THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

THE CONSTITUTION PARTY OF WEST VIRGINIA, DENZIL W. SLOAN AND JEFF BECKER,

Plaintiffs,

v.

Civil Action No. 2:08-CV-61
(Judge Bailey)

FRANK JEZIORO,
Director of the West Virginia Division of Natural Resources,

SAM ENGLAND
Superintendent of Stonewall Jackson Lake State Park,

SCOTT WARNER,

and

JOHN DOES 1 and 2.

Defendants.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS UNDER 12(B)

This case is presently before the Court on defendant's Motion to Dismiss in Lieu of Answer [Doc. 9], filed on May 29, 2008; plaintiffs' Response to Defendant's Motion [Doc. 12], filed on June 19, 2008; defendants' Reply in support of their Motion to Dismiss [Doc. 14], filed on July 10, 2008. After reviewing the record and the arguments of the parties, the Court finds that defendant's Motion to Dismiss in Lieu of Answer [Doc. 9], should be **GRANTED in part** and **DENIED in part**.

BACKGROUND

On April 18, 2008, plaintiffs filed suit in the Northern District of West Virginia alleging

violations of their rights under the First and Fourteenth Amendments to the United States Constitution, and their rights under Article III, sections 1, 3, and 7 of the West Virginia Constitution. (Compl. [Doc. 1]). Plaintiffs brought suit against defendants: Frank Jezioro, Director of West Virginia Division of Natural Resources; Sam England, Superintendent of Stonewall Jackson Lake State Park; and Scott Warner, all in their individual and official capacities as officers and employees of the State of West Virginia.[1] (Compl. [Doc. 1] ¶¶ 5-8).

On May 29, 2008, defendants Frank Jezioro, Sam England, and Scott Warner, filed, by counsel, a Motion to Dismiss in Lieu of Answer [Doc. 9], and accompanying Memorandum [Doc. 10]. Defendants moved under Rule 12(b)(1), (2), (3), and/or (6) to dismiss plaintiffs' claims. In support of the Motion to Dismiss, defendants argue that this Court lacks jurisdiction to hear plaintiffs' claims, that plaintiffs have failed to state a claim upon which relief can be granted, and that the claims must, therefore, be dismissed. On June 19, 2008, plaintiffs filed a Response to Defendant's Motion [Doc. 12], arguing that plaintiffs claims are proper, that this Court does have jurisdiction to hear the instant claims, and that none of the claims are barred by the State's immunity under the Eleventh Amendment (primarily relying on the doctrine of ***Ex parte Young***). On July 10, 2008, defendants filed a Reply in support of their Motion to Dismiss [Doc. 14], again arguing that this Court does not have jurisdiction to hear plaintiffs' claims and disputing the applicability of ***Ex parte Young*** to the case at bar.

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[1] Plaintiffs also brought suit against John Doe 1 and 2 alleging "upon information and belief, are officers, agents, and/or employees of the DNR." (Compl. [Doc. 1] ¶ 8). John Doe 1 and 2 are not, however, joined in this Motion to Dismiss.

FACTS

Plaintiffs allege the following: on September 22, 2007, plaintiffs Sloan, Becker and other Constitution Party of West Virginia (hereinafter "CPWV") members went to Stonewall Jackson State Park, a state park and recreation area located in Lewis County, West Virginia, and operated under the authority of the DNR. (Compl. [Doc. 1] ¶ 15). Plaintiffs were attempting to obtain signatures on petitions for the purpose of meeting the ballot prerequisites so as to get CPWV candidates on the ballot for the offices of President, Vice President, and Governor. (Compl. [Doc. 1] ¶ 15). On September 22, 2007, Stonewall Jackson State Park was hosting an event in recognition of National Hunting and Fishing Day. (Compl. [Doc. 1] ¶ 16). As such, park management and the DNR had allowed vendors to set up display booths within the park, including exhibitors disseminating information on political causes. (Compl. [Doc. 1] ¶ 16).

Plaintiffs Sloan, Becker, and other CPWV members circulated through the crowd at the National Hunting and Fishing Day event, "approached persons and spoke with them about the CPWV, its political positions, and its candidates, and requested that persons sign a petition so that CPWV candidates for President, Vice President and Governor might have access to the statewide ballot in the following year's elections." (Compl. [Doc. 1] ¶ 19). Eventually, plaintiffs were "approached by Defendants Warner, John Doe 1, and John Doe 2, who informed [plaintiffs] that they must stop their petitioning activities because their activities were contrary to Park and DNR rules and policies." (Compl. [Doc. 1] ¶ 22). When plaintiffs asserted that they had a legal right to engage in the petitioning activity, defendant England informed plaintiffs they could no longer solicit signatures for their petitions. (Compl. [Doc. 1] ¶¶ 24). Plaintiffs complied with the instructions of England and

Warner and ceased soliciting signatures. (Compl. [Doc. 1] ¶ 24). After this incident, defendant Jezioro affirmed and ratified the order given to the plaintiffs by England and Warner. (Compl. [Doc. 1] ¶ 26).

After September 22, 2007, plaintiffs, through counsel, sent a letter to defendant Jezioro asking for assurances that plaintiffs would be allowed to petition for signatures at the park. (Compl. [Doc. 1] ¶ 25). Defendant Jezioro then replied and denied, through counsel, that plaintiffs have any right to petition for signatures at parks operated by DNR, citing W. Va. Code of State Rules § 58-31-2.16. (Compl. [Doc. 1] ¶ 26). That State Rule provides: "[h]awking peddling, soliciting, begging, advertising, or carrying on any business or commercial enterprise is prohibited in state parks, state forests, and state wildlife management areas without the written permission of the Director of the Division of Natural Resources." (Compl. [Doc. 1] ¶ 26).

Plaintiffs then requested "any rule, procedure, or policy concerning the method or means by which Plaintiffs or other member of the public might seek permission from the Director of DNR" under W. Va. Code of State Rules § 58-31-2.16. (Compl. [Doc. 1] ¶ 27). Plaintiffs received no response. (Compl. [Doc. 1] ¶ 27). Plaintiffs plan to return to "Stonewall Jackson Lake State Park and other parks under the supervision and control of DNR" in order to "engage in petitioning activities." (Compl. [Doc. 1] ¶ 28). As such, plaintiffs seek declaratory, injunctive, and monetary relief against defendants for violations of plaintiffs' rights under the United States and West Virginia Constitutions. (Compl. [Doc. 1] ¶ 28, p. 13).

STANDARD OF REVIEW FOR 12(B) MOTION TO DISMISS

When a defendant files a 12(b)(1) motion to dismiss the plaintiff's complaint for lack

of subject matter jurisdiction, the 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). In considering a motion to dismiss pursuant to Rule 12(b)(1), a court should "regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." ***Id.*** (internal citation omitted). The moving party's motion to dismiss should be granted when "the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." ***Id.*** (internal citation omitted).

When a defendant files a 12(b)(2) motion to dismiss the plaintiff's complaint for lack of personal jurisdiction, the plaintiff must prove jurisdiction by a preponderance of the evidence. ***Mylan Labs., Inc. v. Akzo***, 2 F.3d 56, 59-60 (4th Cir. 1993). If the court declines to hold an evidentiary hearing and decides to rely on the parties' pleadings, affidavits, and other legal documents, the plaintiff faces a lesser standard such that the plaintiff only must "make a prima facie showing of a sufficient jurisdictional basis in order to survive the jurisdictional challenge." ***Combs v. Bakker***, 886 F.2d 673, 676 (4th Cir. 1989). "In considering a challenge on such a record, the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction." ***Id.***

When a defendant files a 12(b)(3) motion to dismiss the plaintiff's complaint on the basis of improper venue, the court may consider evidence outside the pleadings, and "the pleadings are not accepted as true, as would be required under a Rule 12(b)(6) analysis." ***Sucampo Pharms., Inc. v. Astellas Pharma, Inc.***, 471 F.3d 544, 549-50 (4th Cir. 2006).

Without an evidentiary hearing, however, "the trial court must 'draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party.'" ***Essex Ins. Co. v. MDRB Corp.***, 2006 WL 1892411, *1, *2 (D. Md. 2006)(quoting ***Murphy v. Schneider Nat'l, Inc.***, 362 F.3d 1133, 1138-39 (9th Cir. 2004)); *see also* ***Pennsylvania Nat. Mut. Cas. Ins. Co. v. Carriage Park Associates,*** 2008 WL 5220633, *1, *4 (W.D.N.C. 2008), ***Fixture Specialists, Inc. v. Global Constr. Co.***, 2007 WL 3468997, *1, *1 (E.D.Va. 2007).

