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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

MAJOR DAVID T. WORLEY, Plaintiff, v. BRAD LITTLE, in his official capacity as Governor of the State of Idaho and Commander-in-Chief of the Idaho National Guard; MAJOR GENERAL TIMOTHY J. DONNELLAN, in his official capacity as Adjutant General of the Idaho National Guard; BRIGADIER GENERAL JAMES C. PACKWOOD, in his official capacity as Assistant Adjutant General of the Idaho Army National Guard, Defendants.	Case. No. 1:25-cv-25-DCN RESPONSE BRIEF OPPOSING DEFENDANT GOVERNOR BRAD LITTLE'S MOTION TO DISMISS [DKT. 13].

Plaintiff, Major David T. Worley, pursuant to D. Idaho Loc. Civ. R. 7.1(c), hereby submits this Response in Opposition to Defendant, Governor Brad Little's Motion to Dismiss (dkt. 13) and Brief in Support (dkt. 13-1, "MTD Br."). For the following reasons, the Motion should be denied.

ARGUMENT

I. The Eleventh Amendment Provides No Refuge for Governor Little against Major Worley's Federal Claims for Prospective Equitable and Injunctive Relief.

The Governor contends that he is immune from Major Worley's suit under the Eleventh Amendment. (MTD Br. 6-9.) This is incorrect. *Ex parte Young* provided an important exception to Eleventh Amendment immunity, which is squarely at issue here. *See Ex parte Young*, 209 U.S. 123, 160 (1908). There, the Court excepted suits involving equitable relief against state officers enforcing unconstitutional laws. *Id. See also Arizona Students' Assoc. v. Arizona Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (sovereign immunity "does not bar claims seeking prospective injunctive relief against state officials to remedy a state's ongoing violation of federal law"). Supreme Court "precedents teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 276 (1997).

"The Eleventh Amendment generally does not bar the exercise of the judicial power of the United States where a plaintiff seeks to compel a state officer to comply with federal law," *Summit Med. Assoc. v. Pryor*, 180 F.3d 1323, 1336 (11th Cir. 1999), and "does not bar actions when citizens seek only injunctive and prospective relief." *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1072 (9th Cir. 2014). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) ("*VOPA*").

A. *Ex parte Young* plainly removes the Governor's fictional cloak of immunity when the Governor acts in contravention to federal law.

Over a century ago, the Supreme Court recognized that suits against State officials in their official capacities are not barred by the Eleventh Amendment when the relief sought is entirely prospective. *Ex parte Young*, 209 U.S. at 159. The rationale for this conclusion is simple: when a State official acts in contravention of the United States Constitution or federal law, he is stripped of his cloak of immunity. *Id.* State officials, when acting to enforce or having responsibility to enforce allegedly unconstitutional laws, are stripped of the cloak of sovereign immunity. *R.W. v. Columbia Basin Coll.*, 77 F.4th 1214, 1220 (9th Cir. 2023) ("Because a state officer who violates federal law acts outside of the scope of [his] authority, [he] is 'not the State for sovereign immunity purposes' and is subject to a federal court's injunctive power." (quoting *VOPA*, 563 U.S. at 254)).

Indeed, "[t]he *Ex parte Young* doctrine is founded on the legal fiction that acting in violation of the Constitution or federal law brings a state officer into conflict with the superior authority of the Constitution," *Cardenas v. Anzai*, 311 F.3d 929, 935 (9th Cir. 2002), 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." *Id.* The reason is simple: "the State could not grant immunity for such an act." *Suever v. Connell*, 439 F.3d 1142, 1148 (9th Cir. 2006).

Were it otherwise, the Supremacy Clause would be a dead letter. Indeed,

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. *The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. . . . . 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 (emphasis added). *See also VOPA*, 563 U.S. at 254 (2011) (same); *In re Ellet*, 254 F.3d 1135, 1138 (9th Cir. 2001) (same).

In fact, Eleventh Amendment immunity is inapplicable where there is "'action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves *or the manner in which they are exercised are constitutionally void*." *Little v. Morton*, 445 F.3d 1207, 1213 (4th Cir. 1971) (quoting *Dugan v. Rank*, 372 U.S. 609, 620-21 (1963)) (emphasis added). The Supreme Court's "cases make it clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Fl. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982). "Specifically, a state official ceases to represent the state when it attempts to use state power in violation of the Constitution. Such officials thus may be enjoined from such unconstitutional action—sued and stopped." *Wright v. North Carolina*, 787 F.3d 256, 261 (4th Cir. 2015) (cleaned up). Simply put, "[a] State officer acting in violation of federal law thus loses 'the cloak of State immunity.'" *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002). "Since the State cannot authorize its officers to violate federal law, such officers are 'stripped of their official and representative character and are subjected in their person to the consequences of their individual conduct.'" *In re Ellett*, 254 F.3d at 1138.

B. Major Worley's Verified Complaint plainly satisfies the simple and straightforward *Ex parte Young* inquiry by alleging an ongoing violation of federal law and seeking prospective, equitable relief.

As noted *supra*, the inquiry concerning whether a state official can prevail on a motion to dismiss asserting Eleventh Amendment immunity is simple and straightforward: (1) did the plaintiff allege an ongoing violation of federal law, and (2) did the plaintiff seek prospective relief. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a *straightforward inquiry* into whether the complaint alleges an ongoing violation of

federal law and seeks relief properly characterized as prospective." (emphasis added)). Importantly, "the inquiry into whether suit lies under *Ex parte Young* does *not include an analysis of the merits of the claim*." *Id.* at 646 (emphasis added). *See also Cardenas*, 311 F.3d at 935 n.3 ("The Supreme Court has recently clarified, however, that *Ex parte Young* does not include an analysis of the merits of the claim." (citing *Verizon*, 535 U.S. at 646)) *Pac. Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1124 (9th Cir. 2003) (same).

1. Major Worley alleges an ongoing violation of federal law.

Major Worley's Verified Complaint plainly alleges violations of *federal* constitutional liberties. (Dkt. 1, V. Compl., ¶¶129-143 (alleging violations of the First Amendment to the United States Constitution); *id.*, ¶¶144-159 (alleging retaliation in violation of the First Amendment to the United States Constitution); *id.*, ¶¶160-183 (alleging violations of the Free Exercise Clause of the First Amendment to the United States Constitution); *id.*, ¶¶184-203 (alleging violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution).) Major Worley's Verified Complaint also plainly alleges that each of these violations of federal law is *ongoing*. (Dkt. 1, V. Compl., ¶¶124-128 (alleging that "Major Worley has suffered, *is suffering*, and *will continue to suffer*" irreparable injury for Defendants' unconstitutional actions against him (emphasis added).) Thus, Major Worley has plainly alleged an ongoing violation of federal law sufficient to satisfy the straightforward and simple inquiry before this Court.

2. Major Worley's Verified Complaint seeks prospective relief.

As to the second part of the straightforward inquiry, there can be no dispute that the primary relief sought by Major Worley in this action is entirely prospective. *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965) ("injunctive relief looks to the future" and is thus prospective). Indeed, "[t]he prayer for injunctive relief—that state officials be restrained from enforcing an order

in contravention to controlling federal law—clearly satisfies our straightforward inquiry." *Verizon*, 535 U.S. at 645. Here, Major Worley's Verified Complaint prays for a TRO, preliminary and permanent injunctions, and declaratory relief. (Dkt. 1, V. Compl., at 42-42 (seeking prospective injunctive relief).) And, as the Ninth Circuit has noted, if a plaintiff moves for prospective relief against an ongoing violation of the law, the court is prohibited from dismissing *that part* of the case—even if other prayers for relief are included in the complaint. *Crowe v. Oregon State Bar*, 112 F.4th 1218, 1233 (9th Cir. 2024) ("in addition to suing OSB, Crowe has sued OSB's officers in their official capacities seeking prospective declaratory and injunctive relief for violating his freedom of association right. *Sovereign immunity does not prevent that part of his case from proceeding*." (emphasis added)). Moreover, that Major Worley seeks other relief, such as attorney's fees and costs associated with this action under 42 U.S.C. §1988, is of no moment because "[t]he *Young* doctrine allows individuals to pursue claims against a state for prospective equitable relief, *including any measures ancillary to that relief*." *Arizona Students Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (emphasis added).

Major Worley has plainly alleged an ongoing violation of federal constitutional law and sought prospective injunctive relief against the Governor. His Complaint plainly satisfies the straightforward inquiry, and sovereign immunity provides no shield for Governor Little.

3. The Governor's resort to merits considerations is insufficient as a matter of law to support dismissing Major Worley's Complaint.

Notwithstanding Major Worley's straightforward allegations of federal law and request for injunctive relief, the Governor contends that all of this is a matter of federal regulation so he has no connection to it. (MTD Br., 8.)[1] And the primary thrust of the Governor's contentions

[1] Major Worley disputes the Governor's characterization and notes that his Verified Complaint—which must be taken as true at this stage—plainly dispels that this action centers on federal regulations. (*E.g.*, Dkt. 1, V. Compl., ¶¶93-106 (alleging that Defendants enacted a policy—the No Christians in Command Policy—to screen candidates

concerning his purported immunity is that Major Worley's "claims are based on a non-existent policy concocted by Plaintiff and labeled as the 'No Christians in Command' policy." (MTD Br., 3.) This is a wholly improper denial of fact. *E.g.*, *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (the court "must accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party."). But, more fatally for the Governor's Motion, this is a question concerning the merits of Major Worley's claims, which are inappropriate for consideration on whether a state official is immune under the Eleventh Amendment.

