**U.S. Department of Labor**

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

**IN THE MATTER OF:**

**JOSEPH GLEAN,**

**COMPLAINANT,**

**v.**

**FAIRFAX COUNTY GOVERNMENT,**

**RESPONDENT.**

**ARB CASE NO. 2025-0087**

**ALJ CASE NO. 2025-TAX-00014**
**ALJ ANGELA F. DONALDSON**

**DATE: April 30, 2026**

**Before JOHNSON, Chief Administrative Appeals Judge, and BURRELL, Administrative Appeals Judge**

## DECISION AND ORDER

This case arises under the employee protection provisions of the Taxpayer First Act (TFA) and its implementing regulations.[1] On August 25, 2025, Complainant Joseph Glean filed a Petition for Review with the Administrative Review Board (ARB or Board), seeking review of a U.S. Department of Labor Administrative Law Judge's (ALJ) Order Granting Respondent Fairfax County's Motion to Dismiss, [and] Denying Complainant's Motion to Amend Complaint (Dismissal Order) issued on August 20, 2025. In the Dismissal Order, the ALJ dismissed Complainant's complaint against Fairfax County, finding that the County, "which is a political subdivision of a State, is entitled to sovereign immunity, and thus the complaint must be dismissed for lack of jurisdiction."[2] The ALJ also denied Complainant's motion to amend the case caption to name two county employees, each in their official capacity, as defendants on the basis that state officials acting in their official capacity are protected from a suit by the same sovereign immunity that protects nonconsenting states from suit.[3] Complainant timely appealed the Dismissal Order. For the following reasons, we affirm.

---

1 26 U.S.C. § 7623(d); 29 C.F.R. Part 1989 (2025).

2 Dismissal Order at 4-5.

3 *Id.* at 5 (quoting *Ballinger v. Owens*, 352 F.3d 842, 844-45 (4th Cir. 2003)).

## PROCEDURAL BACKGROUND

On February 18, 2025, Complainant, who was employed by Fairfax County, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Fairfax County did not select him for the position of Director of Wastewater Treatment in retaliation for his complaints to management about the alleged misuse of taxpayer funds. Complainant further alleged that he was owed back pay and Fairfax County did "not want to investigate [his] back pay owed to avoid meeting tax obligations."[4] OSHA conducted an investigation of Complainant's claims, and on April 3, 2025, found that (1) "Complainant and Respondent are not covered under the TFA," and (2) the TFA "does not waive or abrogate federal or state sovereign immunity." Based on these findings, OSHA dismissed the complaint.[5]

Complainant filed objections to OSHA's findings with the Office of Administrative Law Judges, and the case was assigned to ALJ Angela F. Donaldson. On June 16, 2025, Fairfax County filed a "Position Statement," which set forth a basis for dismissing the complaint for lack of jurisdiction, arguing the TFA provides no jurisdiction over a subdivision of a State such as a county.[6] After inquiring whether Respondent would like its Position Statement to be construed as a Motion to Dismiss, the ALJ issued an Order establishing a deadline for Complainant to respond to the County's Position Statement, which the ALJ would treat as a Motion to Dismiss. Complainant filed an Opposition to Fairfax County's Motion to Dismiss, along with a Motion to Amend Caption (Motion to Amend), in which Complainant sought to name his supervisor and the County's Director of Human Resources as respondents, each in their official capacity.

On August 20, 2025, the ALJ issued the Dismissal Order, finding that the complaint was barred by sovereign immunity and dismissing it. The ALJ also denied Complainant's Motion to Amend, finding that official-capacity suits are similarly barred by sovereign immunity and that "amendment of the complaint would not change the outcome[.]"[7]

---

[4] Secretary's Findings, Case #301049480, Occupational Safety and Health Admin. (Apr. 3, 2025).

[5] *Id*. at 2.

[6] Position Statement at 2-3.

[7] Dismissal Order at 5.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to hear appeals from ALJ decisions and to issue agency decisions in cases arising under the TFA.[8] The Board reviews an ALJ's order of dismissal de novo.[9]

## DISCUSSION

### 1. Eleventh Amendment Immunity

The Eleventh Amendment bars suits against non-consenting States. Eleventh Amendment immunity applies to agency administrative proceedings, such as this case.[10] Despite this, it is well established that Eleventh Amendment immunity does not extend to counties, municipal corporations, or other political subdivisions of a State.[11] As the Supreme Court has put it, the "bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances . . . but does not extend to counties and similar municipal

---

[8] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[9] *See, e.g., Van v. JP Morgan Chase & Co.*, ARB No. 2023-0018, ALJ No. 2022-SOX-00028, slip op. at 5 (ARB Nov. 5, 2024) (citing *Bauche v. Masimo Corp.*, ARB No. 2022-0035, ALJ No. 2022-SOX-00010, slip op. at 4 (ARB Sept. 27, 2022)).

[10] *See Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (recognizing that "[t]he affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.").

