UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL	**:**	**CIVIL ACTION NO. 3:12-CV-0657**
	:	
VERSUS	**:**	**CHIEF JUDGE BRIAN A. JACKSON**
	:	
STATE OF LOUISIANA, ET AL.	**:**	**MAGISTRATE JUDGE RICHARD L. BOURGEOIS, JR.**

OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

MAY IT PLEASE THE COURT

DEFENDANTS, James D. "Buddy" Caldwell, Attorney General, Bobby Jindal, Governor, State of Louisiana, and City of Baton Rouge, Parish of East Baton Rouge, and Melvin "Kip" Holden, Mayor-President (hereinafter "Defendants") which for the reasons set forth below, submit the following Memorandum in opposition to the Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Motion"), and respectfully requests this Court to deny the Plaintiffs' request for partial summary judgment.

Federal Rule of Civil Procedure 56:

Federal Rule of Civil Procedure 56 states: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." In evaluating the evidence under Fed. R. Civ. P. 56 the Court must view it in the light most favorable to the non-moving party and draw reasonable inferences in their favor. *Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank, N.A.*, 13-30827, --F.3d.--, 2014 WL 2565661 (5th Cir. June 6, 2014).

I. INTRODUCTION

The motion for partial summary judgment by the Plaintiffs in this matter is woefully lacking both procedurally and materially. As this Court is well aware in a motion for summary judgment the burden is on the mover to put forth sufficient evidentiary material to support they are entitled to judgment as a matter of law. The material presented by the Plaintiffs here comes nowhere close to reaching this burden. Their supporting material has obvious procedural deficiencies as it fails to comply with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The material used to support their arguments is inadmissible evidence, consisting of unauthenticated material, hearsay, uncertified copies of legislation and generally irrelevant material. Further, the affidavits provided by Judge Donald Johnson, Judge Trudy White, Judge Yvette Alexander and Ernest Johnson all in some way shape or form contravene Fed. R. Civ. P. 56(c)(4).

Aside from the procedural deficiencies the remaining supporting material fails to establish discriminatory intent on behalf of the Defendants. The evidence provided does not coincide with the *Arlington Heights* factors and requires significant leaps of faith to place any onus on the Defendants. Thus, the Plaintiffs' do not provide enough supporting material to meet their initial burden as the mover in this motion for summary judgment.

Although not necessary since the Plaintiffs have not met their burden, the Defendants will show as a matter of law Plaintiffs are not entitled to partial summary judgment with reference to precedential and persuasive legal support. Further, the Defendants will provide citations to the record, constitutional articles and an affidavit to show there are several issues of material fact in this matter. Therefore, this Honorable Court should deny the Plaintiffs' motion for partial summary judgment.

II. ARGUMENT

A. The Movants Fail to Meet their Burden Required by Fed. R. Civ. P. 56

Both elements of Fed. R. Civ. P. 56 must be proven by the movant to be granted summary judgment. Fed. R. Civ. P. 56. The burden of the movant in summary judgment is a heavy one. *Nicholas Acoustics & Specialty Co. v. H & M Const. Co., Inc*., 695 F.2d 839, 844 (5th Cir. 1983).

The initial burden of showing there is no genuine dispute as to any material fact must be met by the mover; only then does the burden shift to the nonmoving party to show the existence of a genuine issue of material fact. *Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc*., 738 F.3d 703, 706 (5th Cir. 2013). To meet their heavy burden the movant must present sufficient evidence to show they are entitled to prevail as a matter of law. Fed. R. Civ. P. 56.

The Plaintiffs fail to meet their burden of establishing they are entitled to judgment as a matter of law and that there is no genuine dispute as to any material facts. Their failure is two-fold. First, their memorandum is not properly supported in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Secondly, the argument within the Plaintiffs' memorandum is not adequately supported.

The Plaintiffs' motion for partial summary judgment contains the following attachments:

Exhibit A-affidavit of Judge Donald R. Johnson.

Exhibit 1: Unauthenticated copy of Act 609 of 1993 Reg. session
Exhibit 2: Hearsay Email from Woody Jenkins
Exhibit 3: Unauthenticated copy of HB 1501 of 2004 Reg. session
Exhibit 4: Unauthenticated copy of HB 1505 of 2006 Reg. session
Exhibit 5: Unauthenticated copy of HB 1013 of 2004 Reg. session
Exhibit 6: Unauthenticated copy of SB 849 of 2004 Reg. session
Exhibit 7: Unauthenticated copy of Baton Rouge City Court Admin. Meeting 5/11/2004
Exhibit 8: Unauthenticated transcription of HB 1013 of 2004 Reg. Session

Exhibit 9: Unauthenticated copy of HB 945 of 2006 Reg. session
Exhibit 11:[1] Unauthenticated copy of HB 198 of 2014 Reg. session
Exhibit 12: Unauthenticated copy of HB 1151 of 2014 Reg. session
Exhibit 13: Unauthenticated copy of Senate Committee Amendments to HB 1151 of 2014 Reg. session.