Indeed, as a matter of binding and settled law, the Governor's motion to dismiss cannot be based on his contentions concerning the merits of Major Worley's claims. *That is wholly improper. See Verizon*, 525 U.S. at 646 ("The inquiry under *Ex parte Young* does not include an analysis of the merits of a claim."); *Cardenas*, 311 F.3d at 935 n.3 (same); *Pac. Bell*, 325 F.3d at 1124 (same). In fact, similar to the state officials in *R.W. v. Columbia Basin College*, the Governor here attempts to "ignore this narrow inquiry and characterize the merits of [Major Worley's] First Amendment claim as part of the *Ex parte Young* analysis." 77 F.4th 1214, 1221 (9th Cir. 2023). In essence, the Governor is attempting to intertwine his contentions concerning his purported immunity with his analysis of the merits. Binding precedent prohibits that. The Governor's contentions also amount to the same argument made in *Cardenas* that "plaintiff's action lacks merit and for that additional reason is barred under *Ex parte Young*." 311 F.3d at 935 n.3. This Court must reject that contention.

Rather, the relevant inquiry here—as with all motions to dismiss—is whether Major Worley's *allegations* suffice to satisfy the straightforward inquiry. *E.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("An *allegation* of an ongoing violation of federal law

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for command in the *state's* national guard, and that it was a policy of the *Idaho* Army National Guard, not the federal government or United States Department of Defense).) In any event, as discuss in this section, the Governor's contentions are merits arguments completely inappropriate for resolution on a motion to dismiss.

where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." (emphasis added)); *Verizon*, 535 U.S. at 646 (2002) ("An *allegation* of an ongoing violation of federal law is ordinarily sufficient" (quoting *Coeur d'Alene*, 521 U.S. at 281) (emphasis original)). Indeed, "[f]or a suit to proceed under *Ex parte Young*, the plaintiff must *allege—not prove*—an ongoing violation of federal law for which she seeks prospective injunctive relief." *R.W.*, 77 F.4th at 1221 (emphasis added). *See also D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334, 338 (4th Cir. 2010) ("to fall within the *Ex parte Young* exception, it is sufficient for Plaintiff's suit to *allege* an ongoing violation of federal law, actually *proving* such an ongoing violation is unnecessary" (emphasis original)); *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (same); *Summit*, 180 F.3d at 1338 (same). The Governor's resort to merits-based contentions and challenges to the truthfulness of Major Worley's allegations are improper and cannot be used as a basis to justify dismissal. His Motion must be denied.

C. The Governor is a proper defendant under *Ex parte Young*.

Aside from his plainly improper challenges to the veracity and truthfulness of Major Worley's allegations, the Governor contends that he has no connection to the allegedly federal actions that took place here, so he is an improper defendant in this action. (MTD Br., 8.) In addition to this contention itself being a denial of a factual allegation of the Complaint and thus an improper basis upon which the adjudicate the Governor's contentions, and in addition to its being plainly contradicted by the well-plead allegations of Major Worley's Complaint (*see supra* note 1), the Governor's contentions are meritless on their face and must be rejected.

1. The Governor has a special relationship with the challenged actions.

First, there is no question that "*Ex Parte Young* requires a special relation between the state officer sued and the challenged statute to avoid the Eleventh Amendment's bar," *Waste Mgmt.*

Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001), and that a general duty to enforce the laws is insufficient. *S.C. Wildlife Fed'n*, 549 F.3d at 333. But, as the Ninth Circuit has held, the head of a government agency—such as the Idaho Army National Guard here—has a "fairly direct connection, to say the least" with the challenged actions of that agency. *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). As the Commander in Chief, the Governor "does more than just live with" his subordinates actions and policies, he oversees and administers them under statutory law and is "duty-bound to ensure that his employees follow it." *Id.*

In *Los Angeles County Bar Association v. Eu*, the Ninth Circuit recognized that an executive that has the duty to appoint the individuals responsible for the allegedly unconstitutional state actions and policies was sufficient to give that state official the requisite connection for purposes of *Ex parte Young*. 979 F.2d 697, 704 (9th Cir. 1992). Here, Governor Little has a special connection to the law because, under Idaho statutes, he was responsible for appointing Major General Donnellan and Brigadier General Packwood. *See* Idaho Const., art. II, sec. 4; Idaho Code §46-202.[2] He has direct responsibility over them and is the Commander in Chief directly responsible for their actions, policies, and administration. Idaho Const., art. II, sec. 4. Simply put, the Governor has the requisite connections to the actions and policies challenged in this action.

The Governor's connection to the challenged actions "need not be *qualitatively* special; rather, 'special relation' under *Ex parte Young* has served as a measure of *proximity to* and *responsibility for* the challenged state action." *S.C. Wildlife Fed'n*, 549 F.3d at 333 (bold emphasis added). In *South Carolina Wildlife Federation*, the Fourth Circuit looked to a number of factors to determine whether the named government official had the requisite proximity to and responsibility for the challenged action. 549 F.3d at 332-33. It noted that "[a] court may look to state law to

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[2] Governor Little did, in fact, appoint the other Defendants, Major General Donnellan and Brigadier General Packwood. *Leadership*, Idaho.gov, *available at https://www.imd.idaho.gov/chain-of-command/*.

determine whether the requisite connection exists," whether the named defendant has "supervisory authority" over the challenged action, whether the named defendant was "deeply involved" in the challenged action, whether the named defendant had "responsibility for carrying out its policies," and whether the named defendant represented the challenged policies in public. *Id.* at 333. Similarly, in *Ansley v. Warren*, the court looked to whether the named defendant had "supervisory control" over the challenged action and whether the named defendant was the "head of the agency" responsible for the challenged action. 2016 WL 5213937, *7 (W.D.N.C. Sept. 20, 2016), *aff'd,* 861 F.3d 512 (4th Cir. 2017). In both instances, because those elements were present, the courts concluded that the named defendant was the proper official for purposes of *Ex parte Young*.

So, too, here. Looking to the laws of the State, the Governor plainly has the requisite proximity to and responsibility for the challenged policies, investigations, and order. Indeed, only the Governor is tasked as the Commander in Chief of the Idaho National Guard, *see* Idaho Const., art. IV, sec. 4; Idaho Code §46-110, and thus only he has the sole and unquestioned authority to put a stop to investigations and removals of his subordinate officers. Indeed, Defendants Packwood and Donnellan serve directly at the pleasure of the Governor and can be removed for failure to follow his orders to restore Major Worley. *See* Idaho Code §46-111. That *alone* is sufficient to give him the requisite proximity to and responsibility to the challenged actions here.

Idaho law clearly provides the Governor with the requisite connection to subject him to suit under *Ex parte Young* for the personnel appointed at his pleasure, for the policies and execution of the policies effectuated under his unilateral and unquestioned executive authority, and for the treatment of all officers—including Major Worley—who are under the Governor's command. Under the Constitution of Idaho, "[t]he supreme executive power of the State is vested in the Governor." Idaho Const. art. IV, sec. 5. Under that same provision, the Governor is not only tasked

with "faithfully execut[ing] the laws," which some courts have found too general to avoid Eleventh Amendment problems, but, "[a]ll militia officers shall be commissioned by the Governor." Idaho Const. art. XIV, sec. 3. And, "[t]he governor, as commander-in-chief, pursuant to his or her authority under section 4, article IV, of the constitution of the state of Idaho, *shall administer and control the national guard*." Idaho Code §46-112 (emphasis added). Thus, the Governor's authority to enforce the policies and commissioned officers of the Idaho Army National Guard is plainly contemplated, and indeed mandated, by the Constitution of Idaho and its statutes.

The responsibilities and authority of the Governor in this matter are no mere general grant of authority. The Idaho Constitution provides that that the Governor "shall have power to call the militia to execute the laws, to suppress insurrection, and to repel invasion**.**" Idaho Const. art. IV, sec. 4. He is tasked with ensuring a ready fighting force, commanding those troops, and otherwise setting and enforcing the policies of the Idaho Army National Guard. Idaho Const. art. XIV, sec. 3; Idaho Code §46-112. Moreover, he administers the Guard and controls it. Idaho Code §46-112.

The two other Defendants, Major General Donnellan and Brigadier General Packwood, who oversaw the unconstitutional process against Major Worley are appointed by the Governor Idaho Code §§46-111, 46-113, serve at the Governor's pleasure, *id.*, and enact and implement the Idaho Army National Guard orders at the Governor's direction. *Id*.

The Constitution of Idaho specifically gives the Governor responsibility for and proximity to his National Guard and removes the cloak of immunity that the Eleventh Amendment might otherwise provide in different situations. The exercise of his constitutional authority under Article IV and Idaho Code §46-112 has consequences, and those are plainly outlined in his authority and mandate to enforce the orders he issues. At minimum, the Constitution of Idaho gives the Governor specific "*responsibility for*" his National Guard, *S.C. Wildlife Fed'n*, 549 F.3d at 333 (emphasis

original), as he is the only official tasked with sole and exclusive authority over the ability to put Major Worley back where he was prior to the unconstitutional injury thrust upon him by the Governor's subordinates. That squarely puts him in close proximity to and gives him a special relationship with the challenged orders and actions. This is not some general capacity to enforce the law, but a specific grant of authority to enforce and administer the laws and Guard policies at issue here. Indeed, Idaho code plainly vest the Governor with "supervisory authority" over his subordinate officers. *S.C. Wildlife Fed'n*, 549 F.3d at 333.

2. The Governor has sole and unquestioned authority to grant the relief Major Worley seeks.

The special relationship requirement under *Ex parte Young* is not intended as a shield for liability when ongoing federal constitutional violations are occurring. In fact, as the Ninth Circuit has noted, the connection required to satisfy *Ex parte Young* "is a modest requirement," *Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir. 2022), intended only to ensure that the relief obtained by the plaintiff would be effective if issued against the state official. *Id.* The "requirement ensures that a federal injunction will be effective with respect to the underlying claim." *S.C. Wildlife Fed'n*, 549 F.3d at 444 (cleaned up). *See also McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (same). As the Ninth Circuit has made clear, the Governor's "connection does not need to be primary authority to enforce the challenged law, nor does the [Governor] need to have the full power to redress a plaintiff's injury's in order to have some connection to the challenged law." *Matsumoto v. Labrador*, 122 F.4th 787, 803 (9th Cir. 2024). And an injunction against the Governor would provide Major Worley with effective relief, which is *alone* sufficient to demonstrate the requisite connection. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004) ("An injunction against the attorney general could redress plaintiffs' alleged injuries . . . . For the same reasons, both defendants are properly named under *Ex parte Young*.").

Here, an injunction against the Governor would clearly provide Major Worley with the relief he requires. An injunction prohibiting the institution of the challenged No Christians in Command Policy (dkt. 1, V. Compl., ¶¶93-106) would preclude the Governor and the Idaho Army National Guard from instituting or enforcing the policy against Major Worley, would permit Major Worley to be return to the status quo ante (*see* dkt. 2), and end the ongoing violation of federal law that has been imposed on him because of Defendants' unlawful conduct. Because that relief would redress Major Worley's injuries, the Governor is not immune from suit under *Ex parte Young*.

II. The Eleventh Amendment Provides No Refuge For Governor Little Against Major Worley's State Law Claims For Prospective Injunctive Relief Against The Governor.

The Governor contends that Major Worley cannot seek injunctive relief on his state law claims because they, too, are barred by the Eleventh Amendment under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). (MTD Br., 7.) *Pennhurst*, however, does not extend as far as the Governor would have it reach, particularly where—as here—Major Worley is not seeking the kind of institutional, affirmative, and intrusive relief at issue in *Pennhurst*.

As *Pennhurst* itself recognized, "*the difference between permissible and impermissible relief 'will not in many instances be that between day and night*.'" *Pennhurst*, 465 U.S. at 105 (quoting *Edelman v. Jordan*, 415 U.S. 651, 667 (1974)) (emphasis added). As is true in other Eleventh Amendment context, under *Pennhurst*, the relevant inquiry is still whether "a suit against state officials" is really a suit against the state where the "state is the real, substantial party in interest." *Id.* at 101. And the proper inquiry for that determination is whether the state is the real party in interest rests on the "general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought." *Id.* at 107 (emphasis original).

It is this effect that differentiates *Pennhurst* from the case at bar. In *Pennhurst*, though styled as a case against State officials for prospective relief, the *effect* of the requested relief was

anything but prospective. Indeed, the relief sought and ordered "in effect was that a major state institution be closed and smaller state institutions be created and expansively funded." *Id.* at 107. That is hardly the type of prospective injunctive relief typically requested in suits against State officials, and can hardly be thought prospective at all since it required the expenditure of public funds as a result of the relief ordered. As the Court recognized, the relief ordered could only be carried out if the State—itself—*expended its funding to comply*. *Id.* at 107 n.17 ("The point is that the courts below did not have jurisdiction because the relief ordered so plainly ran against the State. No one questions that the petitioners in operating Pennhurst were acting in their official capacity. Nor can it be questioned that the judgments under review commanded action that could be taken by petitioners only in their official capacity—and, *of course, only if the State provided the necessary funding*." (emphasis added)). As a result, *Pennhurst* concluded, "all the relief ordered by the court below was institutional and official in character," *id.* at 109, rather than against an individual state official who "was stripped of his official or representative character" and therefore disrobed of his "immunity from responsibility." *Ex parte Young*, 209 U.S. at 160. Because of its official character and direct effect on the State treasury, *Pennhurst* held that the Eleventh Amendment barred such relief when based on alleged violations of state law.

