IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF OHIO, et al., Plaintiffs, v. FRANK LaROSE, et al. Defendants.	CASE NO. 1:23-CV-2414 JUDGE: BRIDGET BRENNAN **DEFENDANT CUYAHOGA COUNTY PROSECUTING ATTORNEY'S MOTION FOR SUMMARY JUDGMENT**

Defendant Cuyahoga County Prosecuting Attorney, Michael C. O'Malley ("County Prosecutor") moves for summary judgment under Fed. R. Civ. P. 56 because Plaintiffs lack standing and the County Prosecutor is immune from this suit for injunctive relief in federal court. As more fully set forth in the attached memorandum, the County Prosecutor is entitled to summary judgment.

Respectfully submitted,

MICHAEL C. O'MALLEY, Prosecuting Attorney of Cuyahoga County, Ohio

By: s/Mark R. Musson
Mark R. Musson (0081110)
Assistant Prosecuting Attorney
CUYAHOGA COUNTY
PROSECUTOR'S OFFICE
1200 Ontario Street, 8th Floor
Cleveland, OH 44113
mmusson@prosecutor.cuyahogacounty.us
(216) 443-7795

Attorneys for the Prosecuting Attorney

BRIEF IN SUPPORT OF THE CUYAHOGA COUNTY PROSECUTING ATTORNEY'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs bring this action challenging several state statutes governing the handling Ohio voters' absentee ballots (collectively, "Challenged Statutes") that prohibit anyone - save limited family members of the voter, postal workers and private carriers - from possessing and returning another's absentee ballot to the Board of Elections for counting. *See*, generally, Compl. at ¶¶2 and 3, ECF Doc# 1.

Plaintiffs seek declaratory judgment and injunctive relief enjoining the enforcement of the Challenged Statutes against disabled voters under the Title II of Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("RA") and Section 208 of the Voting Rights Act of 1965 ("VRA"). *See*, *Id.* at Count I, ¶¶107-139, Count II, ¶¶140-158 and Count III, ¶¶159-176, respectively, and Prayer for Relief. Plaintiffs also contend that the Challenged Statutes are void and unenforceable for vagueness under the Due Process Clause of the United States Constitution. See, *Id*. at Count IV, ¶¶177-199.

The County Prosecutor is merely a nominal party to this action and does not administer elections. The co-Defendants Secretary of State and the Attorney General are the proper parties to defend the State of Ohio's election laws, and the County Prosecutor is only named to enjoin certain prosecutions under the Challenged Statutes. See, e.g., Compl. at ¶¶97-99 and 187.

Plaintiffs do not show or even allege any connection between the County Prosecutor and any violation or threat to their rights under the ADA, RA or VRA. Thus, the Plaintiffs lack standing to bring this action against the Prosecuting Attorney. Further, the Prosecuting Attorney

is entitled to immunity from this suit for injunctive relief since the *Ex Parte Young* exception does not apply.

II. STATEMENT OF THE FACTS

Plaintiff League of Women Voters of Ohio ("League") provides voter education and advocacy services to voters throughout Ohio. See, Miller Depo. at pg. 17, 19, 21, 28, 39-40 and 42. However, the League does not know of any prosecutions or specific threats to prosecute anyone under the Challenged Statutes. *Id*. at pg. 111.

Plaintiff Jennifer Kucera is registered to vote in Cuyahoga County, Ohio and has a disability that requires daily assistance of in-home caregivers. See, Kucera Depo. at pg. 23-24, 50-51. Ms. Kucera voted absentee during the elections in March 2024, August 2023 and November 2020 with the assistance of her mother. See, *Id*. at pg. 55-74. Rather than the assistance of her mother, Kucera would prefer that her in-home caregivers assist in returning her ballot to the Board of Elections on her behalf. See, *Id*. at pg. 89-90, 110-118. As with the League, Kucera is not aware of any prosecutions or threats to prosecute anyone under the Challenged Statutes. See, *Id*. at pg. 122.

III. LAW AND ARGUMENT

A. Standard for Summary Judgement

Summary judgment under Fed.R.Civ.P. 56 is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "The burden of showing the absence of any such genuine issues of material facts rests with the moving party." *Edwards v. Velocity Invs.*, LLC, No. 1:10-cv-1798, 2011 U.S. Dist. LEXIS 101655 at **7-9 (N.D. Ohio Sept. 8, 2011), citing *Celotex*, 477 U.S. at 323. However, the nonmoving party must respond with evidentiary material

showing that there is an issue of material fact for the jury. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986).

B. The County Prosecutor is not responsible for the program services that Plaintiffs contest under the ADA, RA or Due Process Clause, and the County Prosecutor not the proper party to defend the state statutes that Plaintiffs seek to challenge.

Plaintiffs attack the State of Ohio's election laws that limit those who may take possession of the absentee ballot of another and return it to the Board of Elections ("Challenged Statutes"). There is no evidence or even an allegation that the Prosecuting Attorney has discriminated against the Plaintiffs or deprived Plaintiffs of any rights or otherwise violated any federal statutes. The Prosecuting Attorney does not provide the "services, programs, or activities" that Plaintiffs argue the Challenged Statutes work to unlawfully deprive disabled individuals from benefiting from under the ADA[1] or the VRA. Even then, the County Prosecutor is absolutely immune from liability in § 1983 lawsuits brought to challenge a prosecutor's advocacy during judicial phase of the criminal process. See, generally, *Van de Kamp v. Goldstein*, 555 U.S. 335, 343 (2009)("absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding.").

Regarding Plaintiffs' claims against the Challenged Statutes themselves, "the interest in defending this statute lies with the state, not with the local prosecutors." *Akron Center for Reproductive Health v. Rosen*, 110 F.R.D. 576, 582 (N.D. Ohio 1986). Cf. *Cicco v. Stockmaster*, 89 Ohio St. 3d 95, 99, 728 N.E.2d 1066, 1070, 2000-Ohio-434 (recognizing the State of Ohio's Declaratory Judgment Act "specifically identifies the Attorney General as an

[1] Plaintiffs do not allege and there is no evidence that the Prosecuting Attorney receives federal financial assistance subjecting its programs or activities subject to the requirements of Section 504 under Rehabilitation Act of 1973. See, Compl. at ¶123 and 29 U.S.C. 794(a).

interested person in cases where the constitutionality of a statute is challenged."). Moreover, the State of Ohio prohibits the County Prosecutor from assuming control over a resolution to this litigation. See, ORC § 9.58.

While the County Prosecutor is potentially a proper party with respect to the injunctive relief that Plaintiffs seek, the County Prosecutor "understandably expect[s] that the state will bear the costs of defending this litigation." *Akron Cen. for Reprod. Health v. Rosen*, 633 F. Supp. 1123, 1130 (N.D. Ohio 1986), aff'd on other grounds, 854 F.2d 852 (6th Cir. 1988), rev'd on other grounds, 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990).

However, hedging against any risk of liability for Plaintiffs' attorney fees, the County Prosecutor adopts and incorporates arguments advanced by the co-Defendant Secretary of State and Attorney General of Ohio in support of their motion for summary judgment herein.

C. Plaintiffs lack standing to obtain declaratory judgment or an injunction against the County Prosecutor

Plaintiffs "must demonstrate standing for each claim [they] seek[] to press" and Plaintiffs "must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 352 (2006). With respect to the claims they bring against the County Prosecutor, Plaintiff cannot demonstrate standing to obtain declaratory judgment or injunctive relief against the County Prosecutor.

Article III of the U.S. Constitution, the Declaratory Judgment Act and the Injunctive Relief available under 42 U.S.C 1983 require an "actual controversy" between the Plaintiffs and the County Prosecutor to invoke the Court's authority to adjudicate any matter between them. See, 28 U.S.C. § 2201(a). The U.S. Constitution's "central mechanism" for preserving our system of government's separation of powers "is the doctrine of standing." See, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). Separating judiciable matters that fall

within this Court's power under Article III to resolve from other disputes that are not recognizable as federal lawsuits hinges on the "irreducible constitutional minimum of standing." *Id*.

To give Plaintiffs' claims against the County Prosecutor an audience in this forum, Plaintiffs "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiffs' requests for declaratory judgment and injunctive relief against the County Prosecutor fail because any injury they suffer due to the mere existence of the Challenged Statutes are not injuries that are "fairly traceable to the challenged conduct" of the County Prosecutor.

This "traceability" component of standing is rooted in the common law principle of causation, and "there must be a causal connection between the injury and the conduct complained of -- the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561, quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Here, the State of Ohio enacted the laws Plaintiff seeks to challenge, not an independent action that the County Prosecutor performed. The County Prosecutor does not write or enact the law, and there is no causal connection between the County Prosecutor and any injury Plaintiffs can demonstrate.

Plaintiffs' complaint alleges that there is a "realistic possibility" that the County Prosecutor will take certain actions they seek to prevent. See, Compl. at ¶99. While Plaintiffs may rely on their assertions in their Complaint at the pleadings stage of litigation, during the summary judgment phase "the nature and extent of facts that must be averred (at the summary

judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). See also, *California v. Texas*, 141 S. Ct. 2104, 2114 (2021)("our cases have consistently spoken of the need to assert an injury that is the result of a statute's actual or threatened *enforcement*, whether today or in the future.")(emphasis in original). Plaintiffs cannot offer any facts showing the County Prosecutor took any action or refrained from any action placing the Plaintiffs' rights in jeopardy or otherwise threatening any rights they seek to vindicate. Thus, Plaintiffs lack standing to maintain their action against the County Prosecutor.

There is simply no evidence that the County Prosecutor would seek criminal charges against any individuals assisting disabled voters such as Plaintiff. Any injuries Plaintiffs may have suffered are not traceable to any conduct or action of the County Prosecutor. Thus, Plaintiffs lack standing to seek declaratory or injunctive relief against the County Prosecutor.

D. The County Prosecutor is Entitled to Eleventh Amendment Immunity from Plaintiffs' Requests for Injunctive Relief

Plaintiffs' claims against the County Prosecutor arise from the office's general responsibility for prosecuting criminal cases, and Plaintiffs alleged that there is some "realistic possibility" that the County Prosecutor could take action adverse to the Plaintiffs' interests. See, Compl., ECF #1 at ¶¶36, 97 and 99. However, without supporting the assertion with admissible evidence under Civ. R. 56 demonstrating such "realistic possibility," Plaintiffs' claims for injunctive relief against the County Prosecutor is barred by the Eleventh Amendment. See, generally, *Pusey v. City of Youngstow*n, 11 F.3d 652, 657-58 (6th Cir. 1993). "Because immunity under the Eleventh Amendment restricts judicial power under Article III, the Court

lacks jurisdiction to hear cases involving such immunity." *Benson v. O'Brien*, 67 F. Supp. 2d 825, 830, citing, *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996).

The Plaintiffs may potentially obtain injunctive relief against the County Prosecutor under the exception to Eleventh Amendment immunity that the Supreme Court established in *Young*, "[h]owever, this exception to sovereign immunity created in *Ex parte Young* has been read narrowly." *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019), citing, *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996). Plaintiffs bear the burden of showing the *Young* exception to the County Prosecutor's Eleventh Amendment immunity based on "a realistic possibility the official will take legal or administrative actions against the plaintiff's interests." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015). This "realistic possibility" does not arise "when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute." *EMW*, supra, at 445, quoting *Children's Healthcare* at 1415. See also, *Nouri v. Ohio*, Case No. 1:22-cv-317, 2023 U.S. Dist. LEXIS 200184, *8, 2023 WL 7336599 (SD Ohio Nov. 7, 2023)("The *Ex parte Young* exception does not apply to general enforcement authority of a defendant, and the defendant must have enforced or threatened to enforce an unconstitutional statute.") See also, *Libertarian Party of Ky. v. Grimes*, 164 F. Supp. 3d 945, 949 (E.D. Kentucky 2016).

The County Prosecutor "is not a proper Defendant under the *Ex parte Young* exception." *Grimes*, supra, at 951. While the County Prosecutor has general prosecutorial powers under Section 309.08(A) of the Ohio Revised Code, the record does not reflect (and Plaintiff does not even allege) that the County Prosecutor has undertaken or even contemplated any action to the enforce the Challenged Statutes against people assisting disabled voters. Rather, Plaintiffs

disavow any knowledge of any such past, present or future enforcement actions. See, Miller Depo. at pg. 111. See also, Kucera Depo. at pg. 122.

There is nothing more than a generalized connection between the County Prosecutor and the statutes Plaintiffs challenge. Without more than the County Prosecutor's wide-ranging authority to bring prosecutions and broad discretion not to prosecute under any given unique circumstances that may present themselves in the future, Plaintiff cannot demonstrate how the *Ex parte Young* exception to the Eleventh Amendment immunity applies here. Accordingly, the County Prosecutor is entitled to summary judgment on Plaintiff's claim for injunctive relief.

IV. CONCLUSION

For the reasons set forth above, Plaintiff cannot establish a claim against the County Prosecutor for declaratory or injunctive relief. Therefore, the County Prosecutor is entitled to summary judgment as a matter of law.

Respectfully submitted,

MICHAEL C. O'MALLEY, Prosecuting Attorney
of Cuyahoga County, Ohio

By: s/ Mark R. Musson
Mark R. Musson (0081110)
CUYAHOGA COUNTY PROSECUTOR'S OFFICE
The Justice Center, Courts Tower
1200 Ontario Street, 8th Floor
Cleveland, OH 44113
(216) 443-7795
mmusson@prosecutor.cuyahogacounty.us

Attorneys for Defendant Cuyahoga County Prosecuting Attorney in his official capacity

CERTIFICATION OF COMPLIANCE WITH L.R. 7.1(f)

This memorandum is less than ten (10) pages long and complies with L.R. 7.1(f).

By: s/ Mark R. Musson
Mark R. Musson (0081110)

One of the attorneys for Defendant Cuyahoga County Prosecuting Attorney in his official capacity