Exhibit B-affidavit of Judge Trudy White
Exhibit 1: Non-certified Court filing *Jerry Johnson, sr. v. St. of Louisiana et al.,* No. 541,528, Division "J", 19th Judicial District Court.
Exhibit C-affidavit of Judge Yvette Alexander
Exhibit D- City Parish Planning Commission Bulletin
Exhibit E-Ken DeJean's notes
Exhibit F-Transcript of House and Governmental Affairs Committee dated 5/17/06 (Rec. Doc. 125-1).
Exhibit G-Minutes of House and Governmental Affairs Committee dated 5/17/06 (Rec. Doc. 70-5).
Exhibit H- Committee Minutes of House and Governmental Affairs dated 5/19/04 (Rec. Doc. 70-4).
Exhibit I-supplemental report of Richard Engstrom
Exhibit J-affidavit of Earnest Johnson

This material is insufficient to establish the Plaintiffs are entitled to summary judgment.

i. The Plaintiffs' Supporting Material Does Not Conform with the Federal Rules of Civil Procedure or the Federal Rules of Evidence.

The only material that can be used to support or oppose a motion for summary judgment is evidence that would be admissible at trial under the Federal Rules of Evidence. *Bellard v. Gautreaux*, 675 F.3d 454, 460 (5th Cir. 2012); *See also* Federal Rule of Civil Procedure 56(c)(2) (providing a mechanism to object to inadmissible evidence used in support of a motion for summary judgment).[2] Therefore, any material attached to a summary judgment motion that would not be admissible in court cannot be used to support or oppose a motion.

[1] There is no Exhibit 10 within Donald R. Johnson's affidavit. Additionally, there is no exhibit 14 either despite several references to it within the affidavit itself.

[2] "Objection that a fact is not supported by admissible evidence: A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

Affidavits or declarations may be used as evidence to support or oppose a motion for summary judgment. Federal Rule of Civil Procedure 56(c)(4) provides specific requirements for the admissibility of affidavits at the summary judgment phase. It provides:

> An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence and show that the affiant or declarant is competent to testify on the matters stated.

Fed. R. Civ. P. 56(c)(4).

If any part of an affidavit fails to meet these requirements, that portion should not be considered evidence in support for the summary judgment motion. The Plaintiffs' affidavits that are submitted in support of their motion generally do not contain admissible evidence; either they address matters that are not before the court or they pontificate on matters on which the affiants are not offered as experts on.

The affiant must have personal knowledge and set out facts that would be admissible in evidence. Although there are very small portions of the affidavits attached to the Plaintiffs' Motion that provide personal knowledge, the vast majority discuss matters outside the affiant's knowledge. Further, these affidavits discuss matters rife with hearsay, authentication issues and provide material that is just not relevant to this case much less this specific motion for partial summary judgment. Additionally, these affidavits make no mention of the Plaintiffs in this matter.

Exhibit A

Plaintiffs' exhibit A, Judge Donald Johnson's affidavit and its 12 exhibits fails to conform to the federal requirements for affidavits as it fails to only address matters of which he has personal knowledge, he is not an expert and offers opinion testimony, the material contained within is hearsay, issues arise under the Best Evidence rule as well as general relevancy issues.

It is well-settled that a court may strike any affidavit that is not based on personal knowledge. *CMS Indus., Inc. v. L.P.S. Int'l, Ltd.,* 643 F.2d 289, 295 (5th Cir. 1981); *Akin v. Q-L Invs., Inc.,* 959 F.2d 521, 530 (5th Cir. 1992). Federal Rule of Evidence 602 requires evidentiary support that a witness has personal knowledge of a matter to be able to testify to it. The Plaintiff provides no evidentiary support that Judge Donald Johnson has personal knowledge of the following:

- The intent of Act 609 of 1993, the intent of the legislators when Act 609 was passed, the basis for the adoption of Act 609, or the general feeling of the legislators or bill sponsors of Act 609.
- The policy the State utilized in 1993.
- The reason R. Neal Watkinson withdrew from the run off election in 1993.
- Interpreting the intent of Judges Suzan Ponder, Alex Wall, Laura Davis, and Christina Peck's testimony on May 19, 2004.
- The population of African Americans in Baton Rouge in 2000, 2004, 2010 or any other year.
- That Representative Erich Ponti successfully lobbied against and opposed House Bill 318 and opposed Representative Williams second House Bill 138.
- Personal knowledge which would allow the affiant to lay the foundation for admission into evidence of Exhibits 1 through 13.

Donald Johnson's affidavit also contains opinion testimony and he has not be qualified as an expert in this matter. An affidavit containing impermissible opinion testimony by a lay witness may be stricken by the court. *Doddy v. OXY USA, Inc.* 101 F.3d 448, 459-60 (5th 1996). Federal Rule of Evidence 701 generally prohibits a witness from offering opinion testimony

unless it is: 1) rationally based on personal perception; 2) helpful to understanding the testimony; and 3) not based on scientific, technical or other specialized knowledge. The material that Donald Johnson opines on does not meet the exception to Fed. R. Evid. 701. His affidavit contains opinion testimony concerning population statistics and population trends, as well as the opinion that Act 609 of 1993 has racially discriminatory effects and/or eliminates the cohesive political strength of African American voters, whether racial polarized voting has occurred in the past or will occur in the future, and voting trends.

In addition to the admissibility problems based on lack of personal knowledge and opinion testimony, the affidavit and its exhibits contain inadmissible hearsay under Fed. R. Evid. 802. The following are just examples as a detailed listing would be too time consuming to create:

- Exhibit 1 to Judge Donald Johnson's Affidavit contains an uncertified copy of Act No. 609 along with a map which was not part of Act No. 609.
- Exhibit 2 to Judge Donald Johnson's Affidavit which is an email from former Senator Woody Jenkins dated April 23, 2014.
- Exhibit 5 to Judge Donald Johnson's Affidavit contains an uncertified copy of House Bill 1505 of the 2001 Regular Legislative Session along with documents entitled Plan Statistics, Assigned District Splits-2000 Census Population, and Assigned Districts Splits Voter Registration 11/03, Baton Rouge City Court Plan (2004) which were not part of House Bill 1505.
- Exhibit 7 to Judge Donald Johnson's Affidavit contains an uncertified copy of the Baton Rouge City Court Administrative Meeting Minutes which are hearsay and to which Judge Donald Johnson does not have personal knowledge as he was not present at the meeting.

Additionally the minutes contain hearsay within hearsay which is precluded by Federal Rule of Evidence 805.

Judge Donald Johnson's Affidavit contains statements which purport to summarize the legislative history of the following legislative instruments: Act 609 of the 1993 Regular Session, House Bill 945 of the 2006 Regular Session, House Bill 198 of the 2014 Regular Session, House Bill 1151 of the 2014 Regular Session, House Bill 1501 of the Regular Session, House Bill No. 1505 of the Regular Session, House Bill 945 of the 2006 Regular Session, House Bill No. 318 of the 2013 Regular Session, House Bill No. 338 of the 2012 Regular Session. The bills themselves are the best evidence of their content pursuant to Fed. R. Evid. 1002 and the affiant's attempt to summarize the legislative acts should be stricken.

It is well-settled that a court may strike any affidavit that is not based on personal knowledge. *CMS Indus., Inc. v. L.P.S. Int'l, Ltd.,* 643 F.2d 289, 295 (5th Cir. 1981); *Akin v. Q-L Invs., Inc.,* 959 F.2d 521, 530 (5th Cir. 1992). Federal Rule of Evidence 602 requires evidentiary support that a witness has personal knowledge of a matter to be able to testify to it. The affiant here does not present any evidence to show he had personal knowledge of the following:[3]

- "White City Court Judges Suzan Ponder, Alex Wall, and Laura Davis, and their agent or attorney, former Assistant Attorney General Christina Peck, personally lobbied the members of the legislature. . ."[4] The reference to Ms. Peck as a former Assistant Attorney General implies that her representation as a private attorney was sanctioned by the Department of Justice and/or reflective of Department of Justice policies which is not true.

[3] This list is solely illustrative of the point, but not all-inclusive.
[4] Rec. Doc. 288-2, pg 2-3.

- The statement that House Bill 338 failed before the full House of Representatives having been defeated by the vote of only White legislators. This statement is prejudicial and implies, with absolutely no supporting evidence that individual legislators voting purely on racial lines. Additionally the document that purports to support this statement, Exhibit 10 to Exhibit A is not attached.
- Asserting that the State, legislators, and other unnamed state officials are belittling the intent of Act 609 of 1993 and depreciating fair representation.

Plaintiffs' exhibit A, Judge Donald Johnson's affidavit and its 12 exhibits fails to conform to the federal requirements for affidavits as it is not limited to matters he has personal knowledge of, he is not an expert and offers opinion testimony, the material contained within is hearsay, and issues arise under the Best evidence rule as well as general relevancy issues. Therefore, it should not be considered evidentiary support for Plaintiffs' motion.

Exhibit B

Plaintiffs' exhibit B, Judge Trudy M. White's affidavit and its exhibit fail to conform to the federal requirements for affidavits as the majority of the material contained within it is irrelevant based on Fed. R. Evid. 401. Judge Trudy M. White's affidavit contains material that is irrelevant; having nothing to do with the motion before honorable court. At least twelve (12) of the sixteen (16) page affidavit contain material on the interworking and internal conflict within the Baton Rouge City Court. The alleged conflicts or issues within the City Court have no bearing on whether the Defendants had discriminatory intent. The discussion of which is not relevant under Fed. R. Evid. 401 and which is immaterial. Some specific examples include but are not limited to:

- The affidavit concerns the alleged transfer of "power and control" to the Clerk / Judicial Administrator which Judge Trudy M. White believed to be purposeful and discriminatory by her White colleagues. This is irrelevant to the present case which is concerned with whether there is discriminatory intent on the part of the Defendants.
- The affidavit alleges discrimination on the part of the Clerk/Judicial Administrator. This is irrelevant to the present case which is concerned with whether there is discriminatory intent on the part of the Defendants.
- The affidavit alleges interoffice conflict between the affiant and her White colleagues. This is irrelevant to the present case which is concerned with whether there is discriminatory intent on the part of the Defendants.
- The alleged actions of the Judicial Administrator are irrelevant to this matter.
- Events surrounding Margo Fleet's termination are irrelevant to this matter.
- Judicial votes on administrative issues and policies of the Baton Rouge City Court are not relevant to this matter.

Further, her affidavit contains matters she does not have personal knowledge of, and she is not an expert and offers opinion testimony. It is well-settled that a court may strike any affidavit that is not based on personal knowledge. *CMS Indus., Inc.,* 643 F.2d at 295; *Akin.,* 959 F.2d at 530. Federal Rule of Evidence 602 requires evidentiary support that a witness has personal knowledge of a matter to be able to testify to it.