Such institutional, official, monetary, systematic, and affirmative relief is directly contrary to the wholly prospective relief seeking to enjoin the Governor from enforcing unconstitutional orders, administering the forced removal of Worley from the Idaho Army National Guard, and the No Christians in Command Policy. *Cf. Pennhurst*, 465 U.S. at 912-13 ("none of the Eleventh Amendment cases can be said to hold that injunctive relief could be ordered against State official for failing to carry out their duties under State statutes"). But Major Worley is not seeking injunctive relief against the Governor for failing to carry out any duty imposed upon him by the

State, but rather seeking to enjoin the exercise of unlawful executive authority to administer the Idaho Army National Guard, its officers, and policies. This critical distinction is what differentiates *Pennhurst* from the case at bar. Indeed, as the Supreme Court has plainly held, "the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Treasure Salvors*, *supra*, 458 U.S. at 689 (emphasis added).

As the Fifth Circuit has recognized,

> *Pennhurst* stands for the proposition that the Eleventh Amendment bars suit not, as the district court found here, where the state official's actions are alleged to be *un*authorized by state law but where state law imposes an affirmative duty upon the official, and it is that duty that provides the basis for the injunctive relief sought.

Word of Faith World Outreach Ctr. Church, Inc. v. Morales, 986 F.3d 962, 966 n.5 (5th Cir. 1993) (emphasis original). *See also K.P. v. LeBlanc*, 729 F.3d 427, 440 (5th Cir. 2013) (same). And, here, Major Worley has plainly alleged that the discriminatory and unconstitutional investigation and removal of Major Worley for his political speech and religious exercise violate not only the First Amendment, but the laws of the State as well. (Dkt. 1, V. Compl., ¶¶129-232.)

Thus, an injunction that merely seeks to restrain the Governor from engaging in unauthorized action is not the type of institutional intrusion into the affairs of the State with which *Pennhurst* is concerned. The doctrine arising from *Pennhurst* suggests that its holding "extends only to the sort of injunctive relief sought in *Pennhurst*, *i.e.*, far-reaching, 'affirmative' reliefs that requires state officials to conform to a detailed regulatory system as prescribed by state law" and then imposing affirmative duties of expending state funds to comply with the ordered relief. *Cuesnongle v. Ramos*, 835 F.2d 1486, 1498 n.9 (1st Cir. 1987). Indeed, "*the sort of 'prohibitive' injunction sought here does not rise to the level of interference that triggers sovereign immunity*." *Id.* (emphasis added). Here, because Major Worley merely seeks a prohibitive injunction

precluding the Idaho Army National Guard from permanently revoking his orders and removing him from active duty service (*see* dkt. 2), not the far-reaching, affirmative relief at issue in *Pennhurst*, the Eleventh Amendment does not bar its claims against the Governor.[3]

III. Major Worley Has Plainly Stated A Claim Against The Governor.

A. Major Worley plainly has standing to sue the Governor.

The Governor contends that Major Worley lacks standing to sue him. (MTD Br., 12.) This is incorrect. "Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized [and] actual or imminent, not conjectural or hypothetical." *Id.* (cleaned up). "Second, there must be a causal connection between the injury and the conduct complaint of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of some independent action of some third party not before the Court." *Id.* (cleaned up). Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* It is also important to note that in the First Amendment

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[3] To the extend *Pennhurst* would preclude Major Worley from obtaining injunctive relief against the Governor, Major Worley contends that it is incorrect and must be revisited. There is no question that *Pennhurst* has been "roundly criticized." *McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 435 (6th Cir. 2000); *Costco Wholesale Corp. v. Hoen*, No. CO4-360P, 2004 WL 7339619, *9 (W.D. Wash. Dec. 1, 2004) ("*Pennhurst* has been criticized because it ignores the interests of judicial economy that usually justifies supplemental jurisdiction"); *Butler v. Ohio St. Univ. Med. Ctr.*, No. 2:06-cv-1075, 2008 WL 11351363, * (S.D. Ohio June 23, 2008) (same). And, the reason for this criticism is evident from the flawed results it produces. In cases, such as here, "there is a matter arising from a common nucleus of operative facts that should be adjudicated with little difficulty," and can be decided upon state law grounds. *McNeilus*, 226 F.3d at 435. And, deciding some matters on the state law grounds – such as Major Worley's Idaho Religious Freedom Restoration Act claims – would be entirely consistent with the long-established preference for constitutional avoidance. *See Norfolk Southern R. Co. v. City of Alexandria*, 608 F.3d 150, 157 (4th Cir. 2010) (noting the preference for the doctrine of constitutional avoidance where "federal courts strive to avoid rendering constitutional rulings unless absolutely necessary"). Adherence to that doctrine was the normal basis of operation for the Supreme Court prior to *Pennhurst*, where federal constitutional claims can be ignored along with any unnecessary sweeping decisions when state law grounds exists for adjudicating the matter. *See, e.g.*, *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909). Unfortunately, "that path [appears] no longer available to lower federal appellate courts, because *Pennhurst* 'overrul[ed] the entire history of *Siler/Ashwander* doctrine in cases where injunctive relief is requested against the state.'" *McNeilus*, 226 F.3d at 435 n.1. Major Worley, of course, understands this Court has no such power to overturn *Pennhurst*, but includes this statement for preservations purposes.

context, the standing "inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). And, even in the standing context, the Court is required to take the allegations of the Complaint as true. *Frankel v. Regents of Univ. of Cal.*, 744 F. Supp. 3d 1015, 1025 (C.D. Cal. 2024). Major Worley satisfies all three elements, and he therefore has standing to sue the Governor for his unconstitutional actions and inactions here.

1. Major Worley has suffered, is suffering, and will continue to suffer significant First Amendment injury and irreparable harm because of the Governor's failure to act.

The Governor ignores the fact that constitutional injury sufficient for standing purposes may be incurred by virtue of the Governor's inaction. Such is the case here.

> When the suit is one challenging the legality of government action *or inaction*, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (*or forgone action*) at issue. *If he is, there is ordinarily little question that the action or inaction has caused him injury*, and that a judgment preventing or requiring the action will redress it.

Lujan, 504 U.S. at 561-62 (emphasis added). *See also United States v. Texas*, 599 U.S. 670, 678 n.2 (2023) (same).

Here, Major Worley was unquestionably the target of unconstitutional investigation and removal from command. (Dkt. 1, V. Compl., ¶¶57-92; 107-123.) And the Governor—despite having unquestioned authority to rectify Major Worley's unconstitutional punishment, Idaho Const. art. XIV, sec. 3; Idaho Code §46-112—failed to act to put Major Worley back to where he was lawfully entitled to be. Thus, Major Worley was "the actual object of the government's [unconstitutional action]," and there is "little question that the [Governor's] inaction has caused him injury." *Meland v. WEBER*, 2 F.4th 838, 845 (9th Cir. 2021). Indeed, Major Worley has suffered unconstitutional investigations, removal from his command, ongoing discipline, and the threat of imminent and permanent removal from active duty all because of his constitutionally

protected religious speech and exercise. (Dkt. 1, V. Compl., ¶¶124-128.) Thus, there is little question that Major Worley is "himself among the injured," *Lujan*, 504 U.S. at 562. Indeed, he is the only one injured and thus the only with standing to challenge the Governor's failure to stop the unconstitutional infringement of his First Amendment liberties in this matter.

2. Major Worley's injuries are caused by the Governor's failure to act.

Where, as here, a Complaint is replete with allegations that Defendants' conduct and inactions caused them significant First Amendment injury, the Complaint has "sufficiently shown causation for standing purposes." *Frankel v. Regents of Univ. of Cal.*, 744 F. Supp. 3d 1-15, 1015 (C.D. Cal. 2024). In fact, "[t]he causation element of standing is easily satisfied" when the alleged injury "was caused and will continue to be caused by" the Governor's inaction in this case. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 986 (9th Cir. 2007).

Again, the Governor—despite having unquestioned authority to rectify Major Worley's unconstitutional punishment, *see* Idaho Const. art. XIV, sec. 3; Idaho Code §46-112—failed to act to put Major Worley back to where he was lawfully entitled to be or to rectify the plainly unlawful actions undertaken by his subordinates who serve at his pleasure. Moreover, as Major Worley's Complaint alleges, Defendants—including Governor Little—have adopted an unconstitutional No Christians in Command Policy that has caused direct injury to Major Worley and continues to cause such injury to this day. "[W]here the plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be a proper defendant, must, at a minimum, have some connection with enforcement of the provision at issue." *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998). When a state official is statutorily required to enforce certain provisions being challenged, that individual is a proper party. *See id.* at 1246-47; *see also ACLU v. The Florida Bar*, 999 F.2d 1486 (11th Cir. 1993).

As the Ninth Circuit has made clear, the Governor's "connection does not need to be primary authority to enforce the challenged law, nor does the [Governor] need to have the full power to redress a plaintiff's injury's in order to have some connection to the challenged law." *Matsumoto*, *supra*, 122 F.4th at 803. An injunction against the Governor would provide Major Worley with effective relief, which is *alone* sufficient to demonstrate the requisite connection. *E.g.*, *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004) ("An injunction against the attorney general could redress plaintiffs' alleged injuries, just as an injunction against the Ada County prosecutor could."). Where, as here, the Governor has the authority and statutory duty to enforce the specific law being challenged, he is a proper defendant. *See, e.g.*, *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (holding that attorney general with a statutory mandate to prosecute certain charges had requisite connection to challenged statute, even though his authority was concurrent with other government officials); *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010) (holding that attorney general need not have some special connection to the challenged statute, only that he have a requisite duty and authority to enforce the provision); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir. 2006) (holding that attorney general was not entitled to sovereign immunity merely because his prosecutorial duty was concurrent with other officials when he had statutory authority to enforce the challenged provisions). The Governor's contention that Major Worley has no standing to challenge his unconstitutional inaction is without merit and cannot extricate him from this suit.

3. Major Worley's claims against the Governor are redressable by this Court.

It is particularly worth noting in this context, that at the motion to dismiss stage a plaintiff "is only required to generally allege a redressable injury caused by the actions [of the defendant] about which it complains." *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All.*,

304 F.3d 1076, 1081 (11th Cir. 2002). Injunctions provide sufficient grounds to find redressability when such injunctions are aimed at preventing future unconstitutional conduct. *FPL Food, LLC v. U.S. Dep't of Argric.*, 671 F. Supp. 2d 1339, 1351 (S.D. Ga. 2009). Indeed, "[a]n injunction against the attorney general could redress plaintiffs' alleged injuries." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004).

B. The Governor's contention that Major Worley's factual allegations are false is not a basis to dismiss his Complaint as a matter of settled law.

The Governor contends that Major Worley's claims are based on a "non-existent policy concocted by Plaintiff and labeled the 'No Christians in Command' policy." (MTD Br., 3.) And, because he claims that this policy does not exist, he contends that there are no allegations that pertain to him meriting a claim for relief. (*Id.*) This is incorrect factually and irrelevant legally.

First, on a motion to dismiss, the Governor cannot contest that factual allegations are not true. Yet, the Governor's arguments are based largely on that point. (MTD Br., 3.) **"**Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). "[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," but a plaintiff must meet his "obligation to show the grounds of his entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Supreme Court does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face" and enough facts to "nudge[] [plaintiffs'] claims across the line from conceivable to plausible." *Id.* at 570; *see also Ashcroft*, 556 U.S. at 679 ("a complaint that states a plausible claim to relief survives a motion to dismiss"). The pleading standard "simply call[s] for enough fact to raise a reasonable expectation that discovery will reveal evidence of [unlawful actions]." *Twombly*, 550 U.S. at 556. This Court "must accept all factual allegations of

the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (emphasis added).

"Ordinarily a motion to dismiss should be disfavored, and doubts should be resolved in favor of the pleader." *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). "A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is *disfavored and rarely granted*." *Neveu v. City of Fresno*, 392 F. Supp. 2d 1159, 1168 (E.D. Cal. 2005) (emphasis added); *Putkowski v. Irwin Home Equity Corp.*, 423 F. Supp. 2d 1053, 1058 (N.D. Cal. 2006) (same). This Court should grant a motion to dismiss only in a rare and extraordinary case. *Informix Software, Inc. v. Oracle Corp.*, 927 F. Supp. 1283, 1285 (N.D. Cal. 1996) ("In analyzing whether to grant a Rule 12(b)(6) motion, the court should keep in mind that dismissal is disfavored and should be granted *only in extraordinary cases*.") (emphasis added). This is not one of those rare instances. "[E]ven if the face of the pleadings indicate that recovery is very remote, the claimant is still entitled to offer evidence to support its claims." *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). "And, of course, *a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of facts is improbable, and that a recovery is very remote and unlikely*." *Twombly*, 550 U.S. at 556 (emphasis added) (internal quotations omitted).

Major Worley has satisfied this hurdle, and the Governor's Motion must be denied.

CONCLUSION

The Governor is not immune from suit under the Eleventh Amendment. Major Worley has standing to sue the Governor. And, the Governor's motion is based on factual disputes wholly inappropriate for a motion to dismiss. His Motion must be denied.

Respectfully submitted,

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