

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

THE LIBERTARIAN PARTY OF KENTUCKY, <i>et. al.</i>	:	Case No. 3:15-CV-86 GFVT
Plaintiffs	:	<i>Electronically Filed</i>
v.	:	
ALISON LUNDERGAN GRIMES, <i>et. al.</i>	:	
Defendants	:	

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO DEFENDANT HON. JACK
CONWAY’S MOTION TO DISMISS**

Plaintiffs, by and through Counsel, hereby submit the foregoing Memorandum in response to Defendant, Hon. Jack Conway’s Motion to Dismiss. A proposed Order denying same is likewise attached.

I. FACTS AS PLEAD IN THE COMPLAINT AND THE NATURE OF THE PENDING CLAIMS

This is an action involving the purposeful, deliberate, and ongoing deprivation of First and Fourteenth Amendment rights of the Plaintiffs, by Defendant Conway through the enforcement of K.R.S. 118.015, K.R.S. 118.305(1)(e), and K.R.S 118.305 (together “Kentucky’s Ballot Access Regime”). (Pl.’s Compl., RE#1, at ¶¶ 1, 9, 10, 13, 15-31). Defendant, Jack Conway, is the Attorney General for the Commonwealth of Kentucky, and, pursuant to K.R.S. 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.* at ¶ 9). He is further provided notice under K.R.S. 418.075 since the constitutionality of a statute is at issue in this matter. (*Id.*) He is sued in his official capacity only. (*Id.*).

As outlined in the Complaint, the Libertarian Party of Kentucky (“LPKY”), “and its members, have suffered an individualized and group harm from the acts and practices herein complained of, and, in particular, it is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise.” (*Id.* at ¶ 2). “Furthermore, the actions complained of herein will cause future harm and are likely to recur in the future, as the LPKY typically fields candidates for local, state, and national elections, who will be subject to similar actions of those complained of herein.” (*Id.*) As for Mr. Moellman, he “was and is a registered Libertarian voter, whose rights to associate and vote for candidates from his political party are impaired by the actions and omissions complained of herein.” (*Id.* at ¶ 3).

Similarly, the Libertarian National Committee (“LNC”), “and its members, have suffered an individualized and group harm from the acts and practices herein complained.” (*Id.* at ¶ 4). Furthermore, the actions complained of herein will cause future harm and are likely to recur in the future, as the LNC typically fields candidates for local, state, and national elections, who will be subject to similar actions and restrictions similar to those complained of herein. (*Id.*) In particular, the LNC is significantly impaired in running its candidates for office under the restrictive ballot access laws complained of herein. (*Id.*)

And, similarly, the Constitution Party of Kentucky (“CPKY”) “and its members, have suffered an individualized and group harm from the acts and practices herein complained of, and, in particular, it is unable to consistently place its candidates on the ballot in Kentucky through petition or otherwise.” (*Id.* at ¶ 5). Furthermore, the actions complained of herein will cause future harm and are likely to recur in the future, as the CPKY typically fields, or attempts to field, candidates for certain state and national elections, who will be subject to similar actions of those complained of herein.” (*Id.*)

Each of the foregoing Defendants, involved in the enforcement of election laws, and specifically the enforcement of K.R.S. 118.015, K.R.S. 118.305(1)(e), and K.R.S. 118.305, has enforced, continues to enforce, and threatens in the future to enforce these statutes, which are unconstitutional on its face and/or unconstitutional as applied to situation complained of herein involving the Plaintiffs. (*Id.* at ¶¶ 11-13).

Defendants, using their respective offices and acting under color of state law, have violated Plaintiffs First Amendment Rights, which has deprived Plaintiffs, who are citizens of the United States, of their rights of Free Speech, and of Association, and rights of Equal Protection of the Law, as guaranteed under the First and Fourteenth Amendment of the U.S. Constitution, which rights are clearly established, and therefore subjected themselves under 42 U.S.C. § 1983, to prospective injunctive relief, and declaratory relief under 28 U.S.C. § 2201. (Pl.'s Compl. ¶ 35).

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim, a complaint must allege sufficient facts that, accepted as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). When determining facial plausibility, the court must construe the complaint in the light most favorable to the plaintiff. *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008).

B. A CLAIM IS PROPERLY STATED AGAINST ATTORNEY GENERAL CONWAY

As Plaintiffs' Complaint makes clear, Attorney General Conway is not sued in his capacity under K.R.S. 418.075, although he was served with the complaint in compliance with that section. (Pl.'s Compl. ¶ 7).

K.R.S. 15.242 provides that: “[t]he Attorney General shall possess jurisdiction, concurrent with that of county and Commonwealth's attorneys, to investigate and prosecute violations of the election laws. The Attorney General, county attorneys, and Commonwealth's attorneys shall notify the Registry of Election Finance of any investigation or prosecution of alleged election law violations.”

Furthermore, K.R.S. 15.243 provides that: “In addition to the other duties and powers of the Attorney General, he shall enforce all of the state's election laws by civil or criminal processes.” It further provides that the Attorney General shall “[i]nitiate investigations or investigate alleged violations of election laws at the request of a registered voter or on his own motion;” “[i]ssue subpoenas for the production of any books, papers, correspondence, memoranda or other records, and compel the attendance of witnesses that he deems relevant to the purposes of any investigation;” “[p]resent evidence of alleged violations to a grand jury;” and “[f]ile appropriate complaints in any court of competent jurisdiction.”

Nor are these laws are merely old statutes on the books; rather, they are actively enforced by the Attorney General, among other parties. *See, e.g. Democratic Party v. Graham*, 976 S.W.2d 423 (Ky. 1998) (investigation and potential prosecution by Attorney General of campaign finance violations). And, more importantly, the mere ability to enforce a statute challenged under First Amendment grounds is sufficient to name a state official, including a prosecuting attorney or attorney general, as a party. *McNeilus Truck & Mfg., Inc. v. State ex rel.*

Montgomery, 226 F.3d 429 (6th Cir. 2000) (sufficient that Attorney General has power to enforce statute for purposes of naming the attorney general as a party in action where at least one of the parties specifically threatened enforcement).

It appears, however, that the Attorney General's arguments boil down to some sort of belief that "Plaintiffs do not allege any violation of Kentucky's election laws" there can be no claim asserted due to Defendant's enforcement of the challenged, unconstitutional statutes. (Mot. Dismiss Memo., RE#6-1 at P.4). This is too clever by half, and, in fact, represents a significant misunderstanding of constitutional law jurisprudence. This argument is foreclosed by the plain language of 42 U.S.C. 1983, which provides, in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ..." Attorney General Conway is just such a person, who, under color of the challenged statutes – which he is charged with enforcing – violates the rights of the Plaintiffs by keeping them off of the ballot through the application of unconstitutional statutes.

It is not a violation of Kentucky's laws that is at issue in this case. It is instead that Kentucky's laws are in violation – of the U.S. Constitution. Attorney General Conway is charged with enforcing the challenged unconstitutional, in fact enforces these statutes, and Plaintiffs are entitled to be placed on the ballot, which the challenged statutes prevent.

Furthermore, neither Plaintiffs, nor any other elected official in an election-related or ballot access case can themselves violate the state law. Instead, the Attorney General, and the Kentucky State Board of Elections, enforce and apply these statutes as they are written, and in so

doing, deny Plaintiffs their First and Fourteenth Amendment rights. The Sixth Circuit explained that this conferred standing, and made the Tennessee officials proper party defendants in an almost identical case in *Green Party of Tenn. v. Hargett*, 767 F.3d 533 (6th Cir. 2014). There, as here, Defendants enforcement of the challenged “ballot-access laws [that] restricted the plaintiffs' political activities within the state and have limited their ability to associate as political organizations, and the plaintiffs have therefore articulated ‘a factual showing of perceptible harm’ resulting from the state's regulations.” *Id.* at 544.

Once a candidate is nominated, it is the duty of the Kentucky Secretary of State to certify to the county clerks the names of the candidates for office. K.R.S. 118.215. There is a prohibition placed upon the Kentucky Secretary of State, enforced with criminal felony charges, for improperly making a certification or withholding a proper certification. K.R.S. 118.215(4); K.R.S. 118.995(2). The Attorney General is the party charged with enforcing those provisions against the Kentucky Secretary of State, under K.R.S. 15.242 and K.R.S. 15.243.

This is not, in fact, the Attorney General’s first rodeo on standing grounds. Earlier this year, the Sixth Circuit addressed standing and the ability to state a claim in light of standing grounds for unconstitutional provisions in Kentucky’s election laws. *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015). In that case, the Sixth Circuit noted that:

"[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." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). It is a suit against the State itself. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). The Eleventh Amendment bars many such suits. *Will*, 491 U.S. at 66. However, there is an exception to States' sovereign immunity under the doctrine announced in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), whereby "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst*, 465 U.S. at 102. "In order to fall within the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law." *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013).

The Sixth Circuit then explained that:

The clearest answer is for Attorney General Conway, who has "jurisdiction, concurrent with that of county and Commonwealth attorneys, to investigate and prosecute violations of the election laws." Ky. Rev. Stat. § 15.242; *see also id.* § 15.243(1) (providing that "the Attorney General . . . shall enforce all of the state's election laws by civil or criminal processes"). Conway therefore has ample authority to prosecute Russell criminally for violating § 117.235(3). . . . A plaintiff need not wait until a prosecutor initiates adverse action to have standing to sue to protect his First Amendment rights. *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974). . . . Russell properly named Conway as a defendant, and the district court properly denied Conway's motion to dismiss.

As the Sixth Circuit explained in *Russell*, "Kentucky's Attorney General, Secretary of State, and State Board members **are all subject to suit** here under *Ex parte Young*'s exception to Kentucky's Eleventh Amendment sovereign immunity." *Id.* at 1049. A political party's unconstitutional exclusion from the ballot has long been held to confer standing and to state a claim. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Storer v. Brown*, 415 U.S. 724 (1974).

The ongoing enforcement of unconstitutional ballot provisions by the Defendants in this case, including enforcement by Attorney General Conway, is sufficient to give rise to a valid claim by Plaintiffs and give them standing in this matter. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (standing exists when the plaintiff suffers an actual or impending injury, no matter how small; the injury is caused by the defendant's acts; and a judicial decision in the plaintiff's favor would redress the injury).

Plaintiffs' First and Fourteenth Amendment rights continue to be violated, and the existence and continued enforcement of these unconstitutional statutes states a claim, because a probability of future injury counts as "injury" for the purpose of standing. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Brandt v. Winnetka*, No.

09-3709, 612 F.3d 647, 2010 U.S. App. LEXIS 14808 (7th Cir. July 20, 2010); *520 South Michigan Avenue Associates, Ltd. v. Devine*, 433 F.3d 961 (7th Cir. 2006); *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013) (investigation sufficient to confer standing under First Amendment jurisprudence).

Plaintiffs have alleged sufficient facts that demonstrate they have standing and have likewise stated a claim. *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995) (standing present to challenge Ohio election campaign law on First Amendment due to threat of future potential enforcement); *Libertarian Party of L.A. County v. Bowen*, 709 F.3d 867 (9th Cir. 2013) (future plan to engage in specific activity in the next election sufficient to confer standing).

