

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

MICHAEL A. GALLUZZO,)	
)	Case No. C-3-01-174
Plaintiff,)	
)	JUDGE ROSE
vs.)	
)	MAGISTRATE
CHAMPAIGN COUNTY COURT)	MERZ
OF COMMON PLEAS, et al.,)	
)	
Defendant.)	

**REPLY TO PLAINTIFF'S RESPONSE TO
MOTION TO DISMISS OF STATE OF OHIO AND
OHIO ATTORNEY GENERAL BETTY D. MONTGOMERY**

As explained in the original motion to dismiss, the State of Ohio, absent its consent, is immune under the Eleventh Amendment from suit by a private party. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100, 101 (1984) (citations omitted). The Attorney General does not enforce the challenged laws, and therefore also is immune under the Eleventh Amendment. *Ex parte Young*, 209 U.S. 123 (1908); *Children's Health Care is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412 (6th Cir. 1996). Plaintiff cites no law and makes no legal arguments contrary to these propositions.

In addition, the Attorney General is not a truly adverse party, as she has no power to grant Plaintiff Galluzzo the relief he desires. Absent a proper defendant, this Court has no jurisdiction over this case. Even if the Attorney General were to voluntarily appear on behalf of the State of Ohio to defend the constitutionality of the challenged laws, there would be no truly adverse party, and therefore no jurisdiction. Neither this Court nor Plaintiff Galluzzo can create federal jurisdiction by naming a party against whom the plaintiff has no case or controversy. Again, Galluzzo cites no law and makes no legal arguments against this position.

While the Attorney General of Ohio has the opportunity to enter cases on behalf of the State in federal court to defend the constitutionality of state statutes, that opportunity is discretionary. 28 U.S.C. 2403(b). The statute does not transform the Attorney General or the State of Ohio into all-purpose defendants, able to create jurisdiction where none exists.

To have jurisdiction in federal court there must be a genuine “case or controversy.” This means not only must the plaintiff have suffered an injury-in-fact, *Allen v. Wright*, 468 U.S. 737, 750 (1984), but the defendant must be genuinely adverse to the plaintiff. *Diamond v. Charles*, 476 U.S. 54, 61-66. Even if the law were to be held unconstitutional, the Attorney General could not compel the proper officials to cease implementing it. “[An] asserted right to have the

Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.” *Diamond*, 476 U.S. at 65, quoting *Allen v. Wright*, 468 U.S. at 754.

Unless a properly adverse defendant is found, this case must be dismissed.

Respectfully submitted,

BETTY D. MONTGOMERY
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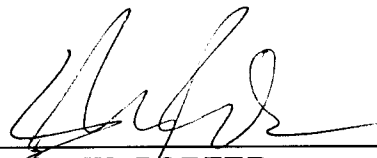
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Betty D. Montgomery

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Attorney General Betty D. Montgomery's Reply was sent via regular U.S. mail this 15th day of November, 2002 to the following:

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