IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LAQUISHA CHANDLER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:21-cv-1531-AMM
	)	
WES ALLEN, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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Plaintiffs assume they can sue directly under Section 2 of the Voting Rights Act because Congress never said they could not. That's backwards. Unless Congress unambiguously creates a private right of action, Plaintiffs do not have one. The text is clear: Section 2 confers no new federal rights. No new rights means no right of action and no enforcement under the vehicle of 42 U.S.C. § 1983. Plaintiffs' Section 2 claim should be dismissed.

Also, "it has been settled for nearly fifty years that a . . . violation of the Equal Protection Clause—including one allegedly arising out of a redistricting effort—" requires a showing of intentional discrimination. *Jacksonville Branch of NAACP v. City of Jacksonville*, 2023 WL 119425, at *4 (11th Cir. Jan. 6, 2023) (Newsom, J., dissenting). Plaintiffs disagree, and apparently concede they have not made that showing. Pls.' Br. at 35. Their Equal Protection claim, too, should be dismissed.

ARGUMENT

I. Section 2 of the Voting Rights Act contains no private right of action.

An *express* private right of action is undeniably absent from the text of Section 2. And an *implied* private right of action should not be read into it for the fundamental reason that the statute creates no new federal rights. The surrounding provisions and broader structure further evince no congressional intent to create a private remedy. The Supreme Court has never said otherwise, and non-binding cases espousing the opposite position are wrong.

A. Section 2 creates no new federal rights.

Where Congress has refrained in a statute from creating "new individual rights, there is no basis for suit, whether under § 1983 or under an implied right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002); *accord Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).

Plaintiffs wait until halfway through their VRA argument to engage with the text of Section 2. When they do, they never identify what new individual right Congress created there. They note that Section 2 "*protects* the 'right of any citizen . . . to vote' free from discrimination." Pls.' Br. at 24 (emphasis added). But protecting an existing right is not creating a private right of action to enforce a new one, and the right to vote free from discrimination has existed since Reconstruction. Indeed, it was enshrined over 150 years ago in the Fifteenth Amendment. *See United States v. Reese*, 92 U.S. 214, 217–18 (1875) ("[T]he [fifteenth] amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress."). Section 2 protects that pre-existing right by delineating how states might violate it and by giving the Attorney General the tools and authority he needs to enforce more effectively the guarantees of the Fifteenth Amendment.[1]

[1] When the VRA was enacted in 1965, "the coverage provided by § 2 was unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Chisom v. Roemer*,

Plaintiffs enlist the aid of *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), where the Eleventh Circuit read Section 1971 of the Voting Rights Act of 1870 as creating new federal rights enforceable under § 1983. Pls.' Br. at 34. The relevant provision states, "No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an [immaterial] error or omission on any record or paper relating to any application, registration, or other act requisite to voting . . . ." 52 U.S.C. § 10101(a)(2)(B). The court analogized this text to Titles VI and IX, which reflect an identical "no person . . . shall" construction, and which the Supreme Court in *Gonzaga* cited as examples of "explicit 'right-or-duty-creating language.'" *Schwier*, 340 F.3d at 1291, 1296 (quoting *Gonzaga*, 536 U.S. at 284).

Plaintiffs argue that Section 2's language resembles that of Section 1971, Title VI, and Title IX, so it too must be read as conferring rights. Pls.' Br. at 24, 34. But of those four, Section 2 is the odd one out. First, it conspicuously lacks the "individually focused" "no person . . . shall" terminology. *Gonzaga*, 536 U.S. at 287.

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501 U.S. 380, 392 (1991); *see also City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) ("[T]he language of § 2 no more than elaborates upon that of the Fifteenth Amendment," and § 2 "was intended to have an effect no different from that of the Fifteenth Amendment itself."). Of course, after the 1982 amendments, "a violation of § 2 is no longer *a fortiori* a violation of the Constitution." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 482 (1997). Nevertheless, Plaintiffs do not argue that the statute, once amended, did more than clarify existing rights to vote free from discrimination. The substitution of "in a manner which results in a denial or abridgement" for "to deny or abridge" reflected Congress's determination "that a 'results' test was necessary to enforce the fourteenth and fifteenth amendments." *Jones v. City of Lubbock*, 727 F.2d 364, 375 (5th Cir. 1984). Understood in that way, the 1982 amendments' "effects test" lowered the evidentiary bar for proving a Section 2 claim. But the underlying right to vote free from discrimination remained the same.

