

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

THE LIBERTARIAN PARTY )  
OF KENTUCKY, et. al. )

Plaintiffs )

v. )

ALISON LUNDERGAN GRIMES )  
SECRETARY OF STATE OF THE )  
COMMONWEALTH OF KENTUCKY, et al., )

Defendants )

*ELECTRONICALLY FILED*

Civil Action No. 3:15-cv-86 GFVT

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REPLY TO PLAINTIFF’S RESPONSE TO MOTION TO DISMISS

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Comes the Defendants, Alison Lundergan Grimes (in her official capacities as Kentucky Secretary of State and Chair of the Kentucky State Board of Elections); Joshua G. Branscum, John Hampton, Stephen Huffman, Donald Blevins, Albert B. Chandler, III, and George Russell (each in their official capacities as Board Members of the Kentucky State Board of Elections); and Maryellen Allen (in her official capacity as Executive Director, Kentucky State Board of Elections), ( hereinafter “Defendants”) by counsel, and respectfully submit their reply to Plaintiffs’ Response in opposition to the Motion to Dismiss as follows:

**I. INTRODUCTION:**

In this action, the Plaintiffs filed suit alleging throughout their Complaint that the Defendants enforce and administer Kentucky’s elections laws, specifically KRS 118.015 and KRS 118.305 (“Ballot Access Provisions”). (Doc. #1, Complaint, PageID #6, 7, ¶¶ 6,7,8, 10,

13, 14.) Plaintiffs' allege that this enforcement and administration of the election laws by the Defendants have deprived them of their First and Fourteenth Amendment rights. (*Id.*, Page ID #1, 12, ¶¶ 1, 35.) The Plaintiffs' further allege that the Defendants have subjected themselves to prospective 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.)

Subsequently, the Defendants filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (Doc. #7). Specifically, Defendants argued that they possess no statutory authority to enforce the election laws of Kentucky and that "Plaintiffs do not allege that the Defendants violated any of Kentucky's election laws that they are charged with administering, specifically KRS 118.015 and KRS 118.305. By not alleging any violation of Kentucky election laws the Defendants administer, the Plaintiffs' Complaint fails to state a claim upon which the Defendants can provide relief." (*Id.* 7-1, Memo, PageID #3, ¶ 1.) In their Response (Doc. #9), Plaintiffs argue that they properly stated a claim against the Defendants. (Response, PageID #4.) Plaintiffs cite specifically to *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6<sup>th</sup> Cir. 2015) as support for their notion that the Defendants are proper parties in the present case. (*Id.* PageID #6-8.) However, *Russell v. Lundergan-Grimes* is distinguishable from the case at hand and does not apply. Therefore, the Plaintiffs' Complaint fails to state a claim upon which relief must be granted.

## **II. ARGUMENT:**

Plaintiffs assert in their Response that *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6<sup>th</sup> Cir. 2015) holds that the Defendants are always proper parties in any and all challenges to Kentucky's election statutes. In *Russell v. Lundergan-Grimes*, the 6<sup>th</sup> Circuit held that Kentucky's ban on political speech within 300 feet of polling sites was unconstitutional.

Specifically, the Plaintiff sued Kentucky Secretary of State Alison Lundergan-Grimes and other officials over the removal of political signs from outside his business, Campbell County Auto Body Inc., during elections in 2012 and 2014. The Plaintiff's shop sat across from and within 300 feet of a polling place in Northern Kentucky, but the two buildings were divided by a four-lane road. The Defendants in the case argued that the Eleventh Amendment barred suit against them. Plaintiffs allege in their Response the Court recognized the *Ex Parte Young*, 209 U.S. 123 (1908), exception to Eleventh Amendment sovereign immunity and held that the Secretary of State and the State Board of Elections ("SBE") are all subject to suit in that particular case. *Id.* at 1049. In reaching their decision, the Court recognized that:

*Young* does not reach state officials who lack a "special relation to the particular statute" and "[are] not expressly directed to see to its enforcement." *Id.* at 157, 28 S.Ct. 441. And it requires more than a bare connection to administering a statute. "Holding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend *Young* beyond what the Supreme Court has intended and held." *Children's Healthcare*, 92 F.3d at 1416.

...

"General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *1st Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3rd Cir.1993). "**Consistent with the *Young* requirement of action on the part of the state official**, we note that the phrase 'some connection with the enforcement of the act' does not diminish the requirement that the official threaten and be about to commence proceedings." *Children's Healthcare*, 92 F.3d at 1416. These precedents do not foreclose injunctive relief here. Enjoining a statewide official under *Young* based on his obligation to enforce a law is appropriate when there is a realistic possibility the official will take legal or administrative actions against the plaintiff's interests. *Cf. id.*; *1st Westco*, 6 F.3d at 114.

*Id.* at 1048.

Plaintiffs conveniently failed to cite in their Response that the Court in *Russell v. Lundergan-Grimes* then held that Secretary Grimes and the State Board of Elections took administrative actions against the Plaintiff's interests:

“KSBE—of which Secretary Grimes is the Chair—is busily engaged in administering Kentucky’s election laws, including [§ 117.235\(3\)](#). **KSBE acted when it promulgated [31 Kentucky Administrative Regulation 4:170](#)**, authorizing an exemption to [§ 117.235\(3\)](#) for bumper stickers on cars while voting. Defendants do not deny that KSBE is actively involved with administering the statute, and so regularly acts in furtherance of its execution. . . . 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.”

*Id.* at 1048-1049.

The case at hand is distinguishable from *Russell v. Lundergan-Grimes*. *Ex Parte Young* requires action on the part of the state official. The Court in *Russell v. Lundergan-Grimes* cited specifically to actions taken by Secretary Grimes and SBE in furtherance of the challenged statute’s execution i.e. the promulgation of an administrative regulation that authorized an exemption to the challenged statute. Unlike *Russell v. Lundergan-Grimes*, the Defendants in this case simply have a “bare connection” to administering the ballot access laws and have taken no actions to constitute enforcement. In fact, there is no avenue for the Defendants to “threaten and be about to commence proceedings” nor is there an avenue to “take legal or administrative actions against the Plaintiffs’ interests” when administering the ballot access provisions challenged in this case. *Id.* at 1048.

Like *Children’s Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412 (6<sup>th</sup> Cir. 1996), the Defendants in this case have a statutory obligation to administer the ballot access provisions. However, “[H]olding that a state official’s obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend *Young* beyond what the Supreme Court has intended and held.” *Id.* at 1416. The Defendants’ obligation to administer the ballot access provisions does not provide the requisite connection required by *Ex Parte Young* for them to be proper parties in this case. “*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.” *Russell v. Lundergan-Grimes*, 784 F.3d at 1049 quoting *Papasan v. Allain*, 478 U.S. 265, 277, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). *Ex Parte Young*’s exception was narrowly tailored and applied to the specific facts and statutes challenged in *Russell v. Lundergan-Grimes*. *Russell v. Lundergan-Grimes* does not extend the applicability of the *Ex Parte Young* exception and hold that the Defendants are proper parties in any and all challenges to Kentucky’s election statutes. Therefore, the *Ex Parte Young* exception does not apply in this case for the reasons set forth above.

**III. CONCLUSION:**

Pursuant to Fed. R. Civ. P. 12(b)(6), this Court should dismiss the Defendants, in their official capacities, from this action. Plaintiffs’ Complaint does not allege that the Defendants violated any of Kentucky’s election laws when administering them pursuant to their authority under KRS 117.015. Additionally, *Ex Parte Young*, 209 U.S. 123 (1908), does not apply to the Plaintiffs’ action to remove the Defendants from the protection of Eleventh Amendment immunity. Therefore, the Plaintiffs’ Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the Defendants respectfully request that the Court dismiss them from this action, with prejudice.

Respectfully Submitted,

/s/ Noel E. Caldwell  
Noel E. Caldwell  
Office of the Secretary of State  
700 Capital Ave., Ste. 152  
Frankfort, KY 40601  
(502) 782-7404  
Noel.caldwell@ky.gov

*Counsel for Defendants Alison Lundergan  
Grimes, in her official capacity as Secretary  
of State of the Commonwealth of Kentucky,  
and the Kentucky State Board of Elections*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was electronically filed this the 13 day of January, 2016. All parties indicated on the electronic filing receipt will be served via the Court's electronic filing system. All other parties will be served via hand delivery or U.S. Mail.

/s/ Noel E. Caldwell

Noel E. Caldwell