

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

DAVID ALAN CARMICHAEL, et al.)

Plaintiffs,)

v.)

Case No.: CL08-2067

THE COMMONWEALTH OF)
VIRGINIA, et al.,)

Defendants.)

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS,
PLEA OF THE STATUTE OF LIMITATIONS AND DEMURRER**

Defendants, the Commonwealth of Virginia (the “Commonwealth”), the Honorable Timothy M. Kaine, Governor (“Governor Kaine”), Pierce R. Homer, Secretary of the Virginia Department of Transportation (“Secretary Pierce”), D. B. Smit, Commissioner of the Virginia Department of Motor Vehicles (“Commissioner Smit”) and the Honorable Robert F. McDonnell, Attorney General for the Commonwealth of Virginia (“Attorney General McDonnell”), by counsel, state as follows in support of their Motion to Dismiss, Plea of the Statute of Limitations and Demurrer:

I. STATEMENT OF THE CASE

Factual Allegations

Pro se Plaintiff David Alan Carmichael (“Plaintiff”) has filed suit on behalf of himself and on behalf of his minor son, Jesse Carmichael (“Plaintiff Jesse Carmichael”) alleging violation of their civil rights. Specifically, Plaintiff claims that a Social Security Number is the “Mark of the Beast” as described in the Book of Revelations in the Bible. Based on this belief,

Plaintiff avers that DMV's requirement that an applicant present a Social Security Number in order to obtain a driver's license violates both the U.S. Constitution and the Virginia Constitution. Construing the Complaint liberally, it appears Plaintiff is attempting to state a federal claim pursuant to 42 U.S.C. § 1983 for violation of his due process rights and right to freedom of religion.

Plaintiff and his son, "devout Christians," both have a Social Security Number, and Plaintiff previously used his Social Security Number to obtain a driver's license. Complaint ¶ 9. However, in 1996, Plaintiff developed the belief that his Social Security Number is the "Mark of the Beast" or "Number of the Beast." Complaint ¶ 11. Plaintiff claims his son shares this conviction and that they are "under a mandate of God to abstain from association with a SSN." Complaint ¶ 5.

In "the first half of 2002," Plaintiff attempted to obtain a religious accommodation allowing him to renew his driver's license without being associated with his Social Security Number. Complaint ¶ 19. The acting DMV Commissioner denied his request. *Id.*

Plaintiff renewed his efforts to obtain a license without using his Social Security Number from May 23-25, 2007. *Id.* ¶ 33. On June 20, 2007 and again on July 23, 2007, Secretary Homer denied the request in writing. *Id.* at 34 and 38.

Counts

The Complaint sets forth numerous counts, and Plaintiff seeks monetary, injunctive and declaratory relief. Plaintiff, though acting *pro se*, requests attorney's fees in addition to costs and expenses.

In Count One, Plaintiff seeks a temporary and permanent injunction against the Attorney General and the Commonwealth's Attorney for the City of Hampton ("Defendant Curtis")¹ preventing prosecution for driving without a valid license. Complaint ¶¶ 70, 72. Plaintiff also seeks a permanent injunction against all Defendants preventing any association between plaintiffs and their Social Security Numbers.

In Counts Two, Three and Four, Plaintiff claims the Defendants have violated Va. Const. art. I, § 16, U.S. Const. amend. I, and the Virginia Act for Religious Freedom, Va. Code § 57-1, *et seq.* by failing to grant his requests for a religious accommodation which would allow him to obtain a license without a Social Security Number. Complaint pp. 22-25.

In Count Five, Plaintiff alleges violations of the due process clause of the U.S. Constitution and the Virginia Constitution, claiming the Defendants have deprived him and his son of the use of their vehicles by denying their request for religious accommodation. Complaint p. 25.