When a defendant files a 12(b)(6) motion to dismiss the plaintiff's complaint on the basis that plaintiff has failed to state a claim upon which relief may be granted, the court should accept the plaintiff's factual allegations as true and view the complaint in the light most favorable to the plaintiff. *See, e.g.,* ***Franks v. Ross***, 313 F.3d 184, 192 (4th Cir. 2002) (quoting ***Mylan Labs., Inc. v. Matkari***, 7 F.3d 1130, 1134 (4th Cir. 1993)). The court should only grant a 12(b)(6) motion if "it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." ***T.G. Slater & Son, Inc. v. Donald P. & Patricia A. Brennan LLC***, 385 F.3d 836, 841 (4th Cir. 2004) (internal citations omitted).

APPLICATION OF LAW AND CITATION TO AUTHORITY

I. Plaintiffs' Federal Claims Against Defendants for Injunctive and Declaratory Relief

Defendants argue that plaintiffs' claims should be dismissed as this Court lacks jurisdiction, pursuant to the Eleventh Amendment, to hear the claims. (Def.'s Mem. to Supp. M. to Dismiss [Doc. 10] at 2). Defendants are correct that the Eleventh Amendment

generally bars claims against States and state officials acting in their official capacities. Defendants overlook, however, exceptions to Eleventh Amendment immunity applicable to the claims at bar. Plaintiffs make claims under 42 U.S.C. § 1983 against all defendants: (1) in their official capacities, and (2) in their personal capacities. Based on the face of the complaint, plaintiffs have presented legally cognizable claims against the defendants, and as such defendant's Motion to Dismiss in Leiu of Answer with regard to plaintiffs' federal claims should be **DENIED**.

A. ***Ex Parte Young***: Defendants Acting In Their Official Capacities May Be Enjoined from Violating the Constitution

The ***Ex parte Young***, 209 U.S. 123 (1908), doctrine is a long recognized exception to Eleventh Amendment immunity. *See, e.g.* ***Edelman v. Jordan***, 415 U.S. 651, 664 (1974)***, Milliken v. Bradley***, 433 U.S. 267, 289 (1977), ***Cyrus ex. rel. McSweeney v. Walker***, 409 F. Supp.2d 748 (S.D.W.Va. 2005). In ***Walker***, the court notes that "the ***Ex parte Young*** doctrine 'allows for expanded federal jurisdiction over state action, and gives federal courts a powerful tool for ensuring state compliance with federal laws.'" ***Id.*** (quoting ***Elephant Butte Irrigation Dist. v. Department of the Interior***, 160 F.3d 602, 608 (10th Cir. 1998)). A state official may be sued under the ***Ex parte Young*** doctrine where a plaintiff seeks prospective equitable relief for ongoing violations of federal law. ***Republic of Paraguay v. Allen***, 134 F.3d 622, 627 (4th Cir. 1998). The only inquiry required, therefore, is "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." ***Verizon Md. Inc. v. Public Service Comm. of Md.***, 535 U.S. 635, 645 (2002).

Here, plaintiffs allege facts constituting an ongoing violation of federal law. Specifically, plaintiffs allege: (1) that defendants prevented plaintiffs from engaging in petitioning activities in a State Park (Compl. [Doc. 1] ¶¶ 22-24); (2) that defendants did so pursuant to an existing rule of the West Virginia Department of Natural Resources (Compl. [Doc. 1] ¶¶ 24, 26); (3) that the head of that state agency communicated to plaintiffs that he and other state actors would continue to enforce the rule preventing plaintiffs from petitioning at West Virginia State Parks (Compl. [Doc. 1] ¶¶ 25-26); and (4) that defendants refusal to allow plaintiffs to petition in West Virginia State Parks continues to deprive plaintiffs of their rights under the First Amendment to the United States Constitution, and, as such, § 58-31-2.16 is unconstitutional on its face and as applied to plaintiffs. (Compl. [Doc. 1] ¶¶ 34-35). Additionally, plaintiffs allege defendants' actions continue to deprive them of their right to equal protection of the law under the Fourteenth Amendment to the United States Constitution. (Compl. [Doc. 1] ¶¶ 45).

Defendants argue in their Reply [Doc. 14] that there is no ongoing violation and, thus, ***Ex parte Young*** does not apply. (Id. at 1-5). Specifically, defendants note that plaintiffs may evidence an ongoing violation by: "either (1) proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." (Def.'s Repl. in Supp. of Def.'s M. to Dismiss [Doc. 14] at 3)(quoting ***Sierra Club v. Union Oil Co. of California***, 853 F.2d 667, 671 (9th Cir. 1988), citing ***Chesapeake Bay Foundation v. Gwaltney***, 844 F.2d 170, 171-72 (4th Cir. 1988), *on remand from* 484 U.S. 49 (1987)). Defendants go on to argue that because plaintiffs

merely asked the defendants how to seek permission and the defendants refused that request–that there is no ongoing violation of plaintiffs' rights. (Def.'s Repl. in Supp. of Def.'s M. to Dismiss [Doc. 14] at 4).

It seems apparent, however, that such a refusal as is alleged in plaintiffs' Complaint, amounts to "evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." ***Sierra Club***, 853 F.2d at 671, citing ***Gwaltney***, 844 F.2d at 171-72. As plaintiffs here were not told how to seek permission to petition in the park(s), and as plaintiffs plan to try to petition in the park(s) again, a reasonable trier of fact could find a continuing likelihood of a recurrence in such an intermittent or sporadic violation of plaintiffs' First and Fourteenth Amendment rights. As such, plaintiffs have alleged a sufficient ongoing violation of their rights to satisfy the first prerequisite of the ***Ex parte Young*** doctrine.

Plaintiffs also request injunctive declaratory relief in accordance with the requirements of ***Ex parte Young***. Specifically, plaintiffs seek: (1) declaratory judgment holding § 58-31-2.16 unconstitutional on its face, and as applied to plaintiffs, as a violation of the First Amendment to the United States Constitution (Compl. [Doc. 1] ¶ 50, at 13); and (2) an injunction preventing defendants, their officers, agents, and employees from interfering with plaintiffs' petitioning activities (Compl. [Doc. 1] at 13).

As plaintiffs' allege "an ongoing violation of federal law and [seek] relief properly characterized as prospective," plaintiffs' claims fall under the ***Ex parte Young*** exception to Eleventh Amendment immunity and this Court has jurisdiction over plaintiffs' federal law claims against defendants in their official capacities. ***Verizon Md. Inc.,*** 535 U.S. at 645-

46.

B. Claims Against Defendants In Their Official Capacities for Injunctive and Declaratory Relief Are Not Barred By the Eleventh Amendment

Defendants are not considered "persons" under 42 U.S.C. § 1983 when sued in their official capacities because when such claims are made, the State is considered the 'true party in interest.' ***Will v. Dept. of State Police***, 491 U.S. 58, 71 (1989). That would seem to mean (as defendants argue) that *any* 'official capacity' suit is barred by Eleventh Amendment immunity. (Def.'s Mem. to Supp. M. to Dismiss [Doc. 10] at 5-6). What defendants failed to note was that in the *same Supreme Court case* where the court "acknowledged that the question whether an entity is entitled to Eleventh Amendment immunity is a separate issue from whether an entity is a 'person' under § 1983" (Id. at 5), the court also stated:

> Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official capacity actions for prospective relief are not treated as actions against the State.... This distinction is commonplace in the sovereign immunity doctrine, and would not have been foreign to the 19th-century Congress that enacted § 1983.

Will, 491 U.S. at 71, n.10 (internal quotations and citations omitted). As discussed above, the plaintiffs here seek injunctive and declaratory relief against defendants in their official capacities. (*See* I (A), *supra*). As such, defendants being "state official[s] in [their] official capacity," and plaintiffs having brought suit "for injunctive relief": defendants are "person[s] under § 1983 because official capacity actions for prospective relief are not treated as

actions against the State."

C. Plaintiffs Allege Defendants Acted Under Color of State Law and Thus Defendants Are Subject to Individual Capacity Claims Under § 1983

A State officer can be subject to personal liability for violation of federal law where the officer acted "under color of state law." ***Hafer v. Melo***, 502 U.S. 21, 25 (1991). Defendant argues that because ***Ex parte Young*** holds that where an officer acts outside of federal law he is stripped of his official or representative character and thereby subject to suit in federal court (as opposed to being protected by the State's Eleventh Amendment immunity), that accordingly when that officer is stripped of his official or representative character he becomes a "private person" and can no longer be held liable for constitutional violations. This is a fundamental misapplication of the law.

