UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL **CIVIL ACTION No. 12-CV-657**
Plaintiff

VERSUS

JUDGE JACKSON

STATE OF LOUISIANA, ET AL.
Defendants **MAGISTRATE JUDGE BOURGEOIS**

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINTS

NOW INTO COURT, through undersigned counsel, come defendants, the State of Louisiana, the Louisiana Governor, Bobby Jindal ("Governor"), and the Louisiana Attorney General, James D. "Buddy" Caldwell ("Attorney General"), (collectively "State Defendants") who file the underlying memorandum in support of the motion to dismiss Plaintiff's amended complaints for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) and for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

BACKGROUND

The Plaintiff filed suit against the State Defendants alleging violations of Section 2 and Section 3 of the Voting Rights Act ("VRA") as well as 42 U.S.C. § 1983. (Rec. Docs. 1, 13, 74, 76, and 180). The State Defendants recently filed a motion for reconsideration (Rec. Doc. 184) related to their previously filed motion to dismiss (Rec. Doc. 39). Not addressed in the reconsideration, are the claims raised in the Plaintiff's amended complaint related to Section 3. (Rec. Doc. 180). The Plaintiff also filed several other amended complaints with the court after

the initial motion to dismiss was filed. (Rec. Docs. 13, 74, 76, and 180). The arguments set forth in the original motion to dismiss are applicable to all of the Plaintiff's amended complaints, therefore, out of an abundance of caution the State Defendants re-urge the arguments which are the subject of the pending motion for reconsideration below herein. Further, the State Defendants address for the first time below the newly raised Section 3 claim.

ARGUMENT

I. PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED

Fed. R. Civ. P. (12)(b)(6) is the proper mechanism to dismiss a complaint that fails to provide the grounds for entitlement to relief, although a plaintiff is not required to have detailed factual allegations within it. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plaintiff must plead enough facts to state a claim for relief that is plausible on its face. *Id.* at 570. The Supreme Court pontificated that:

> [T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' The plausibility standard is not akin to a 'probability requirement,' but it asks for **more than** a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

Conclusory allegations and unwarranted factual deductions will not suffice to avoid a motion to dismiss. *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

A. Plaintiff fails to state a claim upon which relief can be granted as to the State Defendants

To assert a valid cause of action the Plaintiff must show he is entitled to relief against the named defendants. Fed. R. Civ. P. 8(a)(2). If the named defendants cannot redress the harm alleged by the plaintiff then no case or controversy exists and the defendant should be dismissed as a party. *Okpalobi*, 244 F.3d 405, 428-29. Based on the allegations made in the Plaintiff complaints no case or controversy exists as to the Governor or the Attorney General. Enjoining the Governor or the Attorney General would not redress the harm alleged in the Plaintiff's complaints. Neither the Governor nor the Attorney General has the ability to remedy the actions in the Plaintiff's complaints. Further, as discussed below, the authority and powers of the Governor and Attorney General as set forth by the Louisiana Constitution are completely contrary as a matter of law to those set forth in the Plaintiff's allegations. As a matter of law and despite the Plaintiff's allegations to the contrary, the Governor and the Attorney General do not have authority under Louisiana law to enact, maintain, or administer voting qualifications or prerequisites to voting, or election standards, or procedures.

B. Plaintiff fails to state a claim under Section 3(c) of the Voting Rights Act

Section 3(c) of the Voting Rights Act provides a remedy, not a claim for relief. Section 3(c) may be used only after a court finds **intentional** racial discrimination in violation of the "voting guarantees" of the Fourteenth and Fifteenth Amendment.

Section 3(c) is a remedial provision, and "does not … provide a basis on which to state a cause of action." *Weber v. White*, 422 F.Supp. 416, 423 (N.D. Tex. 1976). Section 3 (c) does not provide an independent claim but instead merely announces the procedure and remedies available in a proceeding to enforce the guarantees of the Fourteenth and Fifteenth Amendment.

Plaintiff's attempted cause of action under Section 3 (c) is premature and non-justicable at the juncture. Section 3(c) provides that **after** a judicial determination that

> violations of the fourteenth and fifteenth amendment justifying equitable relief have occurred . . . the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate [to ensure that no voting practice] different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that [the practice] does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [because of membership in a language minority group.]

42 U.S.C. § 1973a(c) (citation to 42 U.S.C. § 1973b(f)(2) omitted.)

This remedy is often referred to as "bail-in."

The statute itself makes clear that bail-in may be ordered only in limited circumstances. 42 U.S.C. § 1973a(c). First, the U.S. Attorney General or an "aggrieved person" must initiate a lawsuit to enforce the "voting guarantees" of the Fourteenth or Fifteenth Amendment. Second, the court must find a violation of the Fourteenth or Fifteenth Amendment. Third, the court must determine that the constitutional violation justifies equitable relief. Fourth, the court must grant some relief to the plaintiffs other than bail-in. After all of these conditions are satisfied, section 3(c) authorizes the court to retain jurisdiction for a period of time "as it may deem appropriate."

In this case, there has been no determination of a Fourteenth or Fifteenth Amendment violation. In the absence of finding a violation, Section 3(c) does not permit bail-in. As a result of Section 3(c) being a remedy, not a claim for relief, the Plaintiff's complaint (Rec. Doc. 18) raising the Section 3(c) claim should be dismissed.

C. Plaintiff fails to meet the standard required for injunctive relief, as a matter of law the one man, one vote principal does not apply to the judiciary.

Plaintiff has failed to provide this Court with the requisite showing that irreparable injury would result to it in the absence of injunctive relief.[1] It should be noted that "[i]njunctive relief is 'an extraordinary and drastic remedy,' and should only be granted when the movant has

[1] Although this Honorable Court denied the Plaintiff's request for a preliminary injunction (Rec. Doc. 45), the requirement for a permanent injunction are the same and must be articulated by the Plaintiff.

clearly carried the burden of persuasion." *Anderson v. Jackson*, 556 F.2d 351, 360 (5th Cir. 2009) (citing *Holland*, 777 F.2d at 997). In *Canal Authority of State of Florida v. Callaway,* the Fifth Circuit set forth four (4) prerequisites that must be met in order to justify issuance of such extraordinary relief. 489 F.2d 567 (5th Cir.1974). The Fifth Circuit held that injunctive relief should issue only where: "(1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest." *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). Plaintiff has failed to meet his cumulative burden of proving the above elements.

1. Plaintiff Has Failed to Establish a Substantial Likelihood of Prevailing on the Merits of its Request for Permanent Injunction.

The Secretary of State's motion to dismiss, eloquently addressed this specific factor that the Plaintiff has not established a substantial likelihood of prevailing on the merits. We adopt and provide below:

> . . . .
> As explained in the prior sections, there are no state constitutional or statutory laws requiring the reapportionment of judicial districts based on racial demographics, and even if there were, Article V of the Louisiana Constitution [does not delegate the procedure to] the Executive Branch.
>
> . . . .
>
> Moreover, new or additional judgeships in Louisiana are determined exclusively through standards and guidelines established by the Judicial Council pursuant to La. R.S. 13:61 and are not established strictly by population or race. Yet, there is no requirement under Louisiana law for a judgeship to be added or created based on changes in population or racial composition. Should this Honorable Court find that the Baton Rouge City Court is malapportioned according to the Plaintiff's theory, then every judicial district in the state must be

found to be malapportioned because no court in this state is apportioned based on population and/or race.

In addition, the United States Supreme Court in *Chisom*, supra, [*Chisom v. Roemer*, 501 U.S. 380, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991)] stated that there exists no constitutional right which would entitle a citizen to vote for a certain number of judges. This general principle is undoubtedly sound, since "judges need not be elected at all" and "ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment." *Id.* Thus, the United States Constitution does not guarantee the right to vote for some minimum number of judges. *Id.*

Furthermore, while the Supreme Court in *Chisom* held that judicial elections are included within the ambit of 42 U.S.C. § 1973 and 1973c, the Court rendered its decision at a time when "no black person ha[d] ever been elected to the Louisiana Supreme Court." *Chisom*, U.S. 380, 386, citing *Chisom v. Edwards*, 839 F.2d 1056, 1058 (CA5 1988). Since that time, the Parish of East Baton Rouge has elected a black mayor-president over white candidates, the City of Baton Rouge has elected a black constable over white candidates, and the City of Baton Rouge has elected black judges over white candidates in City Court judicial elections. In fact, despite the fact that Plaintiff asserts that black citizens will suffer irreparable injury if the November 6, 2012, City Court judicial election is allowed to proceed, all citizens, black and white, in Subdistrict 2 will have the option to vote for black candidates (Joel G. Porter and Tiffany Foxworth) or the white incumbents (Alex "Brick" Wall and Suzan S. Poinder). Therefore, should the black citizens wish to vote for black candidates in the City Court judicial election taking place on November 6, 2012, they will certainly have the ability to do so.

In addition, in *Wells v. Edwards*, supra, [*Wells v. Edwards*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973)] the United States Supreme Court ruled that in Louisiana, the "one-man, one-vote" precept does not apply to the Judicial Branch. The Court explained:

> It should also be noted that the present apportionment of the Supreme Court districts in Louisiana is not a creature of the State Legislature, nor can the makeup of these districts be changed by the Legislature. Those districts were created by Article VII, Sec. 9 of the Louisiana Constitution which was adopted by the people of Louisiana in 1921, and have remained unchanged since that time. They are not subject to change by the Legislature. Thus there is no claim being made here, nor could there be, that any of the defendants in this action have in any way acted arbitrarily or capriciously in establishing or maintaining these judicial districts in their present form. *Id.* at 456. [*Wells v. Edwards*, 347 F. Supp. 453, 456 (M.D. La. 1972) *aff'd*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973)].

> The *Wells* ruling that "one-man, one-vote does not apply to the judiciary" has been upheld since its ruling in 1972, despite the fact that the delegates to the 1973 Constitutional Convention had every opportunity to implement reapportionment requirements or "one-man, one-vote" applications during their deliberations but neglected to do so. . . .
>
> There simply is no requirement anywhere in the law requiring the [Defendants] to perform any of the actions set forth by Plaintiff, as the Judicial Branch is exempt from the "one-man, one-vote" precept and reapportionment of judicial districts must occur through acts of legislation.

Rec. Doc. 40-1, p. 21-23 (adopting in extensio arguments set forth by the Secretary of State).

Thus, the Plaintiff cannot possibly show it will prevail on the merits of his case because the premise he is using to allege an injury does not apply as a matter of law. Without a valid legal basis to bring a claim, the Plaintiff cannot meet the first factor required to seek a permanent injunction because it is impossible to show he can prevail without a legal basis to bring a claim. We respectfully request this Honorable Court grant the 12(b)(6) motion to dismiss, as a matter of law, the one man, one vote does principle does not apply to the judiciary.

. **D. Plaintiff fails to state a claim under Section 2 of the Voting Rights Act**

Further, even if one man one vote did apply to the judiciary, which the State Defendants maintain it does not, there are minimum pleading requirements that must be met in order to assert a Section 2 claim, and the Plaintiff has failed to satisfy these requirements.

The Voting Rights Act, 42 U.S.C. § 1973, forbids the imposition or application of any practice that would deny or abridge, on grounds of race or color, the right of any citizen to vote. Section 2(a) of the Voting Rights Act provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color....

42 U.S.C. § 1973(a).

A § 2 violation is established if:

> based on a totality of the circumstances, it is shown that the political processes leading to nomination or election in the State ... are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> 42 U.S.C. § 1973(b).

This is simply not the case in the City of Baton Rouge, as is evident by the election of a minority Mayor for the City of Baton Rouge.

In order to sustain a vote dilution claim under Section 2 a minority group must initially satisfy the three factor *Gingles* test derived from the United States Supreme Court decision. *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986). State Defendants assert that Plaintiff cannot satisfy the three factor *Gingles* test.

To satisfy the *Gingles* test the minority group must:

> prove by a preponderance of evidence that (1) it is sufficiently large and geographically compact to constitute a majority in a single member district, (2) its members are politically cohesive, and (3) the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority group's preferred candidate.

Magnolia Bar Ass'n Inc. v. Lee, 994 F.2d 1143, 1146 (5th Cir. 1993) (citing *Gingles*, 478 U.S. at 50-51)). Failure to satisfy any of the three factors will defeat a vote dilution claim.

Even if the minority group can satisfy these three factors, then he must offer evidence to satisfy "the totality of circumstances" to demonstrate how "its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice." 42 U.S.C.A. Section 1973(b).

In *Magnolia Bar Ass'n Inc. v. Lee*, the Fifth Circuit Court of Appeal explained how the factors addressed in the Senate Report accompanying the 1982 amendments to 42 U.S.C. §1973 were important to the totality of the circumstances inquiry required under 42 U.S.C. § 1973(b). 994 F.2d at 1146. The Court specifically spelled out the factors as well, which were:

a. the extent of any history of official discrimination in the state or political subdivision that touched the right of members of the minority group to register, to vote, or otherwise participate in the democratic process;

b. the extent to which voting in the elections of the state or political subdivision is racially polarized;

c. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

d. whether members of the minority group have been denied access to [any candidate slating] process;

e. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

f. whether political campaigns have been characterized by overt or subtle racial appeals; [and]

g. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 1146-47 citing S.Rep. No. 417, 97th Cong., 2d Sess., at 28-29, (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

The following two additional factors were also included in the Senate Report that Congress explained "in some cases have had probative value … to establish a violation":

h. whether there is significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]

i. whether the policy underlying the state or political subdivision's use of

> such voting qualification prerequisite to voting, or standard, practice or procedure is tenuous.

Id. citing S.Rep. No. 417, 97th Cong., 2d Sess., at 28-29, (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207.

In summary, the test for a vote dilution claim under Section 2 places the burden on the minority group to satisfy the three *Gingles* factors and the totality of circumstances test. Failure to satisfy any of the *Gingles* factors alone will defeat a Section Two claim. Plaintiff has failed to make any demonstrable showing within any of his four complaints to satisfy the *Gingles* three part test; even if Plaintiff could meet the *Gingles* factors, which State Defendants maintain he cannot, Plaintiff has failed to provide evidentiary support to prevail on the totality of circumstances inquiry. Plaintiff's submission of census data alone is insufficient. Therefore, Plaintiff's vote dilution claim arising under Section 2 should be dismissed.

E. Plaintiff's claims are barred by qualified immunity enjoyed by the State Defendants

In the absence of allegations by Plaintiff of personal involvement by the State Defendants, they also are protected by qualified immunity. Moreover, La. R.S. 9:2798.1, governs policymaking or discretionary acts or omissions of public entities or their officers or employees and provides that:

> A. As used in this section, "public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.
>
> B. **Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.**
>
> C. The provisions of Subsection B of this Section are not applicable:
>
> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or

> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.
>
> D. The legislature finds and states that the purpose of this Section is not to reestablish any immunity based on the status of the sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the Constitution of Louisiana.

(Emphasis added.)

Nowhere in the Plaintiff's complaints does he assert that the State Defendants were acting outside the course and scope of their lawful power and duties.

F. Plaintiff fails to state a claim under the Fifteenth Amendment

The Fifteenth Amendment provides in relevant part that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "The Amendment grants protection to all persons, not just members of a particular race." *Rice v. Caytano,* 528 U.S. at 512, 120 S.Ct. 1044 (2000).

The State Defendants contends that the Fifteenth Amendment is not even implicated by this case because the 1993 Judicial Election Plan does not restrict the right to vote based on the race of the voter. Since voters are allowed to vote regardless of race, the right to vote is not denied or abridged on the basis of the race of the voter. Moreover, despite the Plaintiff's allegations to the contrary the court can take judicial notice that the 1993 Judicial Election Plan was precleared by the United States Department of Justice.

G. Plaintiff fails to state a claim under the Privileges and Immunities Clause of the Fourteenth Amendment

The Fourteenth Amendment's Privileges and Immunities Clause protects only those rights that are unique to being a citizen of the United States rather than an individual state. *Deubert v.*

Gulf Fed. Savs. Bank, 820 F.2d 754, 760 (5th Cir.1987). The rights and privileges of national citizenship include the right to (1) pass freely from state to state, (2) petition Congress, (3) vote for national officers, (4) enter public lands, (5) be protected against violence while in the custody of a United States Marshal, (6) carry on interstate commerce, (7) to take and hold real property, and (8) inform the United States authorities of violations of its laws. *Murphy v. Mount Carmel High School,* 543 F.2d 1189, 1192 n. 2 (7th Cir.1976) (citing *Twining v. New Jersey,* 211 U.S. 78, 97, 29 S.Ct. 14, 53 L.Ed. 97 (1908)); *see also 2* Ronald D. Rotunda & John E. Nowak, Treatise of Constitutional Law § 12.7 (3rd ed.1999).

The Supreme Court has stated that the protection extended under the clause "includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law." *Snowden v. Hughes,* 321 U.S. 1, 6–7, 64 S.Ct. 397, 88 L.Ed. 497 (1944). The right to vote for state officers or initiatives "is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause." *Id.* at 7, 64 S.Ct. 397. The right to vote in a municipal election is rooted in state law. The plaintiffs fail as a matter of law to state a claim under the Privileges or Immunities clause of the Fourteenth Amendment. *See Citizens' Right to Vote v. Morgan,* 916 F.Supp. 601, 608 (S.D.Miss.1996).

The Fourteenth Amendment's Privileges and Immunities Clause is inapplicable to the facts alleged by the Plaintiff, and any claims under the Fourteenth Amendment's Privilege and Immunities Clause should be dismissed.

H. Plaintiff fails to state a claim under § 1983

Holding a government official acting in his official capacity liable under § 1983 requires a finding of state or municipal custom or policy. *Lee v. Morial,* No. 01–30875, 2002 WL 971519, at *4 (5th Cir. Apr.26, 2002); *See also Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). "The official policy or custom must inflict the plaintiff's injury." *Lee,* 2002 WL 971519, at *4; *Monell,* 436 U.S. at 694, 98 S.Ct. 2018. "To show an unconstitutional policy or custom, the plaintiff must (1) identify the policy or custom, (2) connect the policy or custom with the government entity, and (3) show that the policy caused the plaintiff's particular injury." *Lee,* 2002 WL 971519, at *4; *Bennett v. City of Slidell,* 728 F.2d 762, 767 (5th Cir.1984) (en banc). Only prospective injunctive relief is available against states or state employees in their official capacities. *Sossamon v. Lone Star State of Texas,* 560 F.3d 316, 336 n. 74 (5th Cir.2009).

A Plaintiff states a § 1983 claim against a governmental official in his individual capacity by "alleg[ing] specific conduct giving rise to a constitutional violation." *Oliver v. Scott,* 276 F.3d 736, 741 (5th Cir.2002). For a private citizen to be held liable under § 1983, the plaintiff must allege that the citizen conspired with or acted in concert with state or municipal actors. *Priester v. Lowndes County,* 354 F.3d 414, 420 (5th Cir.2004); *Mylett v. Jeane,* 879 F.2d 1272, 1275 (5th Cir.1989). Allegations of conspiracy "that are merely conclusory, without reference to specific facts, will not suffice." *Priester,* 354 F.3d at 420.

In this case, the Plaintiff only makes general allegations regarding a conspiracy and gives no specific reference to facts, thereby failing to state a claim under § 1983.

II. PLAINTIFF'S CLAIMS ARE NONJUSTICIABLE[2]

This Honorable Court addressed in its order denying the State Defendants' Motion to Dismiss, that the *Ex Parte Young* doctrine carves out a narrow exception to a State's Eleventh Amendment immunity.[3] However, as discussed below we respectfully submit that such an exception does not abrogate the Governor nor the Attorney General's immunity in this matter.

As this Honorable Court provided in its order: "[t]he burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist."[4] The Plaintiff's opposition to the State Defendants' Motion to Dismiss failed to assert *an adequate response* to the State Defendants' Eleventh Amendment immunity assertion.[5] This Honorable Court examined the *Ex Parte Young* exception to pierce the State Defendants' Eleventh Amendment immunity.[6]

The State Defendants assert that the narrow *Ex Parte Young* doctrine exception does not apply here based on the criteria required to meet this exception. The *Ex Parte Young* doctrine requires that the plaintiff 1) seek prospective relief; 2) show each of the defendants have some connection with the enforcement of the Act; and 3) show that each of the defendants threaten to or commence proceedings to enforce the unconstitutional Act. *Ex Parte Young*, 209 U.S. 123, 155-56, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

Applying the first factor, the Plaintiff appears to be seeking prospective relief in part, yet it is not clear from the Plaintiff's complaint from which defendant relief is sought. The State Defendants do not concede there is any clearly defined relief sought against the Attorney General

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[2] This argument was presented in our motion for reconsideration of this Honorable Court's denial of the State Defendants' motion to dismiss. It is reiterated here out of an abundance of caution to ensure the State Defendants' Eleventh Amendment immunity has been raised as to all aspects of this matter before this Honorable Court.

3 Rec. Doc. 174.

4 Rec. Doc. 174, p. 8 (quoting *Celestine v. TransWood, Inc.*, 467 Fed.Appx. 317, 318 (5th Cir. 2012)).

5 Rec. Doc. 51.

6 Rec. Doc. 174, p. 12.

or the Governor. Further, any portions of the complaints that are based on past alleged indiscretions do not fall within the *Ex Parte Young* exception to Eleventh Amendment immunity and must be dismissed.

Next we respectfully suggest that the second factor, which requires some connection with enforcement of the allegedly unconstitutional act, prevents the *Ex Parte Young* doctrine from denying the State Defendants Eleventh Amendment immunity. The United States Fifth Circuit Court of Appeals specifically analyzed this factor and found that the general duties of the Louisiana Attorney General and Louisiana Governor do not meet the *Ex Parte Young* exception, that each of the defendants has "some connection with enforcement" factor. *Okapalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001). There the en banc court painstakingly dissected *Ex Parte Young* and its progeny. *Id.* The court specifically held that *Ex Parte Young* requires the ability to actually enforce the Act in question, whether it is specifically articulated in the statute itself or in the other specific duties of the named defendants. *Id.* at 419. Factually, it was held that the Louisiana Governor and the Louisiana Attorney General did not have the ability to do anything under the law at issue or generally related to the law. *Id.* at 427. Just as Eleventh Amendment immunity prohibited the case in *Okapalobi* from proceeding based on nonjusticiability the State Defendants should be dismissed by this Honorable Court.

The Fifth Circuit Court of Appeals specifically stated:

> [t]he *Young* principle teaches that it is <u>not merely the general duty to see that the laws of the state are implemented that substantiates the required</u> "<u>connection</u>," but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty. For a duty found in the general laws to constitute a sufficient connection, it must include[ ] the right *and the power* to enforce the statutes of the state, including, of course, the act in question ... Thus, any probe into the existence of a *Young* exception should gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statute.

Okpalobi, 244 F.3d at 416-17(internal citation omitted)(emphasis added).

The Fifth Circuit continued this line of thinking as it concluded that requiring such a connection is necessary to prevent litigants from misusing the exception and suing the incorrect party who has no role in the enforcement of the law at issue. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). That is the exact problem with the Plaintiff's complaints here.

The State Defendants are not the proper party defendants for the prospective relief sought by the Plaintiff. None of the connections required to pierce Eleventh Amendment immunity based on *Ex Parte Young* have been established. The Plaintiff is hanging his hat on the general duty of these State Defendants. The Judicial Plan of 1993 provides no authority or duty to the Governor or the Attorney General. Also, identifying the Governor as the "Chief Executive Officer" and the Attorney General as the "Chief Legal Officer" is an insufficient connection, as are all other references made in the complaints. None of which are sufficient to establish the connection required by *Ex Parte Young*.

Further, although the State Defendants do not concede the complaints even properly make any allegations against them specifically; as a matter of law the Attorney General and the Governor, have no role in the continued or future implementation of the 1993 Judicial Plan. *See* Louisiana Constitution Article IV, § 5 and § 8; La. R.S. 49:251, *et seq*. We ask that this Honorable Court consider these specific constitutional provisions which expressly articulate the duties of the Attorney General and duties the Governor respectively in reconsidering our Fed. R. Civ. P. 12(b)(1) motion to dismiss. Additionally, nothing within the 1993 Judicial Plan, nor the separate roles as defined by law, give neither the Governor nor the Attorney General the connection required by the second factor to establish that the *Ex Parte Young* exception would apply.

Finally the Plaintiff's complaints fail to meet the third factor required to pierce Eleventh Amendment immunity based on *Ex Parte Young*. None of the State Defendants have threatened to or commenced proceedings to enforce the allegedly unconstitutional Act in question. The Governor plays no role in the Baton Rouge City Court Judges election, nor does the Attorney General. Even with that issue aside in order to meet the *Ex Parte Young* exception, the Plaintiff must at the very least allege that the State of Louisiana, Governor and the Attorney General have threatened to or are proceeding to enforce the unconstitutional Act.

Thus, the State Defendants are entitled to Eleventh Amendment immunity and should be dismissed as party defendants pursuant to Fed. R. Civ. P. 12(b)(1).

III. CONCLUSION

WHEREFORE, the State Defendants pray that this Motion to Dismiss be granted and that the Plaintiff's suit be dismissed with prejudice, at the Plaintiff's costs, and that the State Defendants be granted any other equitable relief this Honorable Court deems necessary and appropriate.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2013, a copy of the above and foregoing Memorandum In Support of the Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to attorney for plaintiff by operation of this Court's electronic filing system.

s/ Angelique Duhon Freel
Angelique Duhon Freel