

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

KENNETH HALL,	*	CIVIL ACTION 3:12-cv-657
<i>Plaintiff</i>	*	
	*	
VERSUS	*	
	*	CHIEF JUDGE BRIAN A. JACKSON
	*	
STATE OF LOUISIANA, PIYUSH	*	
(“BOBBY”) JINDAL, in his official	*	
capacity as Governor of the State of	*	MAGISTRATE RICHARD L. BOURGEOIS
Louisiana, JAMES “BUDDY”	*	
CALDWELL, in his official capacity as	*	
Attorney General, and TOM	*	
SCHEDLER, in his official capacity as	*	
the Louisiana Secretary of State, CITY	*	
OF BATON ROUGE, PARISH OF	*	
EAST OF BATON ROUGE, and	*	
BATON ROUGE CITY COURT,	*	
<i>Defendants</i>	*	

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
REGARDING ACTION BY PLAINTIFF, KENNETH HALL

MAY IT PLEASE THE COURT:

Plaintiff has opposed the Secretary of State’s Motion for Summary Judgment based upon the assertion of obscure statutory references and unrelated Attorney General Opinions that were never previously asserted in this action and that have no relevance or application thereto. In direct contradiction to Plaintiff’s previous discovery responses, Plaintiff now claims that the Secretary has new and different investigative and reporting duties and that due to the Secretary’s failure to comply with these duties, he has violated Plaintiff’s rights under the Voting Rights Act. But Plaintiff’s arguments are flawed for numerous reasons (aside from the impropriety of their assertion discussed more fully in the Secretary’s Motion to Strike), particularly as follows:

- Plaintiff is asserting alleged past violations by the Secretary, when Plaintiff’s claim may only concern prospective relief;

- Plaintiff is asserting violations of state law that do not fall within the *Ex Parte Young* exception to qualified immunity;
- Plaintiff's allegations are based upon the application of the One Person, One Vote Principle, which this Court has already ruled is not applicable in this matter;
- Plaintiff has invented a duty possessed by the Secretary due to Plaintiff's mischaracterization of the term "irregularity" so as to apply the term to the issue of judicial reapportionment;
- Plaintiff has relied on statutory authority that has nothing to do with judicial elections or the duties of the Secretary of State;
- Plaintiff has relied on irrelevant Attorney General Opinions relating to preclearance issues under Section 5 of the Voting Rights Act, which are no longer at issue in this case;
- Plaintiff is mistaken in his assertions as to the duties of the State Board of Election Supervisors and that the Secretary is individually responsible for the Board's action or inaction; and
- Plaintiff has failed to provide any evidence to prove that any alleged breach of the Secretary's alleged duties to investigate and report actually caused his harm in this action.

I. LAW AND ARGUMENT

A. Plaintiff did not oppose the Secretary's arguments seeking to dismiss Plaintiff's claims arising under the First, Fourteenth, and Fifteenth Amendments as enforced by 42 U.S.C. § 1983.

The Secretary first notes that Plaintiff did not oppose his arguments seeking dismissal of Plaintiff's claims arising under the First, Fourteenth, and Fifteenth Amendments. Plaintiff

likewise did not submit any evidence to prove that the Secretary of State has intentionally discriminated against him or African Americans in relation to the subject matter of this litigation. Therefore, the Court should enter an order stating that the Secretary of State has not violated Plaintiff's rights arising under the First, Fourteenth, and Fifteenth Amendments to the United States Constitution as well as 42 U.S.C. § 1983.

B. Plaintiff's complaints involve only alleged past violations by the Secretary, when Plaintiff's claim may only concern prospective relief.

Under the Doctrine of *Ex Parte Young*, Plaintiff may only bring a claim against the Secretary of State seeking prospective relief.¹ But his claims asserted in his opposition to the Secretary's Motion for Summary Judgment concern only alleged past violations, particularly that the Secretary of State failed to investigate Plaintiff's claims and report them to the Legislature. But Plaintiff's claims seeking prospective relief against the Secretary due to the alleged duties are now moot. Plaintiff admits that the Legislature is well-aware of his allegations, and if Plaintiff succeeds in this action, the Court will enter a finding of a violation and the Secretary will have no reason to investigate or report it. Accordingly, Plaintiff's claims in his Opposition have no bearing on his claims for prospective relief. Therefore, they cannot be a basis to deny the Secretary's Motion for Summary Judgment.

