statute] nor advised any other agencies to do so," and where the Appellants had not "allege[d] that the Deputy Commissioner or County Director relied on the Attorney General's advice in denying their . . . requests" under the statute).

The only evidence included with the Complaint establishes that local police departments were advised generally by the Governor to *refrain from enforcing* the orders on initial violations and to issue warnings and provide education as an alternative. Ex. D to Verified Compl, ECF No. 1-5.

Although it is true that the Governor has invoked his statutory authority to promulgate the Executive Orders, he lacks "unique and exclusive" authority to enforce them, despite Plaintiff's assertions to the contrary. Resp. in Opp'n at 6, ECF No. 53. Because there is no evidence that the Governor himself "enforced, threatened to enforce, or advised other agencies to enforce" the Executive Orders against Plaintiff or any other specific individual or entity, "the *Ex parte Young* fiction cannot apply." *McBurney*, 616 F.3d at 402.

Accordingly, the Governor is immune from suit on the federal constitutional and statutory claims on Eleventh Amendment immunity grounds. Counts One, Two, Three, Four, Five, Six, and Ten are dismissed.

B. The Governor is Also Immune from Suit on the State Constitutional & Statutory Claims

The *Ex parte Young* exception is inapplicable to claims in federal court against state officers for violations of state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Instead, suits against state officers for violations of state law are absolutely barred by Eleventh Amendment immunity. *Id.* The Supreme Court has reasoned that

> when a plaintiff alleges that a state official has violated *state* law[,] . . . the entire basis for the [*Ex parte Young* exception to sovereign immunity] disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. (emphasis in original).

A state "may waive its Eleventh Amendment immunity by consenting to be sued in federal court." *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999). Such waiver can be found where a state "directly and affirmatively waive[s] its Eleventh Amendment immunity in a state statute or constitutional provision, as long as the provision explicitly specifies the state's intention to subject itself to suit in federal court." *Id.* (quotations and alterations omitted).

But this test "is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

> Although a [s]tate's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment . . . . "[A] [s]tate's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued."

Id. (emphasis in original) (quoting *Pennhurst*, 465 U.S. at 99) (citations omitted)). A state's intention to subject itself to suit in federal court must be "stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction." *Lee-Thomas v. Prince George's Cty. Pub. Sch.*, 666 F.3d 244, 250 (4th Cir. 2012) (quoting *Atascadero*, 473 U.S. at 240).

"[A] state does not waive its Eleventh Amendment immunity 'by consenting to suit in the courts of its own creation,' 'by stating its intention to sue and be sued, or even by authorizing suits in any court of competent jurisdiction.'" *Lee-Thomas*, 666 F.3d at 251 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999)). "[F]or a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must" explicitly and

unambiguously "specify the [s]tate's intention to subject itself to suit in *federal court*." *Atascadero*, 473 U.S. at 241 (emphasis in original).

The express waiver may be made in a statute or constitutional provision, or by the highest court of the state interpreting the statute or constitutional provision. *Lee-Thomas*, 666 F.3d at 251. "[W]here the highest court of a state has construed a state statute [or constitutional provision] as intending to waive the state's immunity to suit in federal court, the state's intent is just as clear as if the waiver were made explicit in the state statute [or constitutional provision]." *Id.* (quotation omitted).

Plaintiff has brought claims under the Article I, Sections 7, 12, and 16 of the Virginia Constitution (Verified Compl. at 33–39) and the Virginia Act for Religious Freedom (*id.* at 41–44). Nothing in Article I, or any other Article of the Virginia Constitution, explicitly consents to suit in federal court. No Virginia Supreme Court decisions finding that the state has waived its Eleventh Amendment immunity from suit in federal court on state constitutional claims have been cited,[3] and this Court has found none.