It is clear from the Supreme Court's opinion in ***Pennhurst State Sch. & Hosp. v. Halderman***, 465 U.S. 89, 104-05 (1984), a case heavily cited to by defendants in other portions of their motion, that "an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment." ***Id.*** This statement establishes that the 'stripping' discussed in ***Ex parte Young*** is *limited* to an officer's 'official' status with regard to Eleventh Amendment immunity. Further, in ***Hafer***, the Supreme Court stated that "to establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." 502 U.S. at 25 (internal quotations omitted). The Court then went on to distinguish between official and personal capacity suits: "[w]hile the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal

capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law." ***Id.*** [2]

As plaintiffs have alleged that defendants, acting under color of state law, caused plaintiffs to be deprived their federal rights under the First and Fourteenth Amendments to the United States Constitution, defendants' Motion to Dismiss [Doc. 9] on the grounds that defendants cannot be sued in their personal capacities as to violations of federal law should be **DENIED**.

D. Plaintiffs Are Not Required to Exhaust Any State Administrative Procedures Before Filing An Action for Relief Under § 1983

Defendants also object to the filing of this suit on the basis that plaintiffs failed to follow the procedure laid out in West Virginia Code §§ 55-17-1 et seq. (Def.'s Mem. to Supp. M. to Dismiss [Doc. 10] at 11). Defendants' argument fails for two reasons: (1) the statute by it's own terms does not apply to any claim filed in federal court, and (2) plaintiffs are not required to exhaust state remedies before filing a § 1983 action in federal court.

First, the statute cited by defendants states that notice must be given to "the chief officer of the government agency and the attorney general" prior to the institution of an "action" against a government agency or one of its' officers. W. Va. Code § 55-17-3(a)(1). An "action" is defined by the statute as "a proceeding instituted against a governmental agency in a circuit court or in the supreme court of appeals[.]" W. Va. Code § 55-17-2(1). As the United States District Court for the Northern District of West Virginia is neither a

[2] To the extent that defendants raised any personal immunity defenses in their Motion to Dismiss, those defenses were misplaced as they are defenses to a claim and not an argument against lack of jurisdiction.

circuit court nor the supreme court of appeals–the notice statute is by definition inapplicable to the case at bar.

Further, to the extent that defendants are arguing that plaintiffs' § 1983 claims should be dismissed for failure to first exhaust a state administrative remedy, defendants also err. The Supreme Court in ***Patsy v. Board of Regents***, 457 U.S. 496, 500, 516 (1982) reviewed that argument and held that exhaustion of state administrative remedies prior to filing a § 1983 claim is not required. As such, defendants' Motion to Dismiss [Doc. 9] on the grounds that plaintiffs failed to comply with the notice requirement in W.Va. Code §§ 55-17-1 *et seq.* should be **DENIED**.

II. Plaintiffs' State Law Claims Against Defendants

A. Plaintiffs' State Law Claims Seeking Injunctive and Declaratory Relief

Plaintiffs also brought claims against defendants, State officials, for violation of State law; these claims are barred by Eleventh Amendment to the United States Constitution to the extent that plaintiffs seek injunctive or declaratory relief. ***Pennhurst State Sch. & Hosp. v. Halderman***, 465 U.S. 89, 121 (1984). Plaintiffs argue that ***Pennhurst*** is inapplicable because it was decided prior to the enactment of 28 U.S.C. § 1367(a) which codified the principles of ancillary and pendent jurisdiction. (Pl.'s Resp. to Def.'s M. to Dismiss [Doc. 12] at 6). This argument is unpersuasive and the cases plaintiffs cite in support are inapposite.

Congress enacted 28 U.S.C. § 1367(a) to codify well recognized principles of federal jurisdiction allowing federal courts to hear claims over which the court did not have original jurisdiction; but this codification did not change the limitation the Supreme Court had

already placed on the ***Ex parte Young*** doctrine. *See* ***Bragg v. West Virginia Coal Ass'n***, 248 F.3d 275, 292 (4th Cir. 2001) (holding that the federal district court lacked jurisdiction to hear claims brought against a state official seeking to force the official to conform his actions with state law); ***Suarez Corp. Industries v. McGraw***, 125 F.3d 222, 228 (4th Cir. 1997).

As discussed above, the Supreme Court, in ***Ex parte Young***, held that when a state officer violates federal law he is stripped of his authority and; thus, the State is not the real party in interest and the officer is subject to suit in federal court. This construction allows for the enforcement of federal law. Without ***Ex parte Young***, state officers could violate federal law and there would be no legal means of checking their actions; this is because any suit against that officer would constitute a suit against the State and be barred by the State's Eleventh Amendment immunity.

