

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

VANDROTH BACKUS, et al.,)	
)	Civil Action No.: 2:11-cv-03120-PMD-HFF-MBS
Plaintiffs,)	
)	
v.)	
)	
The STATE OF SOUTH)	
CAROLINA, et al.,)	
)	
Defendants.)	
_____)	

Memorandum in Support of Motion to Dismiss by Defendant Nimrata “Nikki” R. Haley, in her capacity as Governor

Plaintiffs have filed an Amended Complaint against the State of South Carolina, Governor Nikki Haley, all Commissioners of the State Election Commission, and the Executive Director of the State Election Commission, Lieutenant Governor Ken Ard, Glenn F. McConnell, President Pro Tempore of the Senate, Robert W. Harrell, Speaker of the House of Representatives, James H. Harrison, Chairman of House Judiciary Committee, and Alan D. Clemmons, Chairman of House Elections Law Subcommittee for a declaratory judgment and injunction requesting a three-judge court re-draw a U.S. House of Representatives District, specific S.C. Senate districts, and specific S.C. House districts. Plaintiffs’ claims are based on the recent redistricting in South Carolina under Acts 71, 72, and 75.

The Plaintiffs’ case arises under the Fourteenth and Fifteenth Amendments to the U.S. Constitution and the Voting Rights Act of 1965, 42 U.S.C. § 1973, et seq. (Amend. Compl., ¶ 5.) The Plaintiffs’ also claim the Court has subject matter jurisdiction under 42 U.S.C. §§ 1981 and 1983 as well. (Amend. Compl., ¶ 6.)

Defendant Nimrata “Nikki” R. Haley, in her capacity as Governor, moves to dismiss the Amended Complaint based on its failure to state a claim upon which relief can be granted because of the sovereign immunity of Governor Haley and a lack of subject matter jurisdiction in this case.

Argument

I. Sovereign Immunity

Absent consent, waiver, or specific actions by Congress, a State may not be sued by a citizen of another state in federal court. “The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.” *Bd. of Trustees of Univ. of Alabama, et al. v. Garrett, et al.*, 531 U.S. 356, 363-64, 121 S.Ct. 955, 962, 148 L.Ed.2d 866 (2001); *relying on Kimel v Florida Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). Stated another way, “Accordingly, for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.” *Kimel*, 528 U.S. at 73, 120 S.Ct. 631; *relying on College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999); *Seminole Tribe of Florida v. Florida, et al.*, 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *see e.g. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Hans v. Louisiana*, 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890); (Eleventh Amendment acts to bar a suit by a State’s own citizen as well).

The Governor has neither waived nor consented to suit in the District of South Carolina or any other federal court pertaining to this matter. The Amended Complaint brings suit against the Governor in her official capacity only. (Amend. Compl., ¶ 18.) The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any

suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State” *U.S. Const. amend XI*. “[T]he doctrine of sovereign immunity under the Eleventh Amendment extends beyond the literal text of the Eleventh Amendment to prevent a state from being sued by one of its own citizens without its consent.” *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 329 (4th Cir. 2001); *relying on Alden v. Maine*, 527 U.S. 706, 72-28, 119 S.Ct. 2240, 140 L.Ed.2d 636 (1999). “State officers acting in their official capacity are also entitled to Eleventh Amendment protection, because ‘a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.’” *Lytle v. Griffith, et al.*, 240 F.3d 405, 408 (4th Cir. 2001); *quoting Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

There is an exception to Eleventh Amendment immunity for state officers as recognized in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The *Ex Parte Young* exception allows a suit in federal court to enjoin a state officer from enforcing an unconstitutional statute. 209 U.S. at 159-60, 28 S.Ct. 441. This exception does not apply to the Governor in this suit.

“*Ex parte Young* requires a ‘special relation’ between the state officer sued and the challenged statute to avoid the Eleventh Amendment’s bar. ‘General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.’ Thus, ‘[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute.’” *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 329 (4th Cir. 2001) (although Governor is under a general duty to enforce laws because of position as top official, he

lacks specific duty to enforce the challenged statutes) (internal citations omitted); *see also* *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010); (because attorney general had no more than general authority to enforce the laws of the state, he lacked a “specific relation” to the legislation); *see also* *Charleston County School Dist. v Harrell, et al.*, 393 S.C. 552, 561, 713 S.E.2d 604, 609 (S.C. 2011) (governor’s ample executive powers insufficient reason to name governor as a party defendant in suit challenging constitutionality of statute).

The Governor does not have any special relation to Acts 71, 72, and 75 which are at issue in this case. She does not have enforcement authority for redistricting in South Carolina. The only acts alleged against Governor Haley are that she signed into law Acts 71, 72, and 75. (Amend. Compl., ¶¶ 44, 46, and 48.)

The primary responsibility for drafting and implementing a redistricting plan in South Carolina always rests with the South Carolina General Assembly, subject to the approval of the Governor. *See U.S. Const. art. I, § 2; S.C. Const. art. III, § 3; see also Colleton County Council v McConnell, et al.*, 201 F.Supp.2d 618, 626 (D.S.C. 2002). In discussing the contrast in duties as between a legislature and federal courts in redistricting the Court in *Colleton County* noted, “[L]egislative reapportionment is primarily a matter for legislative consideration and determination, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.” *Colleton County*, 201 F.Supp.2d at 626; *quoting Connor v. Finch*, 431 U.S. 407, 414-15, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) (citations and internal marks omitted). Thus, the General Assembly has responsibility for redistricting in South Carolina while in this case the Governor has no responsibility for redistricting in South Carolina beyond the ministerial act of signing the bills into law.

II. Legislative Immunity

In this case Governor Haley's signature or veto over legislation is insufficient to waive her immunity for jurisdictional purposes as she is entitled to absolute immunity for such acts. *See Torres Rivera v. Calderon Serra*, 412 F.3d 205 (1st Cir. 2005); *Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) (under the doctrine of absolute legislative immunity, a Governor cannot be sued for signing a bill into law). Governor Haley is entitled to legislative immunity for her signature of the Acts in question in this case. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 301 (D. Md. 1992) (Governor and Governor's committee entitled to legislative immunity for preparing and presenting redistricting plan to General Assembly).

There is no question that a Governor, as an executive, is entitled to legislative immunity for acts undertaken in the conduct of their duties. *See Bogan v. Scott-Harris*, 523 U.S. 44, 55, 118 S.Ct. 966, 973, 140 L.Ed.2d 79 (1998) (executive official's introduction of a budget and signing into law was a legislative function); *Supreme Ct. of Virginia v. Consumer Union of United States, Inc.*, 446 U.S. 719, 731-34, 100 S.Ct. 1967, 1974-76, 64 L.Ed.2d 641 (1980) (officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions); *Smiley v. Holm*, 285 U.S. 355, 372-73, 52 S.Ct. 397, 401-02, 76 L.Ed. 795 (1932) (recognizing that a Governor's signing or vetoing of a bill constitutes part of the legislative process); *Bagley v. Blagojevich*, 646 F.3d 378 (7th Cir. 2011) (legislative immunity protected Governor's line-item veto as signing and vetoing bills are integral steps in legislative process). Thus, Governor Haley's signature of the redistricting bills into law is a proper legislative function and entitled to legislative immunity.

Conclusion

For all of the reasons stated above, Defendant Nimrata “Nikki” R. Haley, in her capacity as Governor is entitled to dismissal with prejudice of Plaintiffs’ Amended Complaint in this case.

Respectfully submitted,

s/ J.C. Nicholson, III

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HALEY, IN HER CAPACITY AS GOVERNOR

December 19, 2011.