Other cases also clearly stand for the proposition that political parties and members of those parties have standing to challenge unconstitutional ballot access laws, and that Attorneys General, and State Boards of Election, are proper parties in those cases. *Constitution Party v. Aichele*, 757 F.3d 347 (3d Cir. 2014) (Attorney General proper party with standing conferred to political parties to challenge the ballot access provisions – District Court judgment to the contrary reversed); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989), *overruling on other grounds recognized by Lightfoot v. Eu*, 964 F.2d 865, 868 (9th Cir. 1992) (voters have standing in case and Defendant Lieutenant Governor, as chief election officer, proper party challenging ballot access laws); *Belitskus v. Pizzingrilli*, 343 F.3d 632 (3d Cir. 2003 (standing exists and suit proper against Secretary of State and Elections Commissioner for ballot access case); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (standing met, and members of the State Board of Elections proper Defendant in case where challenged ballot access provision depleted candidate and political party of funding that could have been used elsewhere in the campaign); *McLain v.*

Meier, 851 F.2d 1045, 1048 (8th Cir. 1988) (holding that voter had standing to challenge ballot access law that he claimed was overly restrictive in signature requirements).

Indeed, numerous cases hold, in even more tenuous situations as the present case, that Attorneys General are proper party defendants where they are involved or charged with the power of enforcing challenged statutes. *Mobil Oil Corp. v. Attorney General*, 940 F.2d 73 (4th Cir.1991) (Attorney General was proper party where state statute expressly granted him authority to "investigate and bring an action in the name of the Commonwealth to enjoin any violation" of the statute); *Cornwell v. Joseph*, 7 F. Supp.2d 1106 (SD Cal. 1998) (Because the attorney general was among the potential enforcers, he was a proper party in the action); *Federal Nat'l Mortg. Asso. v. Lefkowitz*, 383 F. Supp. 1294 (SD NY 1974) (Attorney General, who was charged with enforcing law, is proper party); *Southern Wine & Spirits of Am., Inc. v. Heineman*, 534 F. Supp. 2d 1001 (D NE 2008) (Attorney General who had broad enforcement powers over challenged statute proper party); *Baskin v. Bogan*, 2014 U.S. Dist. LEXIS 86114 (SD IN 2014) (Attorney General, charged with broad enforcement powers, is a proper party).

The *Ex parte Young* exception is directed at "officers of the state [who] are clothed with some duty in regard to the enforcement of the laws of the state, *and* who threaten and are about to commence proceedings . . . to enforce against parties affected [by] an unconstitutional act." *Ex parte Young*, 209 U.S. at 155-56 (emphasis added). Thus, a "special relation" between the officer being sued and the challenged statute must be found. *Id.* at 157; *Gilmore*, 252 F.3d at 331. The special-relation requirement protects a state's Eleventh Amendment immunity while, at the same time, ensuring that, in the event a plaintiff sues a state official in his individual capacity to enjoin unconstitutional action, "[any] federal injunction will be effective with respect to the underlying claim." *Id.* at 333.

As *Young* made clear, however, a special relation is present where a state officer is “expressly directed to see to [a statute’s] enforcement.” 209 U.S. 123, 157, 28 S. Ct. 441, 453, 52 L. Ed. 714. In *Young*, of course, the Attorney General had the duty and power to enforce the challenged statutes. *Id.* In the present matter, Attorney General Conway had and has a specific statutory mandate to enforce the challenged statutes. K.R.S. 15.242 and 15.243. Plaintiffs have properly stated a claim upon which relief can be granted.

III. CONCLUSION

This matter involves a challenge to Kentucky’s Ballot Access Regime and appropriately names Attorney General Conway as a party because of his ongoing enforcement of the challenged statutes, which have and continue to cause Plaintiffs harm. The Attorney General is within the scope of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Plaintiffs have, therefore, stated a claim. Defendant Conway’s Motion to Dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon all counsel of record, this 30th Day of December, 2015, via the Court's CM/ECF system.

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)

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EASTERN DISTRICT OF KENTUCKY
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ORDER DENYING DEFENDANT HON. JACK CONWAY'S MOTION TO DISMISS

The Court, being fully apprised in the premises, and, having considered the motion to dismiss by Defendant Jack Conway, the response in opposition thereto, and any replies, hereby finds that the motion is not well taken, and is DENIED.

IT IS SO ORDERED:

Judge