

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

FIRST BAPTIST CHURCH; ET AL.)	
)	
Plaintiffs,)	
)	
V.)	Case No. 6:20-cv-01102
)	
GOVERNOR LAURA KELLY,)	
in her official capacity, ET AL.)	
)	
Defendant.)	

**SUGGESTION OF LACK OF SUBJECT MATTER JURISDICTION OVER SHERIFF
CARR**

During the April 21, 2020, 10:00 am, telephonic scheduling conference, this Court raised concerns regarding its subject matter jurisdiction and ordered briefing. Defense counsel moved at the scheduling conference that this Court stay its April 18, 2020 TRO, ECF No. 15, in light of the subject matter jurisdiction questions looming over this suit. The Court denied that oral motion. Defendant Kelly filed her Fed. R. Civ. P. 12(b)(1) motion on April 21, 2020. *See* ECF, No. 30. Plaintiffs, in response, filed their First Amended Complaint that added the Adjutant General and the Sheriffs of Ford and Geary County. *See* ECF, No. 32 (April 22, 2020).

In light of the Amended Complaint, Governor Kelly enters this suggestion that this Court lacks jurisdiction over Ford County Sheriff William Carr. Governor Kelly respectfully suggests that this Court **DISMISS** this entire case for lack of subject matter jurisdiction under the Eleventh Amendment as to Defendant Carr. Given the allegations in the Amended Complaint, at this time,

it would appear that this Court does not face an Eleventh Amendment bar regarding the claims against Sheriff Jackson or Adjutant General Weishaar.

Argument

The Eleventh Amendment Bars Jurisdiction Over Sheriff Carr.

The Eleventh Amendment applies to sheriffs in Kansas. In determining whether a particular entity receives Eleventh Amendment immunity, the court considers whether the entity is an “arm of the state.” *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977). The Tenth Circuit sets forth a four-factor test for this analysis: (1) How is the entity characterized under state law? (2) What is the entity’s degree of autonomy from the state? (3) Where does the entity get its operating funds? (4) Is the entity primarily concerned with state or local affairs? *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007). “If a state entity is more like a political subdivision—such as a county or city—than it is like an instrumentality of the state, that entity is not entitled to Eleventh Amendment immunity.” *Id.*

The Tenth Circuit, in an unpublished decision, and a number of courts in the District of Kansas have held that Kansas sheriffs act on behalf of the state and are therefore immune from suit in federal court. *See Hunter v. Young*, 238 Fed.Appx. 336, 338 (10th Cir. 2007); *Arnold v. City of Olathe, Kansas*, No. 18-2703-CM, 413 F. Supp. 3d 1087, 1109 (D. Kan. Sept. 11, 2019) (“The Tenth Circuit and a number of judges in the District of Kansas have held that Kansas sheriffs act on behalf of the state and are therefore immune from suit in federal court.”); *Broyles v. Marks*, No. 18-3030-SAC, 2018 WL 2321822, at *4 (D. Kan. May 22, 2018); *Self v. Cnty. of Greenwood*, No. 12-1317-JTM, 2013 WL 615652, at *2 (D. Kan. Feb. 19, 2013); *Brown v. Kochanowski*, No. 07-3062-SAC, 2012 WL 4127959, at *9 n.3 (D. Kan. Sept. 19, 2012), *aff’d* 513 Fed.Appx. 715 (10th

Cir. 2013). Some decisions from the District of Kansas courts, however, have found that sheriffs are not entitled to immunity in Kansas. *See, e.g., Trujillo v. City of Newton*, No. 12-2380-JAR, 2013 WL 535747, at *10 (D. Kan. Feb. 12, 2013); *Reyes v. Bd. of Cnty. Comm'rs of Sedgwick Cnty.*, No. 07-2193-KHV, 2008 WL 2704160, at *7–9 (D. Kan. July 3, 2008).

This Court should agree with the analysis in those cases finding Kansas sheriffs immune under the Eleventh Amendment. First, the Kansas legislature created the office of the sheriff. Kan. Stat. Ann. 19-801a. Sheriffs in Kansas are required—by statute—“to keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they, and every coroner, may call to their aid such person or persons of their county as they may deem necessary.” Kan. Stat. Ann. 19-813. And the State of Kansas is responsible for prosecuting violations of Kansas law. *Nielander v. Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1164 (10th Cir. 2009) (holding that county attorneys act on behalf of the state, not the county, in Kansas).

Second, the board of county commissioners in Kansas lacks authority to determine how a county sheriff chooses his employees or expends budgeted funds. *Bd. of Cnty. Comm'rs v. Nielander*, 62 P.3d 247, 251 (Kan. 2003). County sheriffs are not subject to local control. Rather, The sheriff is an independently elected officer whose office, duties, and authorities are established and delegated by the legislature. K.S.A. 19-801a *et seq.* Thus, the sheriff is not a subordinate of the board of county commissioners and neither are the undersheriff or the sheriff's deputies and assistants. Rather, the sheriff is a state officer whose duties, powers, and obligations derive directly from the legislature and are coextensive with the county board. *Nielander*, 62 P.3d at 251.

The third and fourth factors are not of weight here. Even if the county funds the sheriff's operations and the sheriff has relatively limited geographical authority, these factors were the same for county attorneys in *Nilander*, and the Tenth Circuit still held that they were entitled to Eleventh Amendment immunity. 582 F.3d at 1164; *see also McMillian v. Monroe Cnty.*, 520 U.S. 781, 791 (1997) (recognizing that salary source and geographic limitations are not dispositive of whether an entity is an arm of the state). Based on these factors, as well as *Hunter v. Young* (albeit an unpublished opinion), this Court should determine that the suit against Sheriff Carr and Sheriff Jackson is governed by the Eleventh Amendment.

The Eleventh Amendment generally bars suits against a state in federal court commenced by citizens of that state or citizens of another state. *See Hans v. Louisiana*, 134 U.S. 1, 13–15 (1890). In *Ex parte Young*, however, the Supreme Court held that the Eleventh Amendment does not bar a suit against a state official in federal court that seeks only prospective equitable relief for violations of federal law. *See* 209 U.S. 123, 159–60 (1908). This exception is predicated upon the state official having “some connection” with the enforcement of the challenged state action. *Id.* at 157 (“In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.”). The Tenth Circuit brings added clarity to the *Ex parte Young* holding, stating that “[d]efendants are not required to have a ‘special connection’ to the unconstitutional act or conduct. Rather, state officials must have a particular duty to ‘enforce’ the statute in question **and a demonstrated willingness to exercise that duty.**” *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013) (quoting *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 828 (10th Cir. 2007)) (emphasis added).

Sheriff Carr lacks a demonstrated willingness to enforce EO 20-25, rendering this court without subject matter jurisdiction over him pursuant to the Eleventh Amendment. Here, while Sheriff Carr and Sheriff Jackson hold “a particular duty” to enforce EO 20-25, Sheriff Carr lacks “a demonstrated willingness to exercise that duty.” Plaintiffs’ Amended Complaint alleges that Sheriff Jackson will enforce EO 20-25. *See* Amd. Cmplt. at ¶ 14. Notably, they make no such allegation regarding Sheriff Carr. As the party asserting jurisdiction, the Plaintiffs bear the burden to establish it. Fed. R. Civ. P. 8(a)(1). Again, they offer no allegations that Sheriff Carr intends to enforce EO 20-25, this on its own is a sufficient basis to dismiss, as the Plaintiffs have failed to meet their burden.

Moreover, Sheriff Carr’s own statements undercut any such possible assertion. Sheriff Carr has stated: “‘As it currently stands our intention will be to continue educating the public on the Governor’s Executive Orders,’ Ford County Sheriff Bill Carr said. ‘We will continue to assess the situation as it presents changes on a continual basis. As for enforcement of violations, we will look at each situation on a case-by-case basis.’” *See* Vincent Marshall, “Enforcement of stay-at-home orders taken case by case,” *Dodge City Daily Globe* (April 2, 2020), available at <https://www.dodgeglobe.com/news/20200402/enforcement-of-stay-at-home-orders-taken-case-by-case>. Sheriff Carr’s statement shows that Plaintiffs lack any demonstrated willingness on behalf of Sheriff Carr to enforce EO 20-25. As such, this Court lacks subject matter jurisdiction over Sheriff Carr pursuant to the Eleventh Amendment.

Conclusion

For the foregoing reasons, Defendant respectfully prays that this Court **DISMISS** the entire complaint for lack of subject matter jurisdiction under the Eleventh Amendment as to Defendants Carr..

RESPECTFULLY SUBMITTED GOVERNOR LAURA KELLY

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