But more fundamentally, the rights recognized in Section 1971 and Titles VI and IX were newly conferred rights upon enactment, whereas the right to vote free from discrimination referenced in Section 2 was not. Take, for example, Section 1971. The federal right of a voter not to be disqualified "because of his or her failure to provide unnecessary information on a voting application" had not been articulated before 1870. *Schwier*, 340 F.3d at 1297. Likewise, Title IX first established the right not to be "subjected to discrimination [on the basis of sex] under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). *Schwier* does not give Plaintiffs the help they need.[2]

Plaintiffs' failure to identify any new right created by Congress in Section 2 is a sufficient ground on which to dismiss the VRA claim, whether brought under Section 2 or § 1983.

B. Section 2 creates no private remedy.

Even if Section 2 created a new federal right, no provision of the VRA contains "clear evidence that Congress intended to authorize" private citizens to seek judicial enforcement of that right. *In re Wild*, 994 F.3d 1244, 1256 (11th Cir. 2021)

[2] Plaintiffs also look for support from *Turtle Mountain Band of Chippewa Indians v. Jaeger*, 2022 WL 2528256, at *5 (D.N.D. July 7, 2022), *Coca v. City of Dodge City*, 2023 WL 2987708, at *5–6 (D. Kan. Apr. 18, 2023), and *Georgia State Conference of NAACP v. Georgia*, 2022 WL 18780945, at *4 (N.D. Ga. Sept. 26, 2022) (three-judge court). The district courts in those cases concluded that Section 2 contains "rights-creating language." But the *Turtle Mountain* court received no push back from defendants on the issue; the *Coca* court merely repeated the *Turtle Mountain* court's scant reasoning; and the *Georgia* court relied on the problematic likening of Section 2's text to that of Titles VI and IX. None of the three considered the arguments made here.

(en banc). Plaintiffs concede that Section 2 itself contains no such evidence, so they jump to Sections 3, 12, and 14 for help, but nothing there can overcome the "presumption against implied rights of action." *Id.* at 1274 (Pryor, C.J., concurring).

Sections 3 and 14. Plaintiffs' reading of Sections 3 and 14 rests upon the age-old logical fallacy of begging the question. Section 3 recognizes a remedy for an aggrieved person in actions brought "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302. Similarly, Section 14 provides attorneys' fees for "the prevailing party, other than the United States," in such actions. *Id.* § 10310(e). From this text, Plaintiffs construct the following syllogism (Pls.' Br. at 26, 28–29):

> Major Premise: Private remedies are available in actions brought under any statute to enforce the Fourteenth or Fifteenth Amendment.
>
> Minor Premise: Section 2 enforces the Fifteenth Amendment.
>
> Conclusion: Private remedies are available for actions brought under Section 2.

This begs the question. Plaintiffs assume that private actions may be brought under Section 2 in the first instance, when that is the very question they purport to answer.[3] That circularity is not "clear evidence" of an implied right of action.

[3] This same syllogistic fallacy did the heavy lifting in *Georgia State Conference of NAACP*, 2022 WL 18780945, at *6 (framing the issue as "whether an action under Section 2 enforces the guarantees of the Fourteenth or Fifteenth Amendments" and thereby assuming that actions may be brought under Section 2). The same was true for Justice Stevens in his *Morse* opinion, joined only by Justice Ginsburg. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 233–34 (1996) (lead opinion) (When a statute, by its terms "is designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments, Congress must have intended it to provide private remedies.").

Justice Thomas recognized this in his dissenting opinion in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). He wrote that although Sections 3 and 14 are some evidence of congressional intent to permit private actions under the Voting Rights Act, they do not "identify any of the provisions under which private plaintiffs may sue." *Id.* at 289 (Thomas, J., dissenting). The "most logical deduction," he wrote, is that "congress meant to address those cases brought pursuant to the private right of action that [the Supreme] Court had recognized as of 1975, *i.e.*, suits under § 5." *Id.* What Plaintiffs need is "clear evidence that Congress intended to authorize" private citizens to sue under Section 2. *In re Wild*, 944 F.3d at 1256. They cannot find that evidence in Section 3 and 14 without first planting it there with the *assumption* that private actions may be brought under Section 2.

Plaintiffs' analysis also ignores that when the VRA was enacted, private parties already could bring actions to enforce the rights guaranteed by the Fourteenth and Fifteenth Amendments through § 1983. *See, e.g.*, *Lane v. Wilson*, 307 U.S. 268, 269 (1939) (Fifteenth Amendment claim brought under 8 U.S.C. § 43, the predecessor to § 1983); *Smith v. Allwight*, 321 U.S. 649, 651 (1944). Section 3 supplements these actions by providing the possibility for judicially imposed preclearance if one of these private "aggrieved persons" vindicates her Fourteenth or Fifteenth Amendment rights through a § 1983 suit. *See League of Women Voters of Fla. v. Fla. Sec'y of State*, 66 F.4th 905, 944 (11th Cir. 2023).

And Section 14 provides additional incentive for private plaintiffs to bring suits under § 1983 "to enforce the voting guarantees of the fourteenth or fifteenth amendment" by providing the prospect of not just "a reasonable attorney's fee," but also "reasonable expert fees, and other reasonable litigation expenses as part of the costs." 52 U.S.C. § 10310(e). This is more than what is guaranteed by the fees provisions of 42 U.S.C. § 1988, which do allow the award of "a reasonably attorney's fee" for a successful plaintiff under § 1983, but expressly allow for "expert fees" only in an "action or proceeding to enforce a provision of section 1981 or 1981a." 42 U.S.C. § 1988(b)-(c). *See, e.g.*, *Favors v. Cuomo*, 39 F. Supp. 3d 276, 308–09 (E.D.N.Y. 2014) (awarding expert fees under Section 14(e) in § 1983 suit alleging Equal Protection Clause violation of "one person one vote"); *Bethune-Hill v. Va. State Bd. of Elections*, 2020 WL 5577824, at *9 (E.D. Va. Sept. 17, 2020) (same, but for racial gerrymandering claim under the Equal Protection Clause).

Thus, the innovation of Section 2 was not that it gave private parties the right to sue state officials for violations of the Fourteenth and Fifteenth Amendment. Rather, as further discussed below, Section 2's purpose is to work with Section 12 to provide the United States with the right to bring civil and criminal enforcement actions to secure those constitutional guarantees.

Section 12. If the "statutory structure provides a discernible enforcement mechanism, *Sandoval* teaches that [the court] ought not to imply a private right of

action because 'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Love v. Delta Air Lines*, 310 F.3d 1347, 1353 (11th Cir. 2002) (quoting *Sandoval*, 532 U.S. at 290). Section 12 indisputably contains "an express provision of one method of enforcing" Section 2. That "is certainly a thumb on [the] scale against finding an implied private cause of action." *Ga. State Conf. of NAACP*, 2022 WL 18780945, at *7. The scale tilts even more under the rule that courts "interpret statutes with a presumption against, not in favor of, the existence of an implied right of action." *Id.* at 1274 (Pryor, C.J., concurring) (citing SCALIA & GARNER, READING LAW § 51, at 313).

Plaintiffs' response is twofold. First, they note examples of implied rights of action appearing in various statutes notwithstanding the presence of other express enforcement mechanisms. They cite *Allen* and *Morse*, which recognized implied rights of action in Sections 5 and 10, respectively, despite Section 12's enforcement mechanism. Pls.' Br. at 30–31. As discussed below, the fractured decisions in *Morse* relied upon *Allen*'s legal reasoning, which was declared defunct by *Sandoval*. The *Allen* court's nonchalant setting aside of Section 12's express enforcement mechanism cannot be extended to the inquiry before the court today.

Plaintiffs again cite *Schwier*, but the court there considered whether Section 1971 was privately enforceable under § 1983, *not* whether Section 1971 contained an implied private right of action (*contra* Pls.' Br. at 31). Having found

that Section 1971 created a federal right, the court then asked whether "Congress intended to 'foreclose a remedy under § 1983 . . . by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Schwier*, 340 F.3d at 1292. The court concluded that enforcement by the Attorney General was not incompatible with individual enforcement, in large part because Section 1971 had been privately enforced from 1871 to 1957. *Id.* at 1294. Unlike here, there was no presumption against the plaintiffs' position. In fact, the presumption worked in favor of finding Section 1971 enforceable under § 1983. *Id.* at 1292. *Schwier* is inapposite.

Plaintiffs then lob a Hail Mary appeal to common sense by rhetorically questioning whether all other courts "got it wrong" who did not "expressly den[y] a private plaintiff the ability to bring a Section 2 claim." Pls.' Br. at 32–33 (quoting *Alpha Phi Alpha Fraternity v. Raffensperger*, No. 1:22-cv-5337-SCJ (N.D. Ga. Jan. 28, 2022), ECF No. 65). The short response is that this Court "would risk error if it relied on assumptions that have gone unstated and unexamined." *Az. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011). The task is to interpret the text of Section 2, not to entertain unauthorized private suits because "that's the way it's always been done." The text refutes the errant tradition of letting private plaintiffs sue directly under Section 2.

C. *Morse* is inapplicable.

Plaintiffs reject Justice Gorsuch's statement, joined by Justