

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT**

THE LIBERTARIAN PARTY OF)
KENTUCKY, et al.,)
)
Plaintiffs)
)
v.)
)
ALISON LUNDERGAN GRIMES, et al.)
)
Defendants.)

Case No. 3:15-CV-86 GFVT
Electronically filed

**MOTION TO DISMISS OF JACK CONWAY,
ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY**

Comes now the Defendant, Jack Conway, the Attorney General of the Commonwealth of Kentucky, by and through counsel, and moves the Court to dismiss the Complaint of the Plaintiffs, The Libertarian Party of Kentucky, the Libertarian National Committee, Inc., Ken Moellman, Jr., and the Constitution Party of Kentucky (hereinafter “Plaintiffs”), pursuant to Federal Rule of Civil Procedure 12(b)(6). The Plaintiffs’ Complaint fails to state a claim upon which relief can be granted by the Attorney General, as it does not allege a violation of Kentucky election laws.

WHEREFORE, the Defendant, Jack Conway, the Attorney General of the Commonwealth of Kentucky, respectfully requests that the Court dismiss, with prejudice, the Plaintiffs’ Complaint.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

/s/ S. Travis Mayo

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CERTIFICATE OF SERVICE AND NOTICE OF ELECTRONIC FILING

I hereby certify that a true copy of the foregoing Motion to Dismiss, and the attached Memorandum in Support of the Motion to Dismiss and the attached Proposed Order, were filed on this the 23rd day of December, 2015 via the CM/ECF system. A hard copy of these documents was mailed via U.S. Mail, postage prepaid to the following Defendants:

Alison Lundergan Grimes
Secretary of State
700 Capitol Avenue
Suite 152
Frankfort, Kentucky 40601

Joshua G. Branscum
Kentucky State Board of Elections
140 Walnut Street
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S. Travis Mayo

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MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS

Comes now the Defendant, Jack Conway, in his official capacity as the Attorney General of the Commonwealth of Kentucky, (hereinafter “Attorney General Conway”), by and through counsel, and states as follows in support of his Motion to Dismiss the Complaint of the Plaintiffs, The Libertarian Party of Kentucky, the Libertarian National Committee, Inc., Ken Moellman, Jr., and the Constitution Party of Kentucky (hereinafter “Plaintiffs”):

FACTUAL SUMMARY

In their Complaint (Doc. 1), the Plaintiffs challenge the process under Kentucky law, specifically, KRS 118.015 and KRS 118.305, through which political parties gain access to election ballots. (Complaint, PageID #1, ¶ 1.) The Plaintiffs allege that the Defendants have deprived them of their First and Fourteenth Amendment rights. (*Id.*, PageID #1, 12, ¶¶ 1, 35.) In the only count of their Complaint, the Plaintiffs allege that the Defendants sued in their official capacity have subjected themselves to prospective injunctive relief under 42 U.S.C. § 1983 and to declaratory relief under 428 U.S.C. §§ 2201 and 2202. (*Id.*, PageID # 12, 14, ¶¶ 35, 42.) The Plaintiffs challenge KRS 118.015 and KRS 118.305, claiming that the statutory provisions offer

no method for a political group to obtain “blanket ballot access” other than through the results of a presidential election. (*Id.*, PageID #13, ¶ 39.)

The Plaintiffs name Attorney General Conway as a defendant because they alleged that the Attorney General, “... pursuant to KRS 15.242 and 15.243, is empowered and authorized, as well as charged with the enforcement of the election laws of the Commonwealth of Kentucky.” (*Id.*, PageID #6, ¶ 9.) The Plaintiffs also name Attorney General Conway to provide notice of the Attorney General that the action questions the validity of a statute, pursuant to KRS 418.075. (*Id.*, PageID #6-7, ¶ 9.)

ARGUMENT

This Court should dismiss, with prejudice, Attorney General Conway from this action. The Plaintiffs’ Complaint fails to state a claim upon which relief can be granted, warranting dismissal under Fed. R. Civ. P. 12(b)(6). Further, the Court should also dismiss Attorney General Conway as a defendant in this action with respect notification under KRS 418.075, as Attorney General Conway, through counsel, filed a Notice of Intention Not to Intervene regarding the constitutional challenge to the validity of KRS 118.015 and KRS 118.305 simultaneous to filing this Motion.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Attorney General Conway is entitled to dismissal, with prejudice, for failure to state a claim upon which relief can be granted. In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must construe the complaint in a light most favorable to the plaintiff and accept all factual allegations as true. *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 424 (6th Cir. 2002). The Court may only dismiss the complaint if it appears “... beyond doubt that the plaintiff can prove no set of facts in

support of his claim which would entitle him to relief.’” *Id.* (quoting *Buchanan v. Apfel*, 249 F.3d 485, 488 (6th Cir. 2001)(internal citation omitted)).

In this action, the Plaintiffs name Attorney General Conway as a defendant pursuant to the authority of the Attorney General to enforce the election laws of Kentucky. Pursuant to KRS 15.242, the Attorney General has concurrent jurisdiction with the County and Commonwealth’s Attorneys, to investigate and prosecute violations of election laws. Under KRS 15.243, the Attorney General shall enforce all of Kentucky’s election laws by civil or criminal processes. That statutory provision outlines the processes the Attorney General must perform in enforcing the state’s election laws as follows: (a) devising and administering programs to observe the conduct of elections; (b) holding public hearings; (c) establishing a toll-free hotline for reporting election law violations; (d) initiating investigations or investigating alleged election law violations; (e) issuing subpoenas for the production of items and to compel the attendance of witnesses; (f) presenting evidence of alleged violations to a grand jury; and (g) filing appropriate complaints in any court of competent jurisdiction. KRS 15.243(2). In addition, KRS 15.243 requires the Attorney General randomly select no fewer than five (5) counties within twenty (20) days after each primary or general election for an independent inquiry for any potential irregularities that may have occurred in each election, and report his findings to the grand jury and circuit judge of each county selected. KRS 15.243(a)-(b). The statute also requires the Registry of Election Finance to forward any matter giving rise to a probable-cause belief of a violation of election laws to the Attorney General for prosecution, and requires that certain public officials and agencies assist the Attorney General in the performance of his duties. KRS 15.243(4)-(5).

These statutes provide the Attorney General with authority to investigate and prosecute alleged criminal violations of election laws. *See Democratic Party of Kentucky v. Graham*, 976 S.W.2d 423, 428-29 (Ky. 1998) (stating KRS 15.242 vests the Attorney General, and county and Commonwealth's attorneys with authority to investigate and prosecute alleged criminal violations of election laws); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 531 (Ky. 2004) (recognizing the authority of the Attorney General to prosecute criminal actions under certain circumstances, including enforcement of election laws under KRS 15.242-15.243).

While KRS 15.243(1) mandates that the Attorney General enforce all of the state's election laws by civil or criminal processes, the remainder of the statute demonstrates that it contemplates enforcement relating to alleged violations of Kentucky election laws. In this action, the Plaintiffs do not allege any violation of Kentucky election laws. By not alleging any violation of Kentucky election laws, the Plaintiffs' Complaint fails to state a claim upon which Attorney General Conway can provide relief. Thus, the Court should dismiss the Plaintiff's Complaint as to Attorney General Conway.

CONCLUSION

Pursuant to Fed. R. Civ. P. 12(b)(6), this Court should dismiss Attorney General Conway, in his official capacity, from this action. While the Plaintiffs' Complaint challenges the constitutionality of KRS 118.015 and KRS 118.305, it does not allege any violation of Kentucky election laws. As such, the statutory provisions that the Plaintiffs state as the basis for naming Attorney General Conway as a defendant, KRS 15.242 and KRS 15.243, do not apply. Further, Attorney General Conway, through counsel, has filed a Notice of Intention Not to Intervene regarding the Plaintiffs' challenge to the validity of KRS 118.015 and KRS 118.305. Therefore, the Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, Attorney General Conway respectfully requests that the Court dismiss him from this action, with prejudice.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL

/s/ S. Travis Mayo

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ORDER

This matter having come before the Court upon Motion of the Defendant, Jack Conway, the Attorney General of the Commonwealth of Kentucky, pursuant to Fed. R. Civ. P. 12(b)(6), and the Court being sufficiently advised, it is hereby ordered that the Defendant’s Motion to Dismiss is GRANTED. The Plaintiffs’ Complaint is dismissed, with prejudice, as to the Defendant, Jack Conway, the Attorney General of the Commonwealth of Kentucky. The Plaintiffs shall bear their own costs and attorney fees incurred in this action.

This is a final and appealable order and there is no just cause for delay.

So ORDERED this _____ day of _____, 2015.

JUDGE GREGORY F. VAN TATENHOVE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY