

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

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

**PLAINTIFFS’ MEMORANDUM IN OPPOSITION TO THE KSBE DEFENDANT’S
MOTION TO DISMISS**

Plaintiffs, by and through Counsel, hereby submit the foregoing Memorandum in response to Defendants, Hon. Alison Lundergan Grimes, in her official capacity as the Kentucky Secretary of State and Chair of the State Board of Elections, as well as Joshua G. Branscum, John Hampton, Stephen Huffman, Donald Blevins, Albert B. Chandler III, and George Russell, each in their official capacities as members of the Kentucky State Board of Elections, and Defendant Maryellen Allen, in her official capacity as the Executive Director, Kentucky State Board of Elections (collectively the “KSBE Defendants”)’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 the KSBE Defendants 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, Alison

Lundergan Grimes, is the duly elected Kentucky Secretary of State, the Chairwoman of the Kentucky State Board of Elections, and pursuant to K.R.S. 117.015 and other laws is responsible for administering and enforcing the election laws of the state, and is the Chief Elections Officer for the state. (*Id.* at ¶ 6). Defendants Joshua G. Branscum, John W. Hampton, Stephen Huffman, Albert B. Chandler, III, George Russell, and Donald W. Blevins, are Board Members of the Kentucky State Board of Elections, and, pursuant to K.R.S. 117.015 and other laws, are responsible for administering and enforcing the election laws of the state. (*Id.* at ¶ 7). Defendant Maryellen Allen is the Executive Director of the Kentucky State Board of Elections, and, pursuant to K.R.S. 117.025 is the Chief Administrative Officer of the Kentucky State Board of Elections, which, pursuant to K.R.S. 117.015 and other laws, is responsible for administering and enforcing the election laws of the state. (*Id.* at ¶ 8).

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).

Furthermore, on November 17, 2015, counsel for the Plaintiffs sent a letter to Defendant Allen, and counsel for Defendant Grimes, seeking to have Plaintiffs’ candidates placed on the ballot for the 2016 election cycle. (*Id.* at ¶¶ 11). The letter gave a deadline to respond by November 24, 2015. (*Id.*) Defendants declined to place the candidates on the ballot, and declined to respond, demonstrating their enforcement of the laws challenged herein, and the deprivation of Plaintiffs rights as a consequence. (*Id.*)

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 THE KSBE DEFENDANTS

K.R.S. 117.015 provides for a special role for the Secretary of State: the Chief Elections Officer of the state of Kentucky and a member of the State Board of Elections. K.R.S. 117.015 further provides, in relevant part, that the State Board of Elections "**shall** administer the election laws of the state and supervise registration and purgation of voters within the state." The Board and the Secretary are likewise charged with placing signs at polling places stating the penalties for

violations of the election laws, i.e. threatening enforcement of violations. K.R.S. 117.030. And state law provides for supervision and oversight of the county board of elections by the State Board of Elections. Finally, the State Board of Elections (“KSBE”) and Secretary have the power to hold proceedings, make findings, and issue orders in relation to its duties. K.R.S. 117.015.

It appears, however, that the KSBE Defendants’ arguments boil down to two separate, completely unsupportable arguments. First, they argue that the KSBE Defendants “possess no statutory authority to enforce the election laws of Kentucky.” (Memo, RE#7-1 at p.3). And second, that Plaintiffs have not alleged that the “Defendants violated any of Kentucky’s laws that they are charged with administering.” (*Id.*). These arguments are too clever by half, and, in fact, represent a significant misunderstanding of constitutional law jurisprudence. First, these arguments are 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 ...” The KSBE Defendants are just such persons, who, under color of the challenged statutes – which they are charged with administering – violate the rights of the Plaintiffs by keeping them, or their candidates, off of the ballot through the application of unconstitutional statutes.

It is not a violation of Kentucky’s laws that are at issue in this case. It is instead that Kentucky’s laws violate the U.S. Constitution. The KSBE Defendants administer such statutes and are charged with their administration. As a consequence, Plaintiffs, or their candidates have

been kept and will be kept off of the ballot. Plaintiffs have sued to have their candidates 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 typically 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, deprive Plaintiffs of 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.

This is not, in fact, the KSBE’s first rodeo on standing grounds in relation to Kentucky’s election statutes. Earlier this year, the Sixth Circuit addressed standing and the ability to state a claim and standing issues 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 Secretary of State and members of the State Board of Elections are empowered with expansive authority to "administer the election laws of the state . . . [and] may adopt administrative regulations necessary to properly carry out its duties." Ky. Rev. Stat. § 117.015(1). They also train state and local personnel on how to implement Kentucky's election laws, *id.* § 117.187(1), which apparently would include instructing other state actors on how to administer this allegedly unconstitutional . . . statute. . . . Moreover, the record evidence indicates that KSBE routinely partnered with the Attorney General in responding to complaints of improper election activity. *Young's* enforcement element is not confined to criminal actions, but is satisfied by a government official's execution of a statute in civil actions as well. *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 437 (6th Cir. 2000).

...

KSBE—of which Secretary Grimes is the Chair—is busily engaged in administering Kentucky's election laws.... Defendants do not deny that KSBE is actively involved with administering the statute, and so regularly acts in furtherance of its execution; they instead argue that because Russell cannot predict *specific* actions that KSBE will take that will directly impact Russell, he cannot name them as parties he wishes to enjoin from infringing his political-speech rights. But that is not what our precedents require. A citizen who wishes to engage in political speech, but is informed by government officers that his speech violates state law, need not prophesy precisely what actions statewide officials actively administering that statute—including promulgating regulations that might impact his ability to speak—will take against him before the Constitution allows him the opportunity to prove that the state law violates the First Amendment. . . . Given KSBE's statutory mandate to administer [the challenged statute], and its undisputed role in effectuating that mandate, Russell's allegations reflect a significant possibility that KSBE's actions to implement this statute would be against his interests vis-à-vis engaging in political speech during elections.

"*Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Papasan v. Allain*, 478 U.S. 265, 277, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (internal quotation marks omitted). This is such a situation. 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 1048-1049.

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 the KSBE Defendants, 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).

The Sixth Circuit has repeatedly found election officials appropriate in cases of this type. In *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995) the Sixth Circuit noted that: “Briggs does not bear a heavy burden to demonstrate a claim of specific present harm or a threat of specific future harm. ... While it is clear that abstract injury is not enough to establish standing ... it is clear the actual harm to individual values of an abstract nature or esoteric nature can provide the basis for standing. So, in a variety of settings, standing is often found to protect

interests in the electoral process, various First Amendment values, and other intangible rights. In the context of threats to the right of free expression, courts justifiably often lessen standing requirements.” *Briggs*, 61 F.3d 487 at 492-493.

The Secretary of State and the members and director of the Kentucky State Board of Elections are proper Defendants under the *Ex parte Young* exception because they have “some connection with the enforcement” of elections laws through the support, promotion and enforcement they provide. *Kilroy v. Husted*, 868 F. Supp.2d 652, 658 (SD OH 2012). In *Kilroy*, the Court noted that “[a]ll that *Ex parte Young* requires is that the state officer have “come connection” with the enforcement of the legislative act alleged to be unconstitutional. ... [T]hat standard is satisfied here ... because the Ohio Revised Code places affirmative duties upon the Ohio Secretary of State when it comes to enforcement of Ohio’s election laws.”

Indeed, precedent supports that the Secretaries of State and State Boards of Elections are proper party defendants and a claim has been states where they have obligations to administer and enforce state election laws. *Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011) (Secretary of State proper party since there is the power to issue orders and administer the laws, even if primary duties of enforcement are handled by persons other than the Secretary and Board); *Ashe v. Board of Elections*, 1988 U.S. Dist. LEXIS 10067 (EDNY 1988)(State Board of Elections proper party in challenge to state election laws); *ABC v. Ritchie*, 2011 U.S. Dist. Lexis 14596, 8-9, 2011 WL 665858 (Secretary of State is “proper party because he is ‘the chief election official in the state’ and because he has the duty to implement an injunction regarding state election law....); *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989)(elections board a proper party in judge’s candidacy suit).

Additional authority supports this proposition. Under *Richardson v. State Bd. of Elections*, 697 F. Supp. 295 (WDKY 1988), the Court for the Western District of Kentucky found the Kentucky State Board of Elections were a proper party to a suit challenging election and voting laws. Further, in *Richardson* the Court allowed the Secretary of State, under Motion of Joinder of a Necessary and Indispensable Party, to be added to the case due to his roles as the Chairman of the State Board of Elections and the Secretary of State. *Id.* at 296. While the constitutionality of the law challenged in *Richardson* was upheld, the relevant fact here is that the Kentucky State Board of Elections and the Secretary of State were deemed not only proper parties, but actually necessary and indispensable parties.

The Eastern District of Kentucky also found the Board of Elections to be a proper party regarding election cases. In *Kay v. Mills*, 490 F. Supp 844 (EDKY 1980), the Court stated it was persuaded "this action, brought against defendants rather than the state and purely prospective in the relief it seeks, falls squarely in the exception to the eleventh amendment bar enunciated in *Ex parte Young* (citation omitted)." *Id.* at 847. The *Mills* case involved a challenge against the constitutionality of ballot placement law.

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. Here, it is the KSBE Defendants that have the statutory duty to place candidates on the ballot. In other words, the KSBE Defendants are essential parties to effective relief. 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 named the KSBE Defendants as parties because of their ongoing enforcement and administration of the challenged statutes, which have and continue to cause Plaintiffs harm. The KSBE Defendants are 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. The KSBE Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)
Paul Darpel (KBA 84989)
Chris Wiest, Atty at Law, PLLC
25 Town Center Blvd, Suite 104
Crestview Hills, KY 41017
859/486-6850 (v)
513/257-1895 (c)
859/495-0803 (f)
chris@cwiestlaw.com

/s/ Jack S. Gatlin
Jack S. Gatlin (KBA 88899)
Thomas B. Bruns (KBA 84985)

Brandon N. Voelker (KBA 88076)
FREUND, FREEZE & ARNOLD
Chamber Office Park
2400 Chamber Center Drive, Ste 200
Ft. Mitchell, KY 41017
Phone: (859) 292-2088
Fax: (859) 261-7602
jgatlin@ffalaw.com
Attorneys for Plaintiffs

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)

UNITED STATES DISTRICT COURT
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ORDER DENYING THE KSBE DEFENDANTS' MOTION TO DISMISS

The Court, being fully apprised in the premises, and, having considered the motion to dismiss by the KSBE Defendants (RE#7-1), 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