In Counts Six and Seven, Plaintiff seeks relief against Governor Kaine. Plaintiff claims Governor Kaine is liable for delegating his duty to the Secretary of Transportation to "ensure that the law in Virginia was faithfully executed when it was squarely put before him by the Plaintiff." Complaint ¶ 89. Plaintiff seeks a writ of mandamus compelling Governor Kaine to "ensure that his agency act on the law as declared by the Court pursuant to the judgments pleaded for herein." Complaint ¶ 99. Construing the Complaint liberally, it appears Plaintiff is seeking an order requiring Governor Kaine to grant him a religious exception to the requirement that an applicant present a Social Security Number when applying for a license to drive a motor vehicle.

¹ No response is made herein on behalf of Defendant Curtis.

Plaintiff seeks declaratory relief in Count Eight, and requests to change his name and Plaintiff Jesse Carmichael's name in Count Nine.²

The Defendants herein move for the dismissal of the Complaint against them with prejudice and further ask that this Court sustain their demurrer due to Plaintiff's failure to state a cause of action.

II. MOTION TO DISMISS

A. **This Court must dismiss Plaintiff Jesse Carmichael's suit because Plaintiff David Alan Carmichael, a non-attorney, cannot litigate the claim on his behalf.**

Plaintiff Jesse Carmichael's suit against all Defendants must be dismissed because it is improperly filed. While Va. Code § 8.01-8 permits a parent to sue on behalf of a minor as his next friend, there is no authority which allows a non-attorney parent to litigate his minor child's claims in court. *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005) (noting that while a parent may assert a claim on behalf of a minor child pursuant to Va. Code § 8.01-8, no Virginia cases authorize a *pro se* parent to litigate the minor child's claim). Here, Plaintiff, a non-attorney, is attempting to litigate a case on behalf of his minor son, essentially acting as his son's attorney. There simply is no permissible basis on which Plaintiff may represent his son as an attorney, thus Plaintiff Jesse Carmichael's suit must be dismissed against all Defendants.

B. **This Court must dismiss Plaintiff David Carmichael's suit for failure to timely file an appeal of decisions of an administrative agency.**

This Court has no jurisdiction to consider Plaintiff's claims because Plaintiff failed to timely file an appeal after the denial of his requests for a license. Va. Code § 46.2-321 provides

² In his "Alternative Motion for Relief," Plaintiff does not appear to name any party as a Defendant. See Complaint p. 37. In any event, Plaintiff fails to state a cause of action against the Commonwealth, Governor Kaine, Secretary Homer, Commissioner Smith or Attorney General McDonnell in Count Nine. See *id.*

Direct Plaintiff
of 1/2007

that “[a]ny person denied a license . . . may appeal in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq.)” Va. Code § 46.2-321. Any person aggrieved by a decision denying a license “shall have a right to the direct review thereof by an appropriate *and timely* court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia.” Va. Code § 2.2-4026 (emphasis added). Va. Sup. Ct. R. 2A:2 requires that a party file his notice of appeal with the agency secretary within 30 days after service of the final order in the case decision denying his request for a license. *See* Va. Sup. Ct. R. 2A:2. Because Plaintiff failed to avail himself of the appellate review provided by statute, his claims are not properly before this Court.

Plaintiff’s suit is nothing more than an attempt to circumvent the mandatory and exclusive administrative procedures for challenging an agency’s case decisions. Plaintiff’s Complaint provides no allegation that he noted an appeal as required by statute after denial of his 2002 request for religious accommodation. *See* Complaint. Nor does the Complaint establish that Plaintiff noted an appeal within 30 days of the case decision denying his 2007 request. In both instances, Plaintiff claims his request for a license was denied based upon his refusal to provide his Social Security Number. Complaint ¶¶ 19, 33-34 and 38. In order to obtain review of these decisions, Plaintiff was required to appeal in accordance with the Administrative Process Act. Va. Code § 46.2-321.

Having failed to follow the specific time constraints established by the Virginia Supreme Court, Plaintiff’s claims are barred and should be dismissed.³ *See Occoquan Land Dev. Corp. v.*

³ Because Plaintiff’s claims are not properly before the Court, this Court has no jurisdiction to consider Plaintiff’s claims for injunctive and declaratory relief under Va. Code § 57-2.02, the Virginia Act for Religious Freedom. Even assuming, *arguendo*, this Court has jurisdiction, Plaintiff fails to state a claim pursuant to Va. Code § 57-2.02. Nonetheless, Va. Code § 57-2.02 does not permit recovery for monetary damages. *Id.* The Plaintiff cannot state a claim against

Cooper, 239 Va. 363, 389 S.E.2d 464 (1990) (concluding that the trial court had no jurisdiction to hear an appeal of an administrative decision after the appellant failed to timely file a notice of appeal pursuant to Va. Sup. Ct. R. 2A:2); *see also Mayo v. Dep't of Commerce*, 4 Va. App. 520, 358 S.E.2d 759 (1987) (affirming dismissal of appeal from administrative decision based on failure to timely file a petition for appeal pursuant to Va. Sup. Ct. R. 2A:4).

C. Governor Kaine is absolutely immune from suit.

To the extent Plaintiff seeks monetary relief against the Governor, Governor Kaine is absolutely immune. In order to ensure the effective operation of state government, Sovereign Immunity protects those who function at the highest level of government. *Messina v. Burden*, 228 Va. 301, 309, 321 S.E.2d 657, 661 (1984) (“There is very little debate regarding the extension of the doctrine to those who operate at the highest levels of the three branches of government. Governors, judges, members of state and local legislative bodies, and other high level governmental officials have generally been accorded absolute immunity.”) The actions of which Plaintiff complains were taken pursuant to Governor Kaine’s constitutional and statutory authority. As such, Governor Kaine is absolutely immune from Plaintiff’s claim for damages.

D. Secretary Homer and Commissioner Smit are immune from suit pursuant to Qualified Immunity.

To the extent Plaintiff seeks monetary relief against Secretary Homer and Commissioner Smit, both are immune from Plaintiff’s suit on the basis of qualified immunity. Qualified immunity shields public officers “from liability for civil damages if their actions did not violate ‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S.

the Commonwealth pursuant to this Code section, because the Commonwealth has not waived its immunity. *Id.*

800, 818 (1982)). “Qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Hope* at 752 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). It is “an entitlement not to stand trial or face the other burdens of litigation. The privilege is an immunity from suit rather than a mere defense to liability.” *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (internal quotations and citations omitted).

In order to determine the issue of qualified immunity, a court must first ask, “[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier* at 201. If a violation occurred, “the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Id.* “For a constitutional right to be clearly established, its contours ‘must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.’” *Hope*, 536 U.S. at 739 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985)).

The facts as alleged do not show that Secretary Homer or Commissioner Smit violated Plaintiff’s constitutional rights. The complaint is void of any allegation that either engaged in any conduct apart from denying Plaintiff’s requests for a driver’s license after Plaintiff failed to provide his Social Security Number. Such conduct does not give rise to a violation of a constitutional right. The facts are insufficient to establish that either Secretary Homer or Commissioner Smit violated a clearly established statutory or constitutional right, and they are immune from suit.⁴

⁴ While the Complaint contains no specific allegation giving rise to a claim against Attorney General McDonnell, the Attorney General is also immune from Plaintiff’s suit.

III. PLEA OF THE STATUTE OF LIMITATIONS

Defendants seek the dismissal of Plaintiff's action against them on the grounds that Plaintiff's claims are barred by the applicable statute of limitations. Assuming Plaintiff is able to assert a federal constitutional violation, Plaintiff's § 1983 claim is barred as to any incidents which occurred more than two years prior to the filing of the instant Complaint. *See Owens v. Okure*, 488 U.S. 235, 239-40 (1989); *see also* Va. Code § 8.01-243(A). Therefore, any claim based on events which happened prior to April 28, 2006 is time barred. Similarly, any claimed violation of the Constitution of Virginia which occurred prior to April 28, 2006 is also time barred. *See* Va. Code § 8.01-243(A).

IV. DEMURRER

Assuming Plaintiff's claims are not barred by the Defendants' immunity, this Court should reject Plaintiff's conclusions of law and sustain Defendants' demurrer as to all claims against them. "A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations." *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 102, 540 S.E.2d 134, 136 (2001). A demurrer does not, however, admit the correctness of the conclusions of law asserted in the pleading to which a party has demurred. *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 493 S.E.2d 516 (1997). The Complaint does not state a cause of action for violation of any right under the U.S. Constitution or the Virginia Constitution; thus, the Complaint is subject to demurrer.

The Complaint should be dismissed for failure to state a claim against the Commonwealth, Governor Kaine, Secretary Homer, Commissioner Smit and Attorney General McDonnell, in their official capacity, as none are "persons" amenable to suit under 42 U.S.C. §

1983. A claim brought pursuant to § 1983 requires the deprivation of a civil right by a “person” acting under color of state law. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58 at 70-71 (1989). “It is now well-settled that a state cannot be sued under Section 1983.” *Id.*

Similarly, a state official, acting in his or her official capacity, is not a “person” for the purposes of the statute, *see id.* at 71 (“neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983”) and is immune from a § 1983 claim for damages. As a result, Plaintiff’s § 1983 claim against the Commonwealth, Governor Kaine, Secretary Homer, Commissioner Smit and Attorney General McDonnell in their official capacity must be dismissed *with prejudice* as a matter of law.

To the extent Plaintiff attempts to assert a claim against Governor Kaine, Secretary Homer, Commissioner Smit and Attorney General McDonnell in their individual capacity, Plaintiff’s § 1983 claim must also be dismissed. Plaintiff has alleged no specific actions taken by any of these Defendants which would amount to a deprivation of any constitutional right. Section 1983 is not “a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.” *Baker v. McCollan*, 443 U.S. 137, 144 (1979). In other words, to sustain an action pursuant to § 1983, Plaintiff must properly plead that these Defendants violated his civil rights. The Complaint does not contain sufficient allegations to state a claim against any of these Defendants in their individual capacity and should be dismissed *with prejudice*.

Lastly, notwithstanding Plaintiff’s claim, he is not entitled to the issuance of a writ of mandamus against Governor Kaine. A writ of mandamus is an “extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law.” *Richlands Med. Ass’n v. Commonwealth ex rel. State Health Comm’r*, 230 Va. 384, 386, 337

S.E.2d 737, 739 (1985) (citing *Richmond-Greyhound Lines v. Davis*, 200 Va. 147, 152, 104 S.E.2d 813, 816 (1958)); see also *Hertz v. Times-World Corp.*, 259 Va. 599, 608, 528 S.E.2d 458, 462 (2000). A ministerial duty is “one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.” *Richlands Med. Ass’n*, 230 Va. at 386, 337 S.E.2d at 739 (quoting *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945)).

Nowhere in his Complaint does Plaintiff identify the nonperformance of any ministerial duty for which this Court may grant a writ of mandamus. As such, Plaintiff’s request must be denied.⁵

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Commonwealth of Virginia, the Honorable Timothy M. Kaine, Governor, Pierce R. Homer, Secretary of the Virginia Department of Transportation, D. B. Smit, Commissioner of the Virginia Department of Motor Vehicles, and the Honorable Robert F. McDonnell, Attorney General for the Commonwealth of Virginia, by counsel, respectfully request that this Court sustain their demurrer and dismiss Plaintiff’s Complaint against them in its entirety. Defendants also request such further and additional relief as this Court deems appropriate.

⁵ Nor can Plaintiff challenge already completed acts by way of mandamus. “[M]andamus is applied prospectively only; it will not be granted to undo an act already done.” *Richlands Med. Ass’n*, 230 Va. at 387, 337 S.E.2d at 740 (citing *Bd. of Supervisors v. Combs*, 160 Va. 487, 498, 169 S.E.2d 589, 594 (1933)).

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA, THE
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