

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

LEAGUE OF WOMEN VOTERS, *ET AL.*, :
PLAINTIFFS, :
VS. : **CASE NO. 3:05-CV-7309**
J. KENNETH BLACKWELL, *ET AL.*, : **JUDGE CARR**
DEFENDANTS. :

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS
THE AMENDED COMPLAINT**

In their memorandum contra, the Plaintiffs have failed to respond in a substantive manner concerning the constitutional standard they must meet in order to allege that they have been denied the right to vote. In addition, it is clear from their memorandum contra that they fail to understand the scope of the Eleventh Amendment defense raised in this case. Because the Plaintiffs have failed to demonstrate that they have stated a cognizable claim, this Court should dismiss their amended complaint.

I. The Plaintiffs Have Failed To Articulate How They Have Alleged That Any Defendants Have Violated Their Constitutional Rights.

The Defendants' motion to dismiss is replete with legal authority demonstrating that garden variety election problems are not violations of the United States Constitution. *See, e.g.,*

Hutchinson v. Miller, 797 F.2d 1279 (4th Cir. 1986); *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270 (7th Cir. 1986); *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975). Yet, instead of addressing this argument, the Plaintiffs have simply ignored it.

Because Plaintiffs have failed to demonstrate how they have alleged anything more than run of the mill garden variety election problems, they have failed to state any violation of the Fourteenth Amendment.¹ They have, therefore, failed to state a cause of action against the defendants.

II. The Plaintiffs Have Failed To Show That The Defendants Are Not Entitled To Eleventh Amendment Immunity.

Ex parte Young gives federal courts jurisdiction to enjoin state officials from engaging in future violations of federal law. *Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005) (en banc). It becomes evident, however, that in order to defeat Eleventh Amendment immunity, a plaintiff must allege and prove an ongoing violation of federal law by state officials. The Plaintiffs in this case have utterly failed to do so. Because of that failure, the Defendants are entitled to Eleventh Amendment immunity.

The Plaintiffs have failed to address how, for example, Charlene Dyson has alleged an ongoing constitutional violation. She was told that if she returned to her polling place on election day, she would be given a curbside ballot. (Dyson Depo. At 25-26). Yet, she was simply too mad to vote. Dyson has failed to argue how she can claim that she will be subjected to ongoing violations of federal law concerning her right to cast a ballot when her problem was remedied immediately in 2004. The same is true for Deborah Cooley, Sadie Rubin, and Mildred Casas. They have simply failed to show how they will be subject to ongoing violations of the

¹ The Plaintiffs, for some inexplicable reason, have attached a newspaper article concerning the 2005 election. Since this is motion to dismiss, such an attachment is inappropriate and should be struck by the Court.

federal constitution by either of the Defendants. Therefore, as it relates to these claims, the Defendants have Eleventh Amendment immunity.

Likewise, as it relates to the other claims, the Plaintiffs have failed to demonstrate that the Defendants are not entitled to Eleventh Amendment immunity. As noted above, for the *ex parte Young* exception to apply, the Plaintiffs must show ongoing federal constitutional violations. Yet, the Plaintiffs have failed to even address the Defendants' argument that the Plaintiffs have not alleged any conduct that violates either the Due Process or Equal Protection Clauses because those clauses do not give rise to a cause of action for ordinary election related problems. Since the Plaintiffs have been unable to show an underlying ongoing constitutional violation, the Defendants are entitled to Eleventh Amendment immunity.

Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 13th day of January, 2005.

/s/ Richard N. Coglianesi
Richard N. Coglianesi
Deputy Attorney General