The Third Circuit in ***Pennhurst*** reasoned that the same 'stripping of authority' that the Court found in ***Ex parte Young*** would apply where an officer violated state law. ***Id.*** 673 F.2d 647, 656-57 (3rd Cir. 1982), *rev'd* 465 U.S. 89 (1984). The Supreme Court in ***Pennhurst***, however, reversed the Third Circuit holding that a State official could not be sued in federal court for violation of State law. 465 U.S. 89, 121 (1984). The Court stated: "[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment... We now hold that this principle applies as well to state law claims brought into federal court *under pendent jurisdiction*." ***Id.*** (emphasis added). Although seemingly illogical, this distinction has been attributed to the Court's conclusion that: "federal courts can give relief against

state officers on federal law grounds because of the importance of securing compliance with federal law. Because the federal system has no such need to ensure enforcement of state law, there is no reason to create an exception to the Eleventh Amendment and allow suits against state officers on pendent state law claims in federal court." Chemerinsky, Edwin, FEDERAL JURISDICTION, 4th ed., p. 432 (2003).

As such, plaintiffs' arguments that the supplemental jurisdiction statute 28 U.S.C. § 1367(a) gives this Court jurisdiction to hear plaintiffs' claims for injunctive or declaratory relief that state officers violated state law are incorrect. 28 U.S.C. § 1367(a) merely codified ancillary and pendent jurisdiction–it did not add to it–thus, the Supreme Court's holding in ***Pennhurst*** that a federal court's pendent jurisdiction does not extend to claims against state officials in their official capacities for violations of state law holds just as much force today as it did the day it was decided. ***Bragg v. West Virginia Coal Ass'n***, 248 F.3d 275, 292 (4th Cir. 2001); ***Suarez Corp. Industries v. McGraw***, 125 F.3d 222, 228 (4th Cir. 1997).

Additionally, plaintiffs' cite to a Northern District of Iowa case to support their contention that "[b]ecause such jurisdiction exists, § 1367 authorizes this Court to exercise jurisdiction over the 'entire controversy', including the claims that the Defendants violated the West Virginia Constitution[,]" but the case is inapplicable. (Pl.'s Resp. to Def.'s M. to Dismiss [Doc. 12] at 6)(citing ***Tinius v. Carroll County Sheriff Dept.***, 255 F.Supp. 2d 971, 977-78 (N.D. Iowa 2003). As plaintiffs noted in their brief, the court in ***Tinius*** held that it had supplemental jurisdiction over the plaintiff's state law claims where such claims were not barred by the Eleventh Amendment. Here, plaintiffs' state law claims for injunctive a

declaratory relief are barred by the Eleventh Amendment, and as such the Court does not have jurisdiction to hear those claims. Accordingly, defendants' Motion to Dismiss [Doc. 9] should be **GRANTED** to the extent that plaintiffs' state law claims against defendants seeking injunctive or declaratory relief should be **DISMISSED.**

B. Plaintiffs' State Law Claims Against Defendants for Monetary Relief

The Court does, however, have jurisdiction to hear claims against state officials for violation of state law where the plaintiff seeks monetary relief. ***Suarez***, 125 F.3d at 228. Plaintiffs are silent as to what relief is being sought against defendants on the state law claims. Plaintiffs do seek, however, an award of "actual and nominal damages against Defendants England, Warner, John Doe 1 and John Doe 2 for the depravation of Plaintiff's rights" (Compl. [Doc. 1] at 13). As the Eleventh Amendment does not bar suits against governmental officials sued in their individual capacities, and, therefore, defendants cannot "seek to impose sovereign immunity to these claims," ***Suarez***, 125 F.3d at 228 (citing ***Hafer***, 502 U.S. 21, 30-31) defendants' Motion to Dismiss [Doc. 9] as to the state law claims seeking monetary relief against defendants in their personal capacities should be **DENIED**.

CONCLUSION

Based on the foregoing, defendants' Motion to Dismiss in Lieu of Answer [Doc. 9] should be **GRANTED in part** and **DENIED in part**. Specifically, defendants' Motion to Dismiss [Doc. 9] is hereby **GRANTED** in that plaintiffs' state law claims against defendants for injunctive or declaratory relief should be, and hereby are, **DISMISSED**, and defendants' Motion to Dismiss all other claims brought by the plaintiffs' is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: January 16, 2009

JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE