

**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 State of South Carolina**

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 State of South Carolina (hereinafter “State”) moves to dismiss the Amended Complaint based on its failure to state a claim upon which relief can be granted, a lack of subject matter jurisdiction and because the Plaintiffs’ lack standing to bring these claims against the State of South Carolina.

## 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 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). The State, as an entity, has no role in performing reapportionment.

Defendant State of South Carolina is most likely not entitled to Eleventh Amendment immunity from a suit brought under the Voting Rights Act. See e.g., *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); *S.C. v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); *U.S. v. Mississippi*, 380 U.S. 128, 140, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965); *Reaves v U.S. Dept. of Justice*, 355 F.Supp.2d 510, 515-16 (D.C. 2005).

However, the State does have a unique immunity which prevents the Plaintiffs from succeeding on their claim for relief under 42 U.S.C. § 1983, the clear language of § 1983 requires that a “person” be sued by another where a deprivation of constitutional rights can be shown. The Supreme Court has expressly held that the states are not “persons” within the meaning of § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). Plaintiffs’ Amended Complaint seeks relief under § 1983 as against the State of South Carolina. (Amend. Compl., ¶ 6 and Prayer for Relief.) Therefore, the State cannot be sued for any violation of § 1983 and this claim as against the State of South Carolina should be dismissed.

## II. Standing

“It is by now well settled that ‘the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’-an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of.... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’” *U.S. v. Hays*, 515 U.S. 737, 742-43, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) (footnote, citations, and internal quotation marks omitted); quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992); see also, e.g., *Allen v. Wright*, 486 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

Plaintiffs’ all assert injury as a result of alleged constitutional violations in this case. Injury is necessary for standing but not sufficient alone. The injury must be “fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*, 486 U.S. 737, 751 (1984). The failure to establish all of the standing elements results in a generalized grievance against allegedly illegal conduct by the government which is insufficient for federal justiciability. “The rule against generalized grievances applies with as much force in the equal protection context as in any other.” *U.S. v. Hays*, 515 U.S. 737, 743, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) (plaintiffs who did not live in district subject to racial gerrymandering claim under §2 of the VRA lacked standing); *Northeastern Florida Chapter of Assoc. General Contractors of Am. v. Jacksonville, Florida*, 508 U.S. 656, 663 (1993). Causation is necessary because if the defendant is the cause of the plaintiff’s injury then injury

will cease if the defendant's behavior is stopped. Redressability is necessary because the decision of the court must make a difference. Plaintiffs' Amended Complaint must be dismissed because they cannot demonstrate causation against the State.

Plaintiffs' constitutional claims under the Fourteenth and Fifteenth Amendments and their Voting Rights claim are derived from the effect that redistricting has on their new location in specific districts. However, as a legal and factual matter, there can be no fairly traceable unlawful conduct of the State of South Carolina because the State, as a corporate entity comprising the entirety of the State, does not have a direct, hands-on role with regard to redistricting. Put simply, the State, as a corporate entity, does not draw the lines that create the districts that Plaintiffs' allege are unlawful. The element of redressability is also not met in this case as against this Defendant. The State's interest includes the creation of a new U.S. Congressional district pursuant to the 2010 Census but the location of the district lines is a matter for the General Assembly to determine. Certainly the State will abide by any court ruling on this matter as far as where the lines are drawn but, as a practical matter, the State, as an entity is not a line-drawer, is not subject to injunctive relief regarding line drawing and is not a necessary party to this suit.

Under clear Supreme Court precedent, Plaintiffs undeniably lack standing to challenge districts in which they do not reside. With respect to the districts in which Plaintiffs do reside, moreover, the Amended Complaint expressly references only a few. And, for the same reasons that the Complaint fails to state a claim, it fails to make even a threshold showing that *any* district has caused cognizable injury to *any* Plaintiff.

As the Supreme Court has explained:

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally

protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*United States v. Hays*, 515 U.S. 737, 742-43 (1995) (internal quotation marks omitted).

Consistent with these principles, the Supreme Court has “repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing to invoke the federal judicial power.” *Id.* at 743. And the burden rests always with a plaintiff “clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of a dispute.” *Id.*

In *Hays*, the Supreme Court held that “[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature’s reliance on racial criteria, and therefore has standing to challenge the legislature’s action.” *Id.* at 745. That standing, however, exists “only with respect to the district in which the plaintiff resides.” *Shaw II*, 517 U.S. at 904. Where, on the other hand, a plaintiff resides outside an allegedly gerrymandered district, he lacks standing unless he can show that he “has personally been subjected to a racial classification.” *Hays*, 515 U.S. at 745. It is “irrelevant” whether plaintiffs couch their claim as a challenge to the redistricting legislation “in its entirety.” *Id.* at 746. And the rationale of *Hays*, articulated in a case involving racial gerrymander claims, applies with equal force to vote dilution claims. For only when a plaintiff can show that minority voting strength was diluted in *his* district can he show that *he* suffered any cognizable injury.

According to their Amended Complaint, the eight Plaintiffs reside in only eight of the 124 House Districts, seven of the forty-six Senate Districts, and five of the seven Congressional Districts—specifically, House Districts 59, 62, 67, 82, 101, 102, 103, 119; Senate Districts 25,

29, 30, 32, 35, 37, 43; and Congressional Districts 1, 2, 5, 6, 7. At most, Plaintiffs can challenge only these specific districts, and not other districts or the Plans as a whole.

Plaintiffs cannot challenge any other district because they have failed to allege facts sufficient to show that the configuration of any other district “has personally . . . subjected [them] to a racial classification.” *Hays*, 515 U.S. at 745. For each Plaintiff here, the Complaint makes a conclusory allegation that the challenged Plans harm him or her “by discriminating against him [or her] on the basis of race for the purpose of including or excluding him [or her] from election districts.” Amend. Compl. ¶¶ 8-15. Similarly, the Complaint makes a general and equally conclusory allegation that all Plaintiffs “are personally injured by being subjected to an illegal racial classification and by being placed into election districts in accordance with this race-based scheme.” *Id.* ¶16. But these conclusory statements alone are insufficient to establish standing for any of Plaintiffs’ claims. *See Hays*, 515 U.S. at 746.

Furthermore, there is not a sufficiently pled injury even as to the districts in which Plaintiffs reside. Plaintiffs’ Amended Complaint refers to only thirty-two specific districts across all three Plans. *See, e.g., id.* at ¶63(b) (“Defendants discriminated on the basis of race for the purpose of packing black voters into House Districts 12, 23, 49, 61, 64, 79, 82, 93, 102, 103, 111, 121, and 122, and for the purpose of maintaining an artificially high black VAP percentages [*sic*] in districts like House Districts 25, 55, 66, and 70 contrary to population shift and traditional redistricting principles); *id.* at ¶64(b) (same for Senate Districts 19, 21, 22, 29, 30, 32, 36, 39, 40, and 42); *id.* at ¶65(b) (“Act 75 has a discriminatory purpose evidenced by the demographics of specific districts, particularly the First, Second, Fifth, Sixth, and Seventh Districts.”). Plaintiffs reside in only three of these House Districts (Districts 82, 102, 103) and three of these Senate Districts (Districts 29, 30, 32), as well as these five Congressional Districts.

The Amended Complaint does not even reference, much less include adequate allegations of injury, for any of the *other* House and Senate Districts in which Plaintiffs reside.

Even as to the handful of districts that are both home to a Plaintiff and at least referenced in the Amended Complaint, the allegations do not allege a cognizable injury. As explained above, the Amended Complaint gives no specifics regarding how the districts allegedly were gerrymandered. And, because the Amended Complaint fails to describe any hypothetical alternative plan in which Plaintiffs even *allegedly* would have enjoyed “undiluted” voting strength, it lacks any cognizable allegation that Plaintiffs were injured by adoption of the challenged Plans instead. In short, Plaintiffs have made no showing that they would be better off under any (unspecified) alternatives to the House, Senate, and Congressional Plans. *A fortiori*, they have made no showing that they are *worse off* under the three duly enacted Plans. Thus, without a cognizable injury, Plaintiffs lack standing to challenge *any* districts in *any* of the enacted Plans.

### **Conclusion**

Therefore, for all of the reasons stated above, Defendant State of South Carolina is entitled to dismissal with prejudice of Plaintiffs’ Amended Complaint in this case.

Respectfully submitted,

s/ J.C. Nicholson, III

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