As for the Virginia Act for Religious Freedom, it provides that "[a] person whose religious exercise has been burdened by government in violation of this section may assert that violation as a claim or defense in any judicial or administrative

[3] The Virginia Supreme Court has declared that the Commonwealth's sovereign immunity is waived as to certain "self-executing provisions of the Constitution of Virginia . . . ." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 371 (Va. 2011). Assuming *arguendo* that the provisions relied upon by Plaintiff are self-executing, the waiver of immunity does not explicitly waive immunity *in federal court*. Because waiver of immunity to suit in federal court must be clear and unambiguous, this ruling is insufficient to allow these claims to proceed in federal court.

proceeding and may obtain declaratory and injunctive relief from a circuit court." Va. Code § 57-2.02(D). The statute also provides that "[t]he decision of the circuit court to grant or deny declaratory and injunctive relief may be appealed by petition to the Court of Appeals of Virginia." Va. Code § 57-2.02(F). The statute does not express an intent by the Commonwealth to subject itself to suit in federal court. Instead, the statute demonstrates the Commonwealth's intent to waive immunity *only* in its own courts by referencing the Virginia circuit courts and the Court of Appeals of Virginia.[4]

Plaintiff has failed to present any other state statute, constitutional provision, or Virginia Supreme Court case establishing that the Commonwealth waives immunity from suit in federal court for alleged violations of the Virginia Religious Freedom Act. Plaintiff appears to have abandoned these claims altogether in its Response in Opposition.

The Court finds that Governor Northam is immune under the Eleventh Amendment to Plaintiff's state statutory and state constitutional claims. Plaintiff's remaining claims are dismissed. Because the Court has concluded that it lacks jurisdiction over Plaintiff's claims and dismisses all of Plaintiff's claims under Rule 12(b)(1), it declines to decide whether the Complaint should be dismissed for failure to state a claim under Rule 12(b)(6).

---

[4] Even standing alone, out of context from the remainder of the provision, the phrase "any judicial or administrative proceeding" could not clearly express the Commonwealth's intent to subject itself to suit in federal court. The phrase "any court of competent jurisdiction" is insufficient to find that a state has waived Eleventh Amendment immunity. *Lee-Thomas*, 666 F.3d at 251.

IV. REQUEST FOR LEAVE TO AMEND THE COMPLAINT

At the conclusion of its Response in Opposition, Plaintiff asserts that if the Court grants the Governor's motion, "it should plainly permit Lighthouse leave to amend" the Complaint. Resp. in Opp'n at 28, ECF No. 53. Federal Rule of Civil Procedure 15(a)(2) provides that "the court should freely give leave [to amend] when justice so requires." It is the Fourth Circuit's "policy to liberally allow amendment in keeping with the spirit of Federal Rule 15(a)." *Scott v. Fam. Dollar Stores, Inc.*, 733 F.3d 105, 112 (4th Cir. 2013) (quoting *Galustian v. Peter*, 591. F.3d 724, 729 (4th Cir. 2010)). Leave to amend "should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (emphasis in original)).

Where, as here, "the plaintiff fails to formally move to amend and fails to provide the district court with any proposed amended complaint or other indication of the amendments he wishes to make, 'the district court does not abuse its discretion in failing to give the plaintiff a blank authorization to do over his complaint.'" *Estrella v. Wells Fargo Bank,* 497 F. App'x 361, 362 (4th Cir. 2012) (alterations omitted) (quoting *Francis v. Giacomelli*, 588 F.3d 186, 197 (4th Cir. 2009) (finding no abuse of

discretion in declining to grant a motion to amend that was never properly made but raised only in opposition to a motion to dismiss)).

Accordingly, Plaintiff's request to amend the Complaint is denied. Plaintiff may move by separate motion for leave to amend the Complaint. Such motion shall include a proposed amended complaint and an explanation of why such amendments are not futile or prejudicial to the defendant(s). An opportunity for briefing from any opposition and responsive briefing will be evaluated.

V. CONCLUSION

For the foregoing reasons, Governor Northam's Motion to Dismiss the Complaint (ECF No. 50) is **GRANTED**. The Complaint is **DISMISSED**. The Clerk is **REQUESTED** to forward a copy of this Order to counsel of record for all parties.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

January 27, 2021
Norfolk, Virginia