C. Plaintiff is asserting violations of state law that do not fall within the *Ex Parte Young* exception to qualified immunity.

Plaintiff's claims arising under the Louisiana statutes cited also cannot be brought in this action against the Secretary of State because he is immune from suit in federal court for claims relating to violations of state statutes. Though the Court has ruled that the *Ex Parte Young* doctrine is applicable to Plaintiff's claims arising under federal law, these state law claims "are

¹ *Aguilar v. Tex. Dep't of Crim. Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998) (citing *Saltz v. Tennessee Dep't of Employment Sec.*, 976 F.2d 966, 968 (5th Cir.1992)).

not cognizable in a proceeding under *Ex parte Young* because state officials continue to be immunized from suit in federal court on alleged violations of state law brought under the federal courts' supplemental jurisdiction."²

D. Plaintiff's allegations are based upon the application of the One Person, One Vote Principle, which this Court has already ruled is not applicable in this matter.

Plaintiff's entire argument rests upon the premise that districts must be reapportioned in accordance with the census data when such data is released. Plaintiff is correct that this is the general standard for reapportionment in order to comply with the principle of One Person, One Vote. But this principle, as recognized by this Court, does not apply to judicial elections.³

Instead, the finding of a Voting Rights Act violation in judicial election districts must be premised upon a finding of vote dilution: a determination that is much more complicated than simply applying census results. The presence of vote dilution is a key disputed fact in this case, a fact upon which the parties and experts both disagree. If experts that are well-versed in the issues relating to vote dilution can disagree as to whether it exists in this case, how can the Secretary of State, who is not a judge or attorney, unilaterally investigate such a claim and make such a determination?

For reasons discussed more fully below, the Secretary of State has no power or authority to determine whether vote dilution exists in judicial election districts, nor does he have the power or authority to investigate claims thereof or to report them to the Legislature or anyone else.

² *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1039 (5th Cir. 1998); *See Pennhurst*, 465 U.S. at 103–21, 104 S.Ct. at 909–19; *see also Papasan v. Allain*, 478 U.S. 265, 277, 106 S.Ct. 2932, 2939–40, 92 L.Ed.2d 209 (1986); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251, 105 S.Ct. 1245, 1260, 84 L.Ed.2d 169 (1985); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir.1992), *cert. denied*, 506 U.S. 1087, 113 S.Ct. 1067, 122 L.Ed.2d 371 (1993).

³ *See Ruling and Order*, Rec Doc. 214 at p. 12-13.

E. Plaintiff has invented a duty possessed by the Secretary due to Plaintiff's mischaracterization of the term "irregularity" so as to apply the term to the issue of reapportionment.

As noted in the Secretary's Motion for Summary Judgment, Article IV, § 7 of the Louisiana Constitution does not impose a duty upon the Secretary of State to report issues to the Legislature regarding the constitutionality of apportionments. Louisiana Revised Statute 36:742(5), (8), and (9) likewise do not impose such a duty.

The provision of this statute that are at issue (provision 8) were added by means of Act 517 of 2004 which also created the Elections Compliance Unit (La. R.S. 18:49.1), a division under the umbrella of the Department of State that is comprised mostly of law enforcement officers.⁴ This unit investigates "irregularities" such as voter fraud, bribery of voters, forgery, duplicate voting, and using a false name to vote.⁵ It does not, nor does any other section of the Office of Secretary of State, ever initiate any investigations or make any reports as to charges of unconstitutionality or as to any issues dealing with apportionment or reapportionment of election districts.⁶ Such issues are not considered "irregularities" within the terms of the statute and the statute does not create any duties of the Secretary of State regarding the investigation or reporting thereof. Accordingly, because this statute is wholly inapplicable to the Secretary of State's duties regarding the apportionment or reapportionment of election districts, it cannot serve as a basis to deny the Secretary's Motion for Summary Judgment.

