

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL : CIVIL ACTION NO.: 3:12-CV-0657
 :
VERSUS : CHIEF JUDGE: BAJ
 :
STATE OF LOUISIANA, ET AL. : MAGISTRATE JUDGE: RLB

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
THE INTERVENOR BRYON SHARPER’S COMPLAINT**

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel, come the named defendants, the State of Louisiana, the Louisiana Governor, Bobby Jindal (“Governor”), and the Louisiana Attorney General, James D. “Buddy” Caldwell (“Attorney General”), (collectively the “State Defendants”) who supplement their motion to dismiss (Rec. Doc. No. 142), relating to Intervenor’s complaints (Rec. Doc. Nos. 128, 133, 181) for the reasons set forth below.

I. THE INTERVENOR’S CLAIMS ARE NONJUSTICIABLE

A. The Intervenor’s claims are barred by Eleventh Amendment Immunity

The Intervenor’s complaints should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).¹ The *Ex Parte Young* doctrine carves out a narrow exception to a State’s Eleventh Amendment immunity.² However, such an exception should not abrogate any of the State Defendants’ immunity in this matter. 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

¹ See Rec. Doc. No. 174, Court’s ruling, wherein this Honorable Court ruled on the State Defendants’ Motion to Dismiss as it relates to the Plaintiff, Hall’s Complaints. This Honorable Court granted the State of Louisiana’s motion to dismiss as it related to the Plaintiff’s 1983 claims based on Eleventh Amendment Immunity. This Honorable Court **has not** ruled on the Motion to Dismiss relating to the Intervenor’s Complaints. State Defendants also have pending before this Honorable Court a Motion for Reconsideration (Rec. Doc. No. 184) and an additional Motion to Dismiss (Rec. Doc. No. 190). To the extent Intervenor’s claims are aligned with the Plaintiff Hall, the arguments raised in the Motion for Reconsideration and Motion to Dismiss are adopted herein by *extensio*. Due to the page limitation the State Defendants are limited in the briefing herein.

² Rec. Doc. No. 174.

the Act; and 3) show that each of the defendants threaten to or commence proceedings to enforce the unconstitutional Act.³

Applying the first factor, it is not clear from the complaints from which defendant relief is sought. There is no clearly defined relief sought against the State, the Attorney General or the Governor. Further, allegations based on past alleged indiscretions do not fall within the *Ex Parte Young* exception and must be dismissed.

Next, the second factor prevents the *Ex Parte Young* doctrine from denying the State Defendants immunity here. The Fifth Circuit specifically analyzed this factor and found that the general duties of the Attorney General and Governor do not meet the *Ex Parte Young* exception because neither defendant had “some connection with enforcement.”⁴ There the Court painstakingly dissected *Ex Parte Young* and its progeny.⁵ The court upheld that *Ex Parte Young* requires the ability to enforce the Act in question, whether it is specifically articulated in the statute itself or in the other specific duties of the named defendants.⁶ Factually, it was held that the Governor and the Attorney General did not have the ability to do anything under the law at issue or generally related to the law.⁷ Just as Eleventh Amendment immunity prohibited *Okpalobi* from proceeding based on nonjusticiability, the State Defendants here should be dismissed. Specifically, the Fifth Circuit stated that:

[t]he *Young* principle teaches that it is not merely the general duty to see that the laws of the state are implemented that substantiates the required “connection,” 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

³ *Ex Parte Young*, 209 U.S. 123, 155-56, 28 S. Ct. 441, 452, 52 L. Ed. 714 (1908).

⁴ *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

⁵ *Id.*

⁶ *Id.* at 419.

⁷ *Id.* at 427.

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.⁸

The Fifth Circuit 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.⁹ It is the exact problem with the complaints here.

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

Further, the State Defendants do not concede the complaints even properly make any allegations against them. 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.¹⁰ The State Defendants ask that this Honorable Court consider these specific provisions which articulate the duties of the Attorney General and the Governor respectively. Additionally, nothing within the 1993 Judicial Plan, nor the separate roles as defined by law, give the Governor nor the Attorney General the connection required by the second factor to establish the *Ex Parte Young* exception.

