

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

BILLIE FAYE KEYES, et al.

PLAINTIFFS

V.

CIVIL ACTION NO. 3:16cv228 CWR-LRA

PHILIP GUNN, et al.

DEFENDANTS

ORAL ARGUMENT REQUESTED

**MOTION TO DISMISS
FOR LACK OF JURISDICTION**

Pursuant to Fed.R.Civ.P. 12(b)(1), defendants respectfully move this Court to dismiss this action as the Court lacks jurisdiction to hear the claims presented in the complaint filed herein. [Dkt 1]. In support thereof, defendants would show as follows:

1. Five registered Smith County voters have sued five Members of the Mississippi House of Representatives and the House itself under 42 U.S.C. § 1983, alleging violation of their rights under the Equal Protection Clause of the Fourteenth Amendment. Complaint ¶ 18. The only concrete relief sought in their prayer seeks the determination of “Blaine ‘Bo’ Eaton to be the lawful Representative of House District 79 . . . and that his position in the Mississippi House of Representatives be restored unto him.” Complaint p. 11. Neither former Representative Eaton nor Mark Tullos, the serving Representative from House District 79, is a party to this action.

2. As set forth more fully in the brief in support of motion to dismiss for lack of jurisdiction, incorporated herein by reference, this Court lacks jurisdiction to entertain the complaint and should dismiss this action.

3. First, Congress did not vest the District Courts with jurisdiction to resolve election contests for State Legislatures. *See Hubbard v. Ammerman*, 465 F.2d 1169, 1180 (5th Cir. 1972),

citing 28 U.S.C. § 1344. The cited authority precludes the transformation of an ordinary election contest under state law into a supposed effort to defend federal constitutional rights.

4. Second, absent explicit congressional authority, not present here, jurisdiction over these defendants is barred by the Eleventh Amendment to the United States Constitution. In praying that former Representative Eaton be restored to his seat, plaintiffs seek relief against the State of Mississippi, but the Eleventh Amendment precludes federal courts from entertaining suits against sovereign States. *Papasan v. Allain*, 478 U.S. 265, 276 (1986). Moreover, this bar cannot be evaded by suing officers or agencies instead of the State itself. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 326 (5th Cir. 2002). Here, the House of Representatives is the arm of the State of Mississippi properly designated to decide entitlement to a seat in the House, Art. 4, § 38, Miss. Const. (1890), and a suit against it is a suit against the State, barred by the Eleventh Amendment.

5. Further, there is no jurisdiction over the five individual Members. Not only are they entitled to legislative immunity, as set forth in a separate motion to dismiss on that basis, but any claim against these Members is too insubstantial to support federal jurisdiction. *Johnson v. Hood*, 430 F.2d 610, 612 n.6 (5th Cir. 1970), citing *Bell v. Hood*, 327 U.S. 678 (1946). The decision to invalidate certain ballots was made by the full House. These five Members could not have deprived these plaintiffs of anything, because they lack the authority to do so, and an injunction against these five Members will not give the plaintiffs anything, because these Members cannot control the decision of the House. For that additional reason, plaintiffs lack standing to seek relief against the Members.

FOR THESE REASONS, as more fully discussed in the supporting brief submitted herewith, defendants respectfully submit that this Court lacks jurisdiction to hear the claims

presented in the complaint, and this Court should dismiss the complaint in accordance with Fed.R.Civ.P. 12(b).

This 10th day of May, 2016.

Respectfully submitted,

PHILIP GUNN, et al.

BY: s/Michael B. Wallace

MICHAEL B. WALLACE (MSB #6904)
REBECCA W. HAWKINS (MSB #8786)
CHARLES E. COWAN (MSB #104478)
WISE CARTER CHILD & CARAWAY, P.A.
Post Office Box 651
Jackson, Mississippi 39205-0651
Telephone: 601-968-5534
Fax: 601-944-7738
mbw@wisecarter.com
rwh@wisecarter.com
cec@wisecarter.com

T. RUSSELL NOBILE (MSB #100682)
WISE CARTER CHILD & CARAWAY, P.A.
1105 30th Avenue, Suite 300
Gulfport, Mississippi 39501-1817
Telephone: 228-867-7141
Fax: 228-867-7142
trn@wisecarter.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I, Michael B. Wallace, hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

John G. Corlew
CORLEW MUNFORD & SMITH, PLLC
P. O. Box 16807
Jackson, MS 39236-6807
jcorlew@cmslawyers.com

William R. Ruffin
P.O. Box 565
Bay Springs, MS 39422-0565
attywrr@bayspringstel.net

This the 10th day of May, 2016.

s/Michael B. Wallace
MICHAEL B. WALLACE