[11] *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). As the Supreme Court has explained, the phrase "Eleventh Amendment immunity" is a "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). The Supreme Court has recognized that one "consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. . . . Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties." *N. Ins. Co. of New York v. Chatham Cnty., Ga.*, 547 U.S. 189, 193 (2006).

corporations."[12] Here, Fairfax County concedes that it is not an arm of the State.[13] Accordingly, the ALJ erred in concluding that the Eleventh Amendment or state sovereign immunity barred Complainant's action against Fairfax County.[14]

**2. The Scope of the TFA's Coverage**

Having determined that the Eleventh Amendment and state sovereign immunity is not a bar to this complaint, we must now consider whether Fairfax County is nonetheless outside the scope of the TFA's coverage. The TFA's anti-retaliation provisions provide that no employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment (including through an act in the ordinary course of such employee's duties) in reprisal for any certain protected activity.[15] The TFA does not define "employer" or "employee," both of which are central to determining the scope of the TFA's anti-retaliation provisions. "Employee" is, however, defined in the TFA's implementing regulations, which specify that "[e]mployee means an individual presently or formerly working for, an individual

---

[12] *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280; *see also, e.g., Alden*, 527 U.S. at 756 ("The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979) ("[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."); *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 369 (2001) ("[T]he Eleventh Amendment does not extend its immunity to units of local government."); *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 466 (2003) (recognizing that "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."); *Galette v. New Jersey Transit Corp.*, 146 S. Ct. 854, 866 (2026) (recognizing that cities and counties are "legal persons separate from the sovereign and thus not entitled to share in the State's sovereign immunity.").

[13] Respondent's Brief (Resp. Br.) at 7 ("To be clear, the County has never asserted in this case that it is an arm of the state.").

[14] Fairfax County did not advance an Eleventh Amendment immunity argument when this case was before the ALJ. Instead, Fairfax County relied on the Secretary's first finding regarding the scope of the TFA's coverage to argue that the complaint should be dismissed. *See* Position Statement at 2 (noting that the Secretary's first finding is determinative and therefore Fairfax County "takes no position on the Secretary's second finding."). On appeal, Fairfax County acknowledges that "[c]ontrary to what the ALJ held, Eleventh Amendment immunity is inapplicable to the County." Resp. Br. at 5.

[15] 29 U.S.C. § 7623(d)(1).

applying to work for, or an individual whose employment could be affected by, another person."[16] The regulations further specify that "[p]erson means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate" and that "[r]espondent means the person named in the complaint who is alleged to have violated TFA."[17]

Based on these definitions, Fairfax County argues that, as a political subdivision of a State (rather than an individual, partnership, company, corporation, association, trust, or estate), it is not a "person," as that term is used in the TFA and its implementing regulations. It logically follows that if Fairfax County is not a person it cannot be a respondent, as that term only encompasses persons who are named in the complaint and alleged to have violated the TFA. Similarly, Complainant—at least in relation to Fairfax County—is not an employee within the meaning of the TFA, as he is not presently or formerly working for, or applying to work for, another person.

Fairfax County argues that the Board should apply the *expressio unius* canon of interpretation, also known as the expression-exclusion rule, and conclude that because the enumerated elements in the regulations' definition of "person" do not include counties, counties are not "persons" for purposes of the TFA and thus fall outside the scope of the TFA's anti-retaliation provisions.[18] Complainant does not directly challenge this proposition, but instead argues that Fairfax County is raising this argument for the first time on appeal and the argument is therefore forfeited.[19] We cannot agree with Complainant. In Fairfax County's Position

---

16 29 C.F.R. § 1989.101.

17 *Id*.

18 We are mindful that the *expressio unius* interpretive canon "is only a guide, whose fallibility can be shown by contrary indications[.]" *See United States v. Vonn*, 535 U.S. 55, 65 (2002); *see also Pauley v. BethEnergy Mines, Inc*., 501 U.S. 680, 703 (1991) (recognizing that the *expressio unius* canon is "a questionable one in light of the dubious reliability of inferring specific intent from silence[.]"). In interpreting the meaning of the definitional provisions in the TFA regulations we do not find it necessary to rely on this interpretive canon.

19 Complainant's Reply Brief (Comp. Reply Br.) at 5-6; *see Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 2001-0103, ALJ No. 1997-SDW-00007, slip op. at 9 (ARB May 29, 2003) (citations omitted) (recognizing that issues raised for the first time on appeal are generally not considered, absent rare circumstances); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

Statement, the County advanced the very same argument that it now makes before the Board: that the TFA regulations define "Respondent" to mean the person named in the complaint who is alleged to have violated the TFA, and the regulations define "person" in a way such that counties and other political subdivisions of a State are not persons.[20] Contrary to Complainant's assertion, Fairfax Country has not engaged in a "post hoc recasting of its argument."[21]

The definitional provision in the TFA regulations states that "person," as used in the TFA and its implementing regulations, "*means* an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, or estate."[22] As an initial matter, we note that this enumerated list does not include "counties" or any comparable term. This is strike one. Further, the use of "means," rather than alternative phrasing such as "includes," "means and includes," or "includes but is not limited to" is dispositive.[23] As the Supreme Court has recognized, "[a] term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning . . . than where . . . the definition declares what a term 'means.'"[24] Put differently, "[t]he natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."[25] This is strike two.

The third and final strike comes from looking at how "person" is defined in other statutes that contain employee protection provisions. The Federal Water

---

20 Position Statement at 2.

21 Comp. Reply Br. at 3.

22 29 C.F.R. § 1989.101 (emphasis added).

23 The implementing regulations for other whistleblower protection provisions make this even clearer. The implementing regulations for the Food Safety Modernization Act's employee protection provisions, for instance, state that "[p]erson *includes* an individual, partnership, corporation, and association." *See* 29 C.F.R. § 1987.101(k) (emphasis added). Similarly, the implementing regulations for the Seaman's Protection Act's employee protection provisions state that "person" "means one or more individuals or other entities, *including but not limited to* corporations, companies, associations, firms, partnerships, societies, and joint stock companies." *See* 29 C.F.R. § 1986.101(j) (emphasis added).

24 *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) (quoting *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (alteration in original)); *see also Groman v. Comm'r*, 302 U.S. 82, 86 (1937) ("[W]hen an exclusive definition is intended the word 'means' is employed[.]").

25 *Helvering v. Morgan's, Inc.,* 293 U.S. 121, 126 n.1 (1934).

Pollution Control Act, Clean Air Act, and Solid Waste Disposal Act each define "person" to include political subdivisions of a State.[26] These three statutes, along with the Safe Drinking Water Act and the regulations implementing the Pipeline Safety Improvement Act of 2002, also define "person" to include municipalities.[27] Although we stop short of endorsing Fairfax County's contention that there is an "associated group of nouns from which to pick and choose in defining who and/or what is a "person" under a particular whistleblower provision," it is clear that when promulgating regulations that defined "persons," the Secretary could have defined "persons" to include other types of entities such as cities or counties. The Secretary did not do so and we cannot substitute the definition contained in the regulations with a different, more expansive definition.

### 3. Complainant's Motion to Amend the Caption

Complainant also objects to the ALJ's denial of his Motion to Amend, in which he sought to amend the complaint's caption and have the ALJ recognize his supervisor and the County's Director of Human Resources, each in their official capacity, as "proper statutory parties."[28] In the Dismissal Order, the ALJ explained that she was denying Complainant's Motion to Amend because "[f]or purposes of the Eleventh Amendment, a state official acting in his official capacity is protected from a damages action by the same immunity" and "Complainant cannot circumvent the

---

[26] *See* 33 U.S.C. § 1362(5) ("The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.") (FWPCA); 42 U.S.C. § 7602(e) ("The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.") (CAA); 42 U.S.C. § 6903(15) ("The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.") (SWDA).

[27] *See* 42 U.S.C. § 300f (12) ("The term "person" means an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency.") (SDWA); 29 C.F.R. § 1981.101 ("Person means a corporation, company, association, firm, partnership, joint stock company, an individual, a State, a municipality, and a trustee, receiver, assignee, or personal representative of a person.") (PSIA).

[28] Pet. for Review at 3; *see also* Comp. Reply Br. at 8 ("[T]he denial of the caption amendment . . . . must also be reversed.").

Eleventh Amendment bar to his claims against the county by naming individual county employees in their official capacities."[29] Although we differ from the ALJ on reasoning, we affirm her denial of Complainant's Motion to Amend.

It is well established that "[o]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."[30] When an official is sued in their official capacity, "the relief sought is only nominally against the official and in fact is against the official's office[.]"[31] The scope of the TFA's coverage does not extend to Fairfax County. Complainant cannot circumvent that essential fact by naming county officials in their official capacity as respondents.[32] We reject Complainant's claim that "[o]nce immunity is removed from the equation, no basis remains for denying [his] request" to amend the caption.[33]

---

[29] Dismissal Order at 5 (quoting *Ballinger v. Owens*, 352 F.3d 842, 844-45 (4th Cir. 2003)).

[30] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.55 (1978); *see also Gedrich v. Fairfax Cnty. Dep't of Fam. Servs.*, 282 F. Supp. 2d 439, 458 (E.D. Va. 2003) ("[T]he First Amended Complaint named several Fairfax County employees in their official capacities, which has the same effect as naming Fairfax County itself.").

[31] *Lewis v. Clarke*, 581 U.S. 155, 162 (2017); *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.").

[32] *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); *Will*, 491 U.S. at 71 (finding that where sovereign immunity barred a suit, allowing a petitioner to bring suit against state officials in their official capacity "would allow petitioner to circumvent congressional intent by a mere pleading device.").

[33] Comp. Reply Br. at 8.

Accordingly, the Dismissal Order is **AFFIRMED** and the complaint is **DISMISSED**.

**SO ORDERED.**

**RANDEL K. JOHNSON**
**Chief Administrative Appeals Judge**

**THOMAS H. BURRELL**
**Administrative Appeals Judge**