Finally the Intervenor’s complaints fail to meet the third factor required to pierce immunity based on *Ex Parte Young*. None of the State Defendants have threatened to or

⁸ *Okpalobi*, 244 F.3d at 416-17(internal citation omitted)(emphasis added).

⁹ *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010).

¹⁰ Louisiana Constitution Article IV, § 5 and § 8; La. R.S. 49:251, *et seq.*

commenced proceedings to enforce the allegedly unconstitutional Act in question. None of the State Defendants play any role in the Baton Rouge City Court Judges election. Even with that issue aside, in order to meet the *Ex Parte Young* exception, the Intervenor must at the very least allege that the State Defendants have threatened to or are proceeding to enforce the unconstitutional Act. Thus, Eleventh Amendment immunity applies, and the State should be dismissed.

B. The Intervenor's claims are barred by Qualified Immunity

In the absence of allegations by the Intervenor of personal involvement by the State Defendants, they also are protected by qualified immunity.¹¹ No where in the Intervenor's complaints does he assert that the State Defendants were acting outside the course and scope of their lawful power and duties.

II. THE INTERVENOR HAS FAILED TO STATE A CAUSE OF ACTION

A. The Intervenor fails to state a claim upon which relief can be granted

As to the Intervenor's alleged constitutional violations and alleged violation of Section 2, the State Defendants ask this Honorable Court to grant the State Defendants' motion to dismiss. The Intervenor failed to meet his burden to properly plead his complaint. It is the burden of the Intervenor to establish a valid complaint.¹² Conclusory allegations and unwarranted factual deductions will not suffice to avoid a motion to dismiss.¹³ To assert a valid cause of action, the Intervenor must show he is entitled to relief against the named defendants.¹⁴ If the named

¹¹ La. R.S. 9:2798.1(B).

¹² Federal Rule of Civil Procedure (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.

¹³ *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

¹⁴ Fed. R. Civ. P. 8(a)(2).

defendants cannot redress the harm alleged by the Intervenor, then no case or controversy exists and the defendant should be dismissed as a party.¹⁵

Based on the allegations made in the Intervenor's three 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 Intervenor's complaints. Neither the Governor nor the Attorney General has the ability to remedy the Intervenor's complaints. Further, as discussed above, 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 Intervenor's allegations.

B. The one person, one vote principle does not apply to the judiciary¹⁶

The Secretary of State's motion to dismiss eloquently addressed the specific factors that the Intervenor must meet, but has failed to do, in order to be granted injunctive relief and to prevail on the merits. We adopt and provide below:

[T]here 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.

....

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

¹⁵ *Okpalobi*, 244 F.3d at 428-29.

¹⁶ This Honorable Court denied the Plaintiff's preliminary injunction request (Rec. Doc. 45), the State Defendants maintain that any type of injunctive relief would be improper as the Intervenor will not prevail on the merits.

irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment." *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.

....

[I]n *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 *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 [or intervenor], as the Judicial Branch is exempt from the "one-man, one-vote" precept and reapportionment of judicial districts must occur through acts of legislation.¹⁷

Thus, the Intervenor 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.

C. The Intervenor fails to state a claim under Section 2 of the VRA

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 Intervenor has failed to satisfy these requirements. In order to sustain a vote dilution claim under Section 2 a minority group must initially satisfy the *Gingles* test.¹⁸ 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

¹⁷ Rec. Doc. No. 40-1, p. 21-23.

¹⁸ *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986).

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.¹⁹

Failure to satisfy any of the three factors will defeat a vote dilution claim. If the minority group can satisfy these three factors, then it 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.”²⁰

In summary, the test for a vote dilution claim under Section 2 places the burden on the minority group to satisfy the *Gingles* test and the totality of circumstances test. The Intervenor fails to satisfy the *Gingles* test. His submission of census data alone is insufficient.

D. The Intervenor fails to state a claim under Section 3(c) of the VRA

Section 3(c) of the VRA provides a remedy, not a claim for relief. It is a remedial provision, and “does not ... provide a basis on which to state a cause of action.”²¹ It 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.²² Specifically, 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.]²³

¹⁹ *Magnolia Bar Ass’n Inc. v. Lee*, 994 F.2d 1143, 1146 (5th Cir. 1993) (citing *Gingles*, 478 U.S. at 50-51)).

²⁰ 42 U.S.C. § 1973(b).

²¹ *Weber v. White*, 422 F.Supp. 416, 423 (N.D. Tex. 1976).

²² *Id.*

²³ 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 implies that bail-in may be ordered only in limited circumstances.²⁴ 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 these other conditions have been satisfied, a court may retain jurisdiction for a period of time “as it may deem appropriate.”

In this case, there has been no determination of a violation. In the absence of finding a violation, Section 3(c) does not permit bail-in. Further, Section 3(c) is a remedy, not a claim for relief; therefore, the Intervenor’s complaint raising Section 3(c) should be dismissed.

E. The Intervenor 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.”²⁵ “The Amendment grants protection to all persons, not just members of a particular race.”²⁶

The Fifteenth Amendment is not implicated by this case because the 1993 Judicial Election Plan on its face does not restrict the right to vote based on the race of the voter, and the US Department of Justice precleared the 1993 Election Plan. Since voters are allowed to vote regardless of race, the right to vote is not denied or abridged on the basis of the race.

²⁴ 42 U.S.C. §1973a(c).

²⁵ U.S. Const. amend. XV, § 1.

²⁶ *Rice v. Cayetano*, 528 U.S. at 512, 120 S.Ct. 1044 (2000).

F. The Intervenor fails to state a claim under Privileges and Immunities Clause

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.²⁷ 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) take and hold real property, and (8) inform the United States authorities of violations of its laws.²⁸ 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 from the relationship of the citizen and his state established by state law.”²⁹ The right to vote for state officers “is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause.”³⁰ The right to vote in a municipal election is rooted in state law. The Intervenor fails as a matter of law to state a claim under the Privileges or Immunities clause.³¹

G. The Intervenor 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.³² “The official policy or custom must inflict the

²⁷ *Deubert v. Gulf Fed. Savs. Bank*, 820 F.2d 754, 760 (5th Cir.1987).

²⁸ *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)).

²⁹ *Snowden v. Hughes*, 321 U.S. 1, 6–7, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

³⁰ *Id.* at 7, 64 S.Ct. 397.

³¹ *See Citizens' Right to Vote v. Morgan*, 916 F.Supp. 601, 608 (S.D.Miss.1996).

³² *Lee v. Morial*, No. 01–30875, 2002 WL 971519, at *4, 37 Fed.Appx. 88 (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)

plaintiff's injury.”³³ “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 injury.”³⁴ Only prospective injunctive relief is available against states or state employees in their official capacities.³⁵ 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.”³⁶ Allegations of conspiracy “that are merely conclusory, without reference to specific facts, will not suffice.”³⁷ In this case, the Intervenor only makes general allegations regarding a conspiracy to intentionally discriminate and gives no specific reference to facts, thereby failing to state a claim under § 1983.

III. CONCLUSION

For the reasons stated above, the State Defendants respectfully submit that their Motion to Dismiss should be granted and they should be dismissed as parties in this matter.

RESPECTFULLY SUBMITTED,

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³³ . *Lee*, 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)

³⁴ *Lee*, 2002 WL 971519, at *4; *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir.1984) (en banc).

³⁵ *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 336 n. 74 (5th Cir.2009).

³⁶ *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir.2002).

³⁷ *Priester*, 354 F.3d at 420.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2013, a copy of the above and foregoing Memorandum in Support of 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
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