F. Plaintiff has relied on statutory authority that has nothing to do with judicial elections or the duties of the Secretary of State.

Plaintiff next asserts an argument based upon the provisions of La. R.S. 33:1371 which deals with the duties of municipalities concerning election districts which these municipalities

⁴ See 2004 La. Sess. Law Serv. Act 517 (H.B. 548) (WEST).

⁵ See. La. R.S. 18:49.1, La. R.S. 18:1461; La. R.S. 18:1461.2; La. R.S. 18:1461.3; see also 2010 La. Sess. Law Serv. Act 797 (S.B. 615) (WEST).

⁶ See Affidavit of Fred Gwin attached hereto as Exhibit "A."

have the authority to reapportion, and based upon La. R.S. 18:1922 which deals with the apportionment of election districts that elect local governing bodies, such as the police jury, city or parish council, and school board.⁷

These statutes have absolutely nothing to do with judicial election districts, which are the creation of the legislature and within the legislature's exclusive jurisdiction to reapportion. Municipalities never certify the equitable apportionment of judicial election districts to the Secretary of State⁸ because (1) municipalities do not have the authority to provide for a new apportionment plan as required by the statute, and (2) the equitable apportionment is dependent upon the application of the principle of One Person, One Vote, which does not apply to judicial elections.

Regardless, the failure of a municipality or local government to comply with its own duties does not create additional duties for the Secretary of State. The Secretary does not have a duty to investigate compliance with state law.⁹ "When a local jurisdiction ... enacts an ordinance to provide for the reapportionment of their body, said ordinance is presumed valid and in compliance with the constitution and laws of our state. Municipal legislative acts are presumed to be valid and are to be interpreted to sustain validity if susceptible to reasonable interpretation having this effect."¹⁰

Therefore, these provisions likewise cannot serve as a basis to deny the Secretary's Motion for Summary Judgment.

⁷ See La. R.S. 18:1921 (West. 2014).

⁸ See Affidavit of Joanne Reed attached hereto as Exhibit "B."

⁹ Attorney General Opinion dated August 7, 2002 attached hereto as Exhibit "C."

¹⁰ *Id.*; see also *City of Shreveport v. Curry*, 357 So.2d 1078 (La.1978).

G. Plaintiff has relied on irrelevant Attorney General Opinions relating to preclearance issues under Section 5 of the Voting Rights Act, which are no longer at issue in this case.

Plaintiff next relies on Attorney General Opinions from 1991 as his sole basis to conclude that the Secretary of State has substantive, non-ministerial duties and discretion regarding the holding of elections “in absence of a valid reapportionment.” But these Opinions do not concern the “absence of a valid reapportionment.” Rather they all concern the absence of preclearance. Under Section 5 of the Voting Rights Act prior to the decision in *Shelby County*, the Secretary of State could not hold elections that had not been precleared. That is well-known. But the 1993 Judicial Election Plan was precleared. And therefore, the Secretary of State could not refuse to hold any election thereunder. Nothing in these Opinions creates a duty for the Secretary of State to, on his own initiative, investigate whether apportionment of judicial election districts is constitutional, make a finding as to their constitutional makeup, and then report this finding to the Legislature and the Governor. This duty simply does not exist and Plaintiff’s reasoning is flawed. Therefore, these Attorney General Opinions likewise cannot provide a basis to deny the Secretary’s Motion for Summary Judgment.

H. Plaintiff is mistaken in his assertion as to the duties of the State Board of Election Supervisors and that the Secretary is individually responsible for the Board’s action or inaction.

Plaintiff next asserts that the under La. R.S. 18:24, the State Board of Election Supervisors has a duty to review election law and procedures and to report to the legislature as required and that the Secretary is somehow responsible for this failure to do so. But, for similar reasons discussed above, these laws and procedures do not involve issues of reapportionment.

In fact, the following statute proscribes the exact laws and procedures that are to be investigated and reported: “election laws in general, registration procedures, election procedures,

election officials, voting machines, tabulation and transmission of election returns, procedures used for casting and counting absentee by mail and early voting ballots, and any other aspect of elections the board deems appropriate.”¹¹ Nowhere does it state that the Board is to investigate and report on issues of judicial reapportionment. Plaintiff either knew or should have known this before making statutory misrepresentations to this Court.

Moreover, as also discussed above, the Secretary cannot be sued for any alleged violation of the breach of the state statutory duties of the State Board of Election Supervisors. He also cannot be is responsible for the action or inaction of a Board of which he is only a member. Plaintiff has not sued the State Board of Election Supervisors in this action and therefore cannot allege claims against it herein. Therefore, these arguments likewise do not provide a basis to deny the Secretary of State’s Motion for Summary Judgment.

I. Plaintiff has failed to provide any evidence to prove that any alleged breach of the Secretary’s alleged duties to investigate and report actually caused his harm in this action.

Lastly, it should be noted that the essence of Plaintiff’s claim as stated in his Opposition is that the Secretary of State had a statutory duty to investigate and report Plaintiff’s allegations as to the unconstitutionality of the election districts and that the Secretary breached this duty. This claim amounts to a claim of negligence (and also amounts only to a claim for retrospective relief as discussed more fully above).¹² Under Louisiana law, under a negligence theory, in addition to proving that the Defendant breached his duty, Plaintiff must also prove that the breach was the cause-in-fact of his injuries.¹³ But Plaintiff has alleged numerous times in his Complaints, and numerous times in his own Motion for Partial Summary Judgment, that the Legislature and the Governor were “well-aware” that the 1993 Judicial Election Plan was

¹¹ La. R.S. 18:25 (West. 2014).

¹² Plaintiff has already admitted that the Secretary of State has not intentionally discriminated against him.

¹³ *See for example* Audler v. CBC Innovis Inc., 519 F.3d 239, 249 (5th Cir. 2008).

unconstitutional.¹⁴ Therefore, because the Legislature and the Governor already knew of the alleged unconstitutional apportionment for the Baton Rouge City Court, Plaintiff cannot claim that he was injured based upon any breach of the Secretary's duty to inform them.

II. CONCLUSION

The Secretary of State does not have the authority or ability to investigate or report allegations regarding the unconstitutionality of the apportionment of judicial election districts. This authority was not even alleged in Plaintiff's Complaints. Therefore, he cannot be under a "duty" to do so.

Plaintiff has invented this "duty" based upon the cherry-picking of various statutes and opinions that are wholly irrelevant and inapplicable to the case at hand. The Secretary submitted a Motion for Summary Judgment supported by proper summary judgment evidence. Plaintiff has not provided any evidence that is adequate to refute it. Therefore, the Secretary of State is entitled to a judgment as a matter of law dismissing Plaintiff's entire action against him, and his Motion for Summary Judgment should be granted in full.

¹⁴ See for example Rec. Doc. 288-1 at p. 24 ("As a result of the testimony given before the Committee in 2004 and 2006, it was clearly understood that the inherent problem of maintaining the established lines provided in the Judicial Election Plan was racially biased in favor of White candidates and voters."); see also *id.* at p. 27 ("Since the 2000 United States Census the Defendants have known about the demographics of the electorate for City Court ... After the 2010 United States Census, it became obvious that the populations and demographics had drastically changed ..."); at p. 28 ("The effect of overpopulating Election Section 2 and underpopulating Election Section 1 was brought to the attention of the Louisiana Legislature in 2004 by Christina Peck.")

Respectfully Submitted:

SHOWS, CALI & WALSH, LLP

/S/ Beth P. Everett

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 26th day of **June, 2014**, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, and notice will be sent to counsel for Plaintiff, **KENNETH HALL**, and all other counsel of record by operation of the court's electronic filing system.

/s/ Beth P. Everett
BETH P. EVERETT