The Plaintiff provides no evidentiary support that Judge Trudy M. White has personal knowledge of the following:[5]

- White candidates hiring black campaign workers to walk and put out signage

[5] This list is illustrative not all encompassing.

- White candidates generally have the financial means to buy political influence
- What the White Judges thought of addition of a 6th judgeship

In addition to the admissibility problems based on lack of personal knowledge and opinion testimony, the affidavit and its exhibit contain inadmissible hearsay under Fed. R. Evid. 802. The following are just examples as a detailed listing would be too time consuming to create:

- Requiring candidates to run citywide would dilute minority voters from electing their preferred candidate.
- Local and state officials acted in a purposeful and discriminatory manner.

Plaintiffs' exhibit B, Judge Trudy M. White's affidavit and its exhibit fails to conform to the federal requirements for affidavits. Therefore, it should not be considered evidentiary support for Plaintiffs' motion.

Exhibit C

Plaintiffs' exhibit C, Judge Yvette M. Alexander's affidavit fails to conform to the federal requirements for affidavits as it addresses irrelevant material. Fed. R. Evid. 401. Just like the Affidavit of Judge Trudy M. White, Judge Yvette M. Alexander's contains statements which discuss the interworking of the Baton Rouge City Court which has no relevancy to the cause of action asserted by the Plaintiffs. How the Baton Rouge City Court judicial administrator operated or operates has no bearing on where the Defendants in this case had discriminatory intent regarding Act 609. Thus, her discussion of this irrelevant material should be stricken.

Exhibit J

Plaintiffs' exhibit J, Ernest L. Johnson's affidavit fails to conform to the federal requirements for affidavits as it fails to limit his affidavit to matters he has personal knowledge of, and he is not an expert and offers opinion testimony.

It is well-settled that a court may strike any affidavit that is not based on personal knowledge. *CMS Indus., Inc..,* 643 F.2d at 295; *Akin,* 959 F.2d at 530. Federal Rule of Evidence 602 requires evidentiary support that a witness has personal knowledge of a matter to be able to testify to it. The Plaintiff provides no evidentiary support that Ernest L. Johnson has personal knowledge of the following:[6]

- The role of Attorney General Ieyoub and Governor Edwin Edwards in the resolution of the *Clark v. Edwards* case in 1992.
- The intent of the legislative sponsors and supporters of the Act to "establish a state policy to create a population-based system favoring multimember district for City Court based on the racial majority of the city's white and black population."
- The basis under which State Senators John Michael Guidry and Charles Jones introduced Senate Bill 1126.

Ernest L. Johnson's affidavit also contains opinion testimony and he has not be qualified as an expert in this matter. An affidavit containing impermissible opinion testimony by a lay witness may be stricken by the court. *Doddy,* 101 F.3d at 459-460. Federal Rule of Evidence 701 generally prohibits a witness from offering opinion testimony unless it is: 1) rationally based on personal perception; 2) helpful to understanding the testimony; and 3) not based on scientific, technical or other specialized knowledge. The material that Ernest L. Johnson opines on does not meet the exception to Fed. R. Evid. 701. For example he opines "in my opinion

[6] This list is simply illustrative of items discussed that the affiant does not appear to have personal knowledge of, it is not all inclusive.

demonstrates a pattern of racial bias and illicit motive regarding the Legislature's decision not to adjust the method of electing City Court Judges consistent with … majority rule." Ernest L. Johnson's affidavit contains statements that he does not have personal knowledge of and it should be stricken.

Therefore the affidavits attached to the Plaintiffs' motion for partial summary judgment, Exhibits A, B, C and J, should not be considered evidentiary support and should be struck from the record.

Not only are the affidavits procedurally impaired, the remaining 'evidentiary support' is glaringly lacking. Assertions within a motion for summary judgment must be supported by evidence. [O]nly evidence-not argument, not facts in the complaint-will satisfy the [summary judgment] burden." *Solo Serve Corp. v. Westowne Assoc.,* 929 F.2d 160, 164 (5th Cir. 1991) (internal citation omitted). "Mere conclusory allegations are not competent summary judgment evidence, and they are therefore insufficient to defeat or support a motion for summary judgment." *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Further, "[u]nsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence." *Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1060 (5th Cir. 1994).

Here, the Plaintiffs make allegations within their memorandum that are either unsupported,[7] cite material that is does not exist,[8] is not provided,[9] or does not stand for the premise it is supporting.[10]

---

[7] See Rec. Doc. 288-1, beginning at the "History of Racial Discrimination" Section heading the following sentences provide factual statements but have not citations: pg. 11, 5 sentences; pg. 12, 5 sentences; pg. 13, 3 sentences; pg. 14, 3 sentences; pg. 15, 3 sentences; pg. 16, every sentence on page; pg. 17, 8 sentences; pg. 18, 5 sentences; pg. 19, 7 sentences; pg. 20, 2 sentences; pg. 21, 3 sentences; pg. 22, 5 sentences; pg 23, 5 sentences; pg. 24, 5 sentences; pg. 25, 6 sentences; pg. 26, 4 sentences; pg. 27, 4 sentences; pg. 29, 1 sentence.

