

No. 17-1727

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

RUSSELL WALKER,

Plaintiff-Appellant,

v.

**HOKE COUNTY BOARD OF ELECTIONS, and
NORTH CAROLINA STATE BOARD OF ELECTIONS**

Defendants-Appellees.

**INFORMAL BRIEF OF
DEFENDANT-APPELLEE,
NORTH CAROLINA STATE BOARD OF ELECTIONS**

NOW COMES the North Carolina State Board of Elections (the “State Board”), by and through its undersigned counsel, and pursuant to Local Rule 34(b) respectfully submits this informal brief.¹

STATEMENT OF THE CASE

Appellant is a resident of Hoke County that brought suit against the State Board and Hoke County Board of Elections (“Hoke BOE”) challenging the process by which county commissioners are elected in Hoke County. *See* Amended Complaint. Currently, there are five members on the Hoke County Board of Commissioners and they are all elected at large. *See* Amended Complaint at ¶¶ 8 & 9. Appellant asserted that there are “4 non-white

¹ The State Board does not believe that the 15 May 2017 dismissal was included in this appeal. Nevertheless, because the Appellant is *pro se*, the State Board files this Informal Responsive Brief in an abundance of caution.

County Commissioners and one white County Commissioner,” and argued that there should be more white commissioners because “the population of Hoke County is approximately 51% white, and 49% non-white.” Amended Complaint at ¶¶ 10, 12, 15, & 16. Based on these allegations, Appellant asserted that his “right to vote has been debased and diluted to the point of effective denial through the ‘democratic’ process;” and asked the court to declare, among other things, that the “‘at large’ method of election constitutes a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment,” and to enjoin use of the “at large” system of voting. Amended Complaint at ¶¶ 17, 22 & 24. Appellant sought the creation of “5 election districts with each election district in Hoke County being represented by one representative County Commissioner.” Amended Complaint at ¶ 27

The State Board moved to dismiss the Complaint against it as barred by the Eleventh Amendment to the Constitution of the United States; and, in the alternative, for failing to state a claim and for lack of standing. Hoke CBE also moved for dismissal. Appellant sought to amend his Complaint to address his lack of standing, which was not opposed. The court allowed the amendment and found that there was no need for the defendants to renew their motions to dismiss. The court considered the motions as against the Amended Complaint.

On 15 May 2017, the court held that Appellant’s claims against the State Board were barred by the Eleventh Amendment and granted the State Board’s Motion to Dismiss. On 8 June 2017, the court granted dismissal to Hoke CBE finding that Appellant had failed to state a claim in his Amended Complaint. On 14 June 2017, Appellant noticed his appeal

of the court's "Order and Judgment dismissing the case entered in this action on the 8th day of June."

ARGUMENT

The Appellant has not appealed the dismissal of the State Board. Alternatively, the court did not err in finding that the Eleventh Amendment bars this suit against the State Board. Therefore, dismissal of all claims against the State Board was warranted.

I. Appellant has failed to include the dismissal of the State Board in this appeal.

Appellant, appealing *pro se*, does not appear to appeal the court's Order and Judgment dated 15 May 2017, which dismissed the State Board from this matter. Neither that Order nor the State Board is referenced in Appellant's Notice of Appeal. Likewise, Appellant's Informal Brief does not identify the dismissal of the State Board as an issue on appeal. It also makes no reference to the Eleventh Amendment or the court's analysis of the State Board's immunity. Rather, the only issue asserted by Appellant in his Informal Brief goes to the merits of his claim. As such, Appellant has waived appellate review of the 15 May 2017 dismissal of the State Board. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief.")(citing, 4th Cir. R. 34(b))

II. The court did not err in dismissing the State Board.

In the event that this Court finds that the Appellant sufficiently raised the dismissal of the State Board as an issue for review, the dismissal should be affirmed because Appellant's suit against the State Board is barred by the Eleventh Amendment.

This Court's review of the district court's dismissal based on Eleventh Amendment immunity is *de novo*. *See Hutto v. S.C. Ret. Sys*, 773 F.3d 536, 542 (4th Cir. 2014)("Whether an

action is barred by the Eleventh Amendment is a question of law that we review de novo.”)(citing, *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 222 (4th Cir. 2001).) The State Board had the burden of raising Eleventh Amendment immunity as an affirmative defense. *Id.* at 544. The State Board asserted this defense in its Motion to Dismiss.

As asserted in the Motion to Dismiss, the Appellant sued the State Board, but the Eleventh Amendment protects a State as well as its agencies from suit in federal court by one of the State’s citizens or the citizen of another state. *California v. Deep Sea Research*, 523 U.S. 491, 501 (1998). *See also Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997); *Hans v. Louisiana*, 134 U.S. 1 (1890). In response to the Motion to Dismiss, the Appellant asserted that he may sue the State Board for prospective relief, and cited to *McBurney v. Cuccinelli*, 616 F.3d 393 (4th Cir. 2010). However, as asserted by the State Board and noted by the district court in its dismissal, *McBurney* “was a suit against an individual state official, not a state agency.” 15 May 2017 Dismissal. The district court then concluded correctly that “[t]he Eleventh Amendment’s jurisdictional bar against suing states and state agencies ‘applies regardless of the nature of the relief sought.’” *Id.*, quoting, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).

The State Board was and continues to be entitled to Eleventh Amendment immunity because it is an agency of the State of North Carolina. As such, the district court did not err in dismissing the State Board, and the dismissal should be affirmed.

CONCLUSION

North Carolina State Board of Elections respectfully requests this Court to affirm the 15 May 2017 District Court Order.

Respectfully submitted, this the 5th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July, 2017, I electronically filed the foregoing **INFORMAL BRIEF OF DEFENDANT-APPELLEE, NORTH CAROLINA STATE BOARD OF ELECTIONS** with the Clerk of this Court using the CM/ECF system.

I hereby further certify that I have mailed the specified document to the following non-CM/ECF participant:

Russell F. Walker
176 Quewhiffle Road
Aberdeen NC 28315
Plaintiff Pro se

This the 5th day of July, 2017.

/s/ James Bernier, Jr.
James Bernier, Jr.
Special Deputy Attorney General