

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL

*Plaintiff,*

CIVIL ACTION NO.: 3:12-cv-657  
BAJ/RLB

BYRON SHARPER

*Plaintiff-Intervenor*

v.

STATE OF LOUISIANA, et al

*Defendants.*

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**OPPOSITION TO STATE DEFENDANT'S SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS  
PLAINTIFF-INTERVENOR BYRON SHARPER'S COMPLAINT**

**MAY IT PLEASE THE COURT:**

Defendants, State of Louisiana, Louisiana Governor Piyush “Bobby” Jindal, and Louisiana Attorney General James D. “Buddy” Caldwell (collectively the “State Defendants”), filed Defendants’ Supplemental Memorandum in Support of Motion to Dismiss Plaintiff-Intervenor’s Byron Sharper’s Complaint, *see* Docket No. 195. Plaintiff-Intervenor Sharper files this opposition to the State Defendants’ motion to dismiss.

**LAW AND ARGUMENT**

**I. THE INTERVENOR’S CLAIMS ARE JUSTICIABLE**

**A. Plaintiff-Intervenor’s Claims are not barred by the Eleventh Amendment Immunity as Interpreted by *Ex Parte Young*.**

The State Defendants allege that the narrowly construed *Ex Parte Young* doctrine is inapplicable due to the State Defendants’ lack of connection to the enforcement of the 1993 Judicial Election Plan, Act 609. The *Ex Parte Young* doctrine requires Plaintiff-Intervenor

Sharper: 1) seek prospective relief; 2) allege the State Defendants have some connection with the enforcement of the Act; and 3) allege that the State 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, Plaintiff-Intervenor Sharper has asked this Honorable Court to issue an order prohibiting the State Defendants from continuing to enforce the 1993 Judicial Election Plan. By its plain meaning, an order prohibiting further and/or continued enforcement of the Act is one seeking prospective relief. Plaintiff-Intervenor's Supplemental Complaint alleges that, unless the Court enjoins Defendants from "continu[ing] to conduct elections for [Baton Rouge] City Court under the present method of election that denies African American citizens and voters... the opportunity to participate equally with white citizens and voters," Plaintiff-Intervenor Sharper will be harmed by the Defendants' "ongoing" and "repeated violations" of federal law. (Doc. 133, ¶ 1, 26.)

Applying the second factor, Plaintiff-Intervenor Sharper has alleged specific allegations showing the State Defendants have some connection with the enforcement of the Act. Governor Jindal is identified as the "Chief Executive Officer" of the State of Louisiana, and Attorney General Caldwell is identified as the "Chief Legal Officer" of the State of Louisiana (Doc. 128, ¶ 5, 6); the Defendants "had an official state policy per its Chief Legal Official, the Attorney General of the State of Louisiana, to discriminate against Louisiana's African American voters, particularly not to comply with the 1965 Voting Rights Act since its inception" (Doc. 128, ¶ 61); and the Defendants "all have ... authority to modify the challenged Judicial Election Plan and each have separate and/or joint responsibility to remedy the alleged violations (Doc. 133, ¶ 19).

Applying the third factor, Plaintiff-Intervenor Sharper has alleged specific allegations showing the State Defendants are threatening to enforce the Act, as elections were just held last November/December 2012, and will continue in their harmful effect every six years to deprive Plaintiff-Intervenor Sharper of his right to participate equally in the election process to elect judges for Baton Rouge City Court.

When taken together, Plaintiff-Intervenor Sharper's Complaints, on their face, allege the State Defendants have some connection with the enforcement of the 1993 Judicial Election Plan, as they are specifically charged with the duty to enforce the Plan, and they are currently exercising or threatening to exercise that duty. Plaintiff-Intervenor Sharper further shown he is seeking prospective relief. Accordingly, based upon the foregoing, the State Defendants' contentions are without merit and should be dismissed.

**B. The Intervenor's Claims are not barred by Qualified Immunity.**

The State Defendants should not be entitled to the defense of qualified immunity. Qualified immunity is a purely legal question. *Hare v. City of Corinth*, 135 F.3d 320, 325 (5th Cir. 1998). To determine whether the State Defendants are entitled to qualified immunity, this court must determine whether Plaintiff-Intervenor Sharper has alleged a violation of a clearly established constitutional right; and, if so, whether the State Defendants' conduct is objectively unreasonable in light of clearly established law at the time of the incident.<sup>1</sup>

Plaintiff-Intervenor Sharper has clearly alleged violations of established constitutional rights, namely the rights afforded by the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act. Additionally, Plaintiff-Intervenor Sharper has alleged the State Defendants' conduct is objectively unreasonable in light of clearly established law.

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<sup>1</sup> *Jacobs v. West Feliciana Sheriff's Department*, 228 F.3d 388, 393 (5th Cir. 2000); *Hare II*, 135 F.3d at 325.

Therefore, the State Defendants should not be entitled to qualified immunity.

## II. INTERVENOR BYRON SHARPER HAS STATED A CAUSE OF ACTION

### A. Intervenor Sharper has alleged a claim upon which relief can be granted.

The State Defendants also seek to dismiss Plaintiff-Intervenor Sharper's complaints on the basis that he has failed to state claims upon which relief may be granted. Plaintiff-Intervenor Sharper has adequately and sufficiently stated numerous claims upon which relief may be granted for constitutional (e.g., Fourteenth and Fifteenth Amendments) violations under Section 1983, and violations under Section 2 of the Voting Rights Act of 1965. Accordingly, the State Defendants' Supplemental Memorandum in Support of Motion to Dismiss should be denied on the nonexclusive claims argued below.

### B. The One-Person, One-Vote Principle applies to the instant matter.

Although, the Supreme Court ruled in *Wells v. Edwards*, 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973), that the "one-man, one-vote" principle does not apply to the Louisiana state constitutionally created Supreme Court election districts, it delineated specific reasons that included the distinction that districts drawn by the Louisiana legislature are not necessarily included in this general principled decision; that the decision was based upon the unique facts presented in that case.

Plaintiff-Intervenor Sharper submits that the Defendants incorporated the "one-man, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution into the enabling provisions that created the 1993 Judicial Election Plan. During the hearing before the Judicial Committee in support of Senate Bill 1126, former State Senator John Michael Guidry (now a judge on the Court of Appeal, First Circuit) pronounced the 1993

Judicial Election Plan was statutorily created based on “one-person, one-vote” principle of the United States Constitution, in contrast to *Wells vs. Edwards, supra*.

As alleged in the Original Complaint, then Senator John Michael Guidry testified that Election Section 1 and Election Section 2 of the 1993 Judicial Election Plan would be based on “one man, one vote” and that the allotment of City Court judgeships would be numerically based on the racial percentage of African Americans and White citizens according to the 1990 United States census. It is well settled that the state can grant more civil and voting rights (*e.g.*, equality of right) than those provided by the federal constitution. This federal principle “one-man, one-vote” has been codified into state law by Act 609 and now all judges to the Baton Rouge City Court have to be elected based upon this concept. Moreover, one aspect of the federal judiciary under the Equal Protection Clause is to protect “discrete and insular minorities” from majoritarian prejudice or indifference. See *United States v. Carolene Products*, 304 U.S. 144 (1938).

**C. Intervenor stated a claim under Section 2 of the Voting Rights Act.**

Plaintiff-Intervenor Sharper has sufficiently articulated factual allegations in his complaints, when taken together, show he has met the threshold requirements set forth by the United States Supreme Court in *Thornburg v. Gingles*, 474 U.S. 30 (1986): 1) that African Americans in the city of Baton Rouge are sufficiently large and geographically compact to constitute a majority in a single-member district; 2) that African Americans are politically cohesive; and 3) that the White majority votes sufficiently as a bloc to cause them to usually defeat the African American’s preferred candidate. *Gingles*, 478 U.S. at 49-50.

Moreover, a ruling on the totality of the circumstances is premature at this time as there has yet to be a trial on the merits. Plaintiff-Intervenor Sharper cannot be deprived of presenting

evidence to prevail on the totality of the circumstances inquiry. Taking the three complaints together, Plaintiff-Intervenor Sharper has satisfied the pleading requirement to support a claim for violation of Section 2 of the Voting Rights Act.

The State Defendants continue to maintain that the Governor and the Attorney General are not the proper parties to provide the relief requested. They have yet to provide any law or legal authority to support their assertion they are not proper parties to this suit. Indeed, there are a myriad of cases in which the governor and/or the attorney general were named as defendants in Voting Rights Act cases.<sup>2</sup> Therefore, this argument is without merit and should be denied.

**D. Plaintiff-Intervenor Sharper requested a remedy under Section 3c of the Voting Rights Act.**

State Defendants incorrectly assert that Plaintiff-Intervenor Sharper has added a *claim* under Section 3c of the Voting Rights Act of 1965. This contention is totally absurd and without merit. Plaintiff-Intervenor Sharper filed a motion for leave to add the Section 3c *remedy* (Doc. 160). The Court granted leave and Plaintiff-Intervenor Sharper filed his Second Amending and Supplemental Complaint (Doc. 181) asserting that after a finding of intentional discrimination on *claims* of violations of the Fourteenth and Fifteenth Amendments to the United States Constitution, the court fashion a *remedy* under Section 3c of the Voting Rights Act. (Emphasis added). The State Defendants are correct in their assertion that there has been no determination of a Fourteenth or Fifteenth Amendment violation; there has been no trial of this matter to date to make that determination. Plaintiff-Intervenor Sharper has only added Section 3c as a remedy in

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<sup>2</sup> See, e.g., *Williams v. McKeithen*, No. 05-1180, 2005 U.S. Dist. LEXIS 17788, at \*1 (E.D. La. August 8, 2005) (Governor of the State of Louisiana named as a defendant); *Carr v. Edwards*, No. 94-1280, 1994 U.S. Dist. LEXIS 11087, at \*1, 1994 WL 419856, at \*1 (E.D. La. August 8, 1994) (Governor of the State of Louisiana and Louisiana Attorney General named as defendants); *Clark v. Roemer*, 777 F. Supp. 471 (M.D. La. 1991) (governor of the State of Louisiana and Louisiana Attorney General named as defendants); *African-American Citizens for Change v. Robbins*, 825 F. Supp. 885, 891 (E.D. Mo. 1993) (concluding that the proper defendant in a Voting Rights Act claim is the state and/or the governor of the state).

the event the Court rules that the State Defendants have violated the Fourteenth and Fifteenth Amendments to the United States Constitution.

Therefore, this argument is without merit and should be denied.

**E. Plaintiff-Intervenor Sharper has stated a claim under the Fifteenth Amendment.**

The Fifteenth Amendment provides that the right to vote shall not be denied by the United States or by any State on account of race, color, or previous condition of servitude, and Congress was empowered to enforce this Amendment by Sections 2 and 5 of the Voting Rights Act of 1965. Various attempts by the States to discriminate against voters because of race or color have been invalidated by the courts under the Fifteenth Amendment of the United States Constitution. See *Guinn v. United States*, 238 U.S. 347, 59, L.Ed. 1340, 35 S.Ct. 926, (1915); *Lane v. Wilson*, 307 U.S. 268, 83 L.Ed. 1281, 59 S.Ct. 872 (1939).

Moreover, the United States Supreme Court in *Gomillion* held that the right of Blacks to vote in municipal elections under the Fifteenth Amendment is deemed violated when the state redefined the boundaries of the City of Tuskegee so as to remove from the city all but four or five of the Black voters while not removing a single White voter or resident. See *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.Ed. 2d 110, 81 S.Ct. 125(1960).

Plaintiff-Intervenor Sharper has alleged that the legislative apportionment of Baton Rouge City Court was based on the 1990 United States census data and the racial supermajoritarian former composition and status of White citizens and that despite the fact that the population growth from 1990 to 2010 has shifted to a supermajority politically cohesive African American population, the failure of the State and local Defendants to reapportion the Court denies him and other African American's equal suffrage in free and equal elections and the equal protection of the laws. Moreover, "the right to vote freely for the candidate of one's

choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533 (1964).

The State Defendants' intentional maintenance of the Act and its judicial election districts that dilute the weight of African Americans and the weight of their votes as a supermajority is a violation of the Fifteenth Amendment. Under the circumstances of this case, the Fifteenth Amendment requires that State of Louisiana to make an honest and good faith effort to construct/apportion election sub-districts consistently and equally when there are shifts in the population demographics. Otherwise, the Judicial Election Plan grants an exclusive minoritarian privilege and right of majority rule exclusively to White electors and candidates in elections to City Court.

**F. Plaintiff-Intervenor Sharper has stated a claim under the Privileges or Immunities Clause of the Fourteenth Amendment.**

The Fourteenth Amendment, Section 1, Clause 2 provides, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...." On May 10, 1866, in the closing debate on the House floor to amend the Fourteenth Amendment, Congressman John Bingham explained: "many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever." It was based upon the egregious injustices committed by the states that Congress added the protection of the Privileges or Immunities Clause to all citizens.

In 1869, the Louisiana Legislature granted a twenty-five year monopoly to a slaughterhouse company to conduct business in the city of New Orleans. Various butchers bought suit against the monopoly on the ground that it deprived them of the privileges or immunities that the Fourteenth Amendment guaranteed to all citizens. Similarly, the State Defendants have intentionally maintained Act 609's (1993 Judicial Election Plan) election subdistricts and its apportionment of such subdistricts' in the nature of a White monopoly on the court, inconsistently and unequally when African American citizens in Baton Rouge are the majority in population and voting age population, thereby creating an exclusive minoritarian privilege and right of majority rule exclusively to White electors and candidates in elections to City Court.

Act 609 is unconstitutional on its face and as applied because the privileges asserted herein are fundamental in nature, and there can be no doubt that the right to vote as an American citizen, to be free from racial discrimination, and to be free to participate equally is of the utmost importance in a democratic society. State Defendants deny Plaintiff-Intervenor Sharper the same rights given to White citizens by creating a monopoly and an apartheid form of government, which confers "odious and exclusive" election privileges upon a small number of White electors and citizens at the expense of the great body of the community of Baton Rouge, depriving Plaintiff-Intervenor Sharper of the right to exercise his suffrage freely and equally and without subversion of his franchise and privilege in favor of White citizens.<sup>3</sup>

**G. Intervenor has stated a claim under Section 1983.**

State Defendants incorrectly assert that Plaintiff-Intervenor Sharper has failed to state a claim for relief under Section 1983. "Recovery under section 1983 requires a plaintiff to allege and prove two essential elements: (1) that the defendants' conduct occurred under the color of

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<sup>3</sup> See implied guarantees of the federal constitution in *Crandall v. Nevada*, 73 U.S. 35 (1867).

state law, and (2) that the defendant's conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or a law of the United States." 42 U.S.C.A. Section 1983; *McCoy v. City of Monroe*, 747 So.2d 1234 (La. App. 2nd Cir. 12/8/99). The intentional actions of the State Defendants are systematic, ongoing, continuous, and may remain permanently recurrent in their harmful effect every six years to deprive Plaintiff-Intervenor Sharper of his right to participate equally in the election process to elect judges for Baton Rouge City Court.

Last year's fall (November/December 2012) City Court elections originated and were predicated on the State Defendant's failure to amend Act 609 (1993 Judicial Election Plan), which violated Plaintiff-Intervenor Sharper's rights and deprived him of an equal opportunity to participate in the election of city court judges. The effect of not amending the Judicial Election Plan acts as a continual denial of Plaintiff-Intervenor Sharper's rights.

Accordingly, the State Defendants Supplemental Memorandum in Support of Motion to Dismiss Plaintiff-Intervenor's Complaints should be denied.

### **CONCLUSION**

Plaintiff-Intervenor Sharper asks this Honorable Court to deny and/or dismiss the State Defendant's Supplemental Memorandum in Support of Motion to Dismiss the Intervenor Byron Sharper's Complaint for all the reasons stated above.

**RESPECTFULLY SUBMITTED:**

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 15<sup>th</sup> day of November, 2013, a true and correct copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record.

Baton Rouge, Louisiana, this 15<sup>th</sup> day of November, 2013.

/s/ Ronald R. Johnson  
**RONALD R. JOHNSON**