[8] See Rec. Doc. 288-1, pg. 18, fn. 22, 23; pg. 19, fn. 25; pg. 24, fn. 48. All provide citations to exhibits that were not submitted to this Honorable Court in support of their motion.

[9] See Rec. Doc. 288-1, pg. 12, fn. 4, 5, 6; pg. 29, fn. 61. All provide a citation but the material is not attached as an exhibit nor is it part of the record.

The Plaintiffs' memorandum heading "History of Racial Discrimination" should contain factual information backed up by supporting material that would be admissible in court, but it actually contains mostly argument with an occasional reference to supporting material that does not stand for that premise. To illustrate this point the Plaintiffs argue that the "State has continued to attempt to expand and reinforce at-large voting for boards of alderman, judges and school boards throughout the 1980s, 1990s, and even as recent as this decade."[11] The supporting material references Judge Donald Johnson's affidavit, but nowhere in his affidavit does he address boards of alderman or school boards at all. Further, nothing in his affidavit discusses the 1980s either. The only at-large voting discussion within the affidavit is regarding Rep. Ponti's 2014 house bill. Thus, the Plaintiffs' are clearly making argumentative statement without proper supporting material.

In the Plaintiffs' memorandum the third heading is no better, titled "History of Baton Rouge City Court." It provides an entire page of purported factual matters without a single piece of supporting material.[12] There is even a block quote from an alleged letter, but not only is there no reference or citation to the letter, it is not attached as an exhibit to this motion. Even when arguments appear supported the support comes up lacking. In four different places the Plaintiffs cite to a reference that does not exist.[13]

Another example is the Plaintiffs' reliance on Ken DeJean's handwritten notes, which were produced inadvertently based on a public records request regarding preclearance records, is not competent evidence much less sufficient to assert discriminatory intent on any of the

---

[10] See Rec. Doc. 288-1, pg. 7, fn. 1; pg. 11, fn 3; pg. 15, fn 19, 20; pg. 21, fn 27. All are alleged to support a premise but the support does not contain that anything to back up the argument.

[11] Rec. Doc. 288-1, pg. 11.

[12] Rec. Doc. 288-1, pg. 16.

[13] Plaintiffs reference to exhibit 11 and exhibit 14 of Donald Johnson's affidavit, but no such items are attached to the affidavit.

Defendants.[14] The note would be inadmissible at trial as it is unauthenticated and contains hearsay. Further, Mr. DeJean's notes were and still are privileged work product.[15]

The Plaintiffs also offer a City Parish Planning Commission bulletin as Exhibit D, but the material is unauthenticated hearsay, which would be inadmissible in court. Therefore, it cannot be valid supporting material for the Plaintiffs here. The above are just a few examples of the failures of the Plaintiffs to evidentiarily support their motion.

The failure to provide competent evidentiary support for a motion is sufficient grounds to deny it. The Plaintiffs' supporting material is so procedurally deficient, that is it not even necessary to evaluate the merits of their motion. It should be denied solely on their failure to materially provide proper evidentiary support to meet their burden.

A. The Plaintiffs' Memorandum Does Not Contain Sufficient Supporting Material to Meet their Initial Burden

In addition to the Plaintiffs' glaring procedural deficiencies, materially the Plaintiffs cannot meet their initial burden to assert a legitimate summary judgment argument. The Plaintiffs are seeking partial summary judgment as to an element required to assert a constitutional challenge under the Fourteenth and Fifteenth Amendments because the challenged law is neutral on its face; they must prove discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977). Here, the Plaintiffs are required to prove discriminatory intent to meet their summary judgment burden, they fail to do so.

When a law is neutral, like the Judicial Election Plan of 1993, the Plaintiffs must provide that the law has a "disproportionally adverse effect that can be traced to a discriminatory purpose." *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 348 (5th Cir. 2011) (internal

[14] See Exhibit A, affidavit of Kenneth C. DeJean.
[15] *Id.*

citation omitted). That purpose must be more than a "mere awareness of consequences." *Id*. at 349 (internal citation omitted).

The United States Supreme Court established a set of factors as a method of determining discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). The factors are: "(1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, (5) legislative history, especially where there are contemporary statements by members of the decision-making body." *Id*. at 267–68. Even if the Plaintiffs could show the Defendants had the knowledge that this inaction would have an adverse impact on a certain racial group that is insufficient to establish discriminatory intent. *United States v. LULAC*, 793 F.2d 636, 647 (5th Cir. 1986).

The Plaintiffs significant procedural and evidentiary deficiencies within their memorandum and leave little legitimate material remaining to support their argument and allegations. What support material remains fails to meet the threshold requirements for a summary judgment mover. Nowhere in Plaintiffs' memorandum do they provide any proper evidence that even implies the Defendants had any discriminatory intent.[16]

To illustrate the failings of the remaining material to meet the mover's heavy initial burden, is the reliance on insinuations and argument. For example, the fact someone filed a lawsuit does not show a general discriminatory intent, nor do stipulations from a twenty-eight (28) year old case.[17] The Plaintiffs also attempt to mischaracterize Judge Parker's finding in

[16] At best the Plaintiffs claim the Attorney General and Governor were asked to conduct hearing, but provide no supporting material to prove that occurred. See Rec. Doc. 288-1, pg. 26-27. The City Parish is only mentioned in a supposed request to the City Council to support legislation with no supporting material. See Rec. Doc. 288-1, pg. 26.

[17] Rec. Doc. 288-1, pg 13.

Clark v. Roemer.[18] There was no finding against the Baton Rouge City Court in that case. *Clark v. Roemer*, 777 F.Supp. 445, 449 (M.D. La. 1990). The fact that an expert reviewed two elections of it does not equal a finding on that matter. The Plaintiffs' reliance on a list of cases[19] filed mostly outside of the Middle District of Louisiana is completely irrelevant to the matter at hand, which is the City Court of Baton Rouge and the Judicial Election Plan, Act 609. The filing of a lawsuit does not prove a history of discrimination against African Americans by the Defendants related to the Baton Rouge City Court. Just because someone files suit does not mean that a person or an entity has discriminated or violated a law. Such an analysis is the same as saying once someone is arrested they obviously are a criminal.

Despite this material being very weak from an evidentiary standpoint, it also should be noted that this material does not fit into any of the factors the United States Supreme Court set out in *Arlington Heights*.[20]

Although the remaining material provided does not related to the Baton Rouge City Court or the creation of the Judicial Election Plan, even if this Court determines it has some bearing on this case the material must be considered in light of the United States Supreme Court's most recent Voting Rights Act decision, *Shelby Cnty., Ala. v. Holder*, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). It discussed the significant improvements made in minority voting rights related to the originally covered states, of which Louisiana was one.

> [M]inority candidates hold office at unprecedented levels. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. …[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in

---

[18] *Id.*

[19] Rec. Doc. 288-1, pg 15.

[20] The Arlington Heights Factors are: 1) historical background of the decision; 2) the specific sequence of events leading up to the decision; 3) departure from the normal procedural sequence; 4) substantive departures and 5) legislative history.

> Congress, State legislatures, and local elected offices. [T]he number of African–Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982, and noted that [i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters. … significant increases in the number of African–Americans serving in elected offices; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African–American elected officials in the six States originally covered by the Voting Rights Act.

Shelby Cnty., Ala., 133 S. Ct. at 2625 (internal citations omitted).

The Plaintiffs have also provided citations to letters from the U.S. Dept. of Justice regarding preclearance, but fail to include these letters as exhibits. It should be noted that according to the U.S. Dept. of Justice only one percent of voting rights changes submitted have been objected it to since its inception in 1965.[21] A few letters about areas outside of Baton Rouge that the Defendants had no control over have no bearing on the intent of the Defendants regarding the Baton Rouge City Court.

In summary, the Plaintiffs' are not entitled to partial summary judgment. Their procedural deficiencies strike the majority of the material they have provided as evidentiary support. The remaining material is either unsupported argument or legal conclusions which are insufficient evidence to support a motion for summary judgment. The slim amount of material that is actually supported by proper evidence comes no where close to the burden the Plaintiffs are required to meet. Therefore, the Plaintiffs' motion should be denied.

II. <u>As a Matter of Law the Plaintiffs are Not Entitled to Summary Judgment</u>

In addition to bearing the burden of showing there is no genuine dispute as to any material fact, the Plaintiffs are also required to prove they are entitled to judgment as a matter of

[21] Section 5 of the Voting Rights Act, United States Department of Justice http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited June 20, 2014)

law. Fed. R. Civ. P. 56. The Plaintiffs cannot show they are entitled to judgment as a matter of law.

It is generally improper to grant summary judgment when the intent of parties is at issue. *Ashman v. Barrows*, 438 F.3d 781, 784 (7th Cir. 2006); *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.,* 685 F.2d 1149, 1156 (9th Cir. 1982); *Ashe v. Distribuidora Norma, Inc.,* CIV. 10-2236 DRD, 2014 WL 1017877 (D.P.R. Mar. 14, 2014). The Plaintiffs' sole issue on summary judgment is whether the Defendants had discriminatory intent.[22] The Plaintiffs' provide nothing to show why it would be proper to grant summary judgment when intent is at issue. Therefore, the Plaintiffs are not entitled to judgment as a matter of law as to the Defendants because it would be improper to grant summary judgment on this issue.

Additionally, the Plaintiffs are not entitled to partial summary judgment regarding "intentional discrimination under the Fourteenth Amendment's Equal Protection Clause."[23] As a matter of law this issue has been decided by this Honorable Court.[24] This Honorable Court specifically dismissed the Plaintiffs' claim under the Equal Protection Clause of the Fourteenth Amendment.[25] Thus, the Plaintiffs are not entitled to a judgment as a matter of law on a matter that was already dismissed with prejudice.

The *Ex Parte Young* exception only pierces Eleventh Amendment immunity for prospective relief. The Plaintiffs are not entitled to a § 1983 and § 1988 award even if they succeed on their constitutional challenges. This Honorable Court dismissed their §1983 and § 1988 claim against the State of Louisiana based on Eleventh Amendment immunity.[26] Generally

---

22 Rec. Doc. 288, pg 3.
23 Rec. Doc. 288, pg 3.
24 See Rec. Doc. 214, pg 17.
25 *Id.*
26 Rec. Doc. 174 and 214.

Eleventh Amendment immunity bars claims for money damages. *Cozzo v. Tangipahoa Parish Council –President Government*, 279 F.3d 273, 280 (5th Cir. 2002).

Plaintiffs' summary judgment motion states "[p]laintiffs sued Defendants Piyush "Bobby Jindal, in his official capacity as Governor of the State of Louisiana; James D. "Buddy" Caldwell, in his official capacity as the Attorney General for the State of Louisiana."[27] This Honorable Court found that the §1983 claims against the Governor and the Attorney General met the *Ex Parte Young* exception to Eleventh Amendment immunity.[28] Yet, the *Ex Parte Young* exception only allows for "suits against state officials in their official capacity in order to enjoin enforcement of an unconstitutional state statute." Rec. Doc. 214, pg. 10 *citing Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (emphasis added). The *Ex Parte Young* doctrine only applies to the aspect of the Plaintiffs' complaint that is seeking prospective relief. *Aguilar v. Tex. Dep't of Crim. Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998). Despite the Court's ruling that *Ex Parte Young* applies, the Plaintiffs are still prohibited from seeking money damages under §1983 because of the State Defendants' Eleventh Amendment immunity. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318 (5th Cir. 2001). *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2011); *Aguilar v. Texas Dep't of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998). The *Ex Parte Young* doctrine does not allow a plaintiff to pierce the Eleventh Amendment immunity of a state official based on past activity seeking monetary damages, which is the § 1983 claim before this Court.

Therefore, as a matter of law the Plaintiffs are not entitled to a judgment in their favor regarding any past activity of the Governor and the Attorney General based on Eleventh

[27] Rec. Doc. 288, pg. 1.
[28] Rec. Doc. 214

Amendment immunity. The only aspect of their § 1983 claims that remains is seeking prospective relief seeking to enjoin enforcement.

Further, as addressed in the Governor and Attorney General's motion for summary judgment, the Plaintiffs' discovery responses admit that they have no evidence of intentional discrimination on behalf of the Governor and the Attorney General.

Plaintiffs' discovery responses admit they have no evidence of personal intentional discrimination by the Attorney General. *See* Rec. Doc. 289-5, Exhibit C, Request for Admission Numbers 1 and 2; *See* Rec. Doc. 289-4, Exhibit B, Request for Admission, Numbers 1 and 2.

The Plaintiffs admit that they have no evidence to support their allegations that the Governor has intentionally discriminated against the Plaintiffs and/or minority voters. See Rec. Doc. 289-6, Exhibit D, Request for Production Numbers 3, 4, 5, 6, 7, 8, 9, 10; See also Rec. Doc. 289-7, Exhibit E, Request for Production Numbers 3, 4, 5, 6, 7, 8, 9, 10. The Plaintiffs cannot be entitled to judgment as a matter of law if they admit they have no evidence to support their motion here before this Court.

The Plaintiffs are not entitled to summary judgment. They have failed to assert why an issue of intent should be decided on summary judgment. Additionally, they are not entitle to judgment on their Equal Protection claim beause it was dismissed with prejudice by this Honorable Court. Further, the Plaintiffs admit they have no evidence of discriminatory intent. Lastly, the Plaintiffs are not entitled to a judgment as a matter of law because Ex Parte Young only allows for suits against state officials in their official capacity when seeking prospective relief not retrospective relief.

III. There are material facts that are genuinely disputed in this matter

In the alternative, if this Court determines that the Plaintiffs have met their burden of showing there is no genuine dispute as to any material facts and that they are entitled to

judgment as a matter of law, despite their procedural and material deficiencies, the Plaintiffs' motion for summary judgment should still be denied. The Defendants provide additional material to deny the Plaintiffs' motion because there are material facts that are genuinely disputed.

There is a fundamental conflict as to what the Attorney General and the Governor can do in regard to the creation and modification of the judicial election sections of the Baton Rouge City Court. It is obvious from the specific constitutional provisions which provide the duties of the Attorney General and Governor that neither has any control over this matter. *See* La. Const. art. II, §§ 1 and 2 and La. Const. art. IV, § 8.

The Plaintiffs appear to assert that the fault of the Attorney General and Governor is in "failing to revise and/or amend the Judicial Election Plan, Act 609."[29] Yet, the creation and/or ability to modify the voting districts is outside of their authority. It is the legislative branch of the State of Louisiana who has that authority. La. Const. art. III, § 1; La. R.S. 13:1952. The Louisiana Legislature created the current Election Sections for the election of City Court Judges and is the proper authority to change or amend the geographic boundaries of those Election Sections. *See* La. Const. art. III, § 1. Alternatively, the City of Baton Rouge can amend its Plan of Government. *See* Plan of Government, Section 11.04.

The Attorney General has no ability to revise or amend an Act of the Louisiana Legislature. The power and authority of the Attorney General is set forth in La. Const. art. IV, § 8. The creation or change to voting districts is not within the authority of the Attorney General. More specifically, the Attorney General has no authority to conduct elections for Baton Rouge City Court. Nor does the Attorney General have any rile in the day-to-day operations of the

[29] Rec. Doc. 288-1, pg. 21.

Baton Rouge City Court.[30] The Plaintiffs fail to assert any specific statutory or constitutional authority that give the Attorney General any rule in conducting elections for Baton Rouge City Court.

Further, the Attorney General's role in preclearance was no more than a procedural responsibility.[31] He does not help create or modify the Act that is the sole action of the legislative body that enacted the law.[32] Whether a Louisiana legislative law or a municipality ordinance was precleared has no impact on the Attorney General's general intent.[33] If the Department of Justice even sought additional information from the State of Louisiana, it was never construed as a final determination.[34] The Attorney General did not have any discriminatory intent regarding the Judicial Election Plan.

Ken DeJean worked for the Louisiana Attorney General's Office for over 48 years.[35] There was never an official policy by the Louisiana Attorney General's Office to blatantly ignore the Voting Rights Act.[36] His notes, provided inadvertently through a public records request for preclearance information, were taken out of context by the Plaintiffs and are being used to assert and stand for premises that are not true.[37] The Attorney General's Office has complied with the Voting Rights Act.

It is a fact that no act or omission by the Governor or the Attorney General can alter the outcome in this case. The Governor and the Attorney General have no authority of any kind to pass legislation relative to the Election Sections for the Baton Rouge City Court. *See* La. Const. art. II, §§ 1 and 2.

---

30 Exhibit A, pg. 2.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*

Just as the Attorney General does not have the ability to revise or amend an Act of the Louisiana Legislature, nor does the Governor. The power and authority of the Governor is set forth in La. Const. art. IV § 5. The creation and/or assignment of voting districts is not within the authority of the Governor. *Id*. Governor Jindal **has not** vetoed any legislation relative to the creation and/or assignment of voting districts by the Baton Rouge City Court.

The Governor only has the right to propose or veto legislation. La. Const. art. IV, § 5. In this case, there is no evidence that the Governor ever vetoed legislation relative to the City Court Judges, and in fact no legislation has been passed by the Legislature since the creation of the Judicial Election Sections as part of the 1993 Election Plan. Further, the Governor has no authority to conduct elections for Baton Rouge City Court, and the Intervenor admits that it has no evidence showing that the Governor has this authority. See Rec. Doc. 289-7, Exhibit E, Request for Production Number 12.

A party cannot have acted or failed to act with discriminatory intent if that party cannot do anything to implement or prevent an action from taking place. That is the exact position the Defendants find themselves in. They played no role in the creation of the Act nor is there any indication from the Plaintiffs material that the Attorney General or Governor did anything to prevent a revision or amendment of it at any point.

The Defendants have shown there clearly are genuine disputes as to material facts in this case by presenting competent evidence in opposition to the Plaintiffs' motion. When conflicting evidence is presented to the court at the summary judgment phase a court should not make a creditability assessment of conflicting evidence. *Louisiana Contractors Licensing Serv., Inc. v. Am. Contractors Exam Servs., Inc.*, CIV.A. 12-560-JJB, 2014 WL 1364815 (M.D. La. Apr. 7,

2014). Here it is clear there is conflicting evidence present, which is sufficient in itself to defeat a motion for summary judgment.

In conclusion, the Plaintiffs' motion for partial summary judgment is glaringly lacking both procedurally and materially. The Plaintiffs' fail to even provide the necessary evidentiary support to meet the high burden required of a motion for summary judgment to assert there is no genuine dispute as to any material fact and that they are entitled to a judgment as a matter of law. The Defendants have provided not only clear law that the Plaintiffs are not entitled to a judgment as a matter of law, but also clear material facts that are in dispute.

WHEREFORE, the Defendants, pray that an Order be issued by this Court which:

1. Denies the Plaintiff's motion for partial summary judgment;
2. For all other legal and equitable remedies available to them.

RESPECTFULLY SUBMITTED,

James D. "Buddy" Caldwell
ATTORNEY GENERAL

/s/ Jessica MP Thornhill
William P. Bryan, III (La. Bar Roll No. 26826)
Madeline Carbonette (La. Bar Roll No. 3873)
Angelique Duhon Freel (La. Bar Roll No. 28561)
Jessica MP Thornhill (La. Bar Roll No. 34118)
Assistant Attorneys General
Louisiana Department of Justice
Civil Division
P. O. BOX 94005
Baton Rouge, Louisiana 70804-9005
Phone: (225) 326-6031; Fax: (225) 326-6099

Counsel for the Defendants, State of Louisiana, and James D. "Buddy" Caldwell, Attorney General, and Bobby Jindal, Governor

MARY E. ROPER, PARISH ATTORNEY

BY: /s/ **Ashley W. Beck**

Ashley W. Beck, LA Bar Roll No. 30180
Assistant Parish Attorney
Sarah S. Monsour, LA Bar Roll No. 30957
Assistant Parish Attorney
222 Saint Louis Street, Room 902
Baton Rouge, Louisiana 70802
Phone: 225.389.3114; Fax: 225.389.5554

/s/ **Christina B. Peck**
CHRISTINA B. PECK (T.A.), (#14302)
ROEDEL, PARSONS, KOCH, BLACHE,
BALHOFF & MCCOLLISTER, A.L.C.
8440 Jefferson Highway, Suite 301
Baton Rouge, Louisiana 70809-7652
Telephone: 225/929-7033; Fax: 225/928-4925

Attorneys for Defendants City of Baton Rouge, Parish of East Baton Rouge and the Honorable Melvin "Kip" Holden, Mayor-President

CERTIFICATE OF SERVICE

I hereby certify that, on June 23, 2014, I electronically filed the forgoing with the Clerk of Court by using the CM/EMF system, which will send a notice of electronic filing to all counsel of record.

_____/s/Jessica MP Thornhill_____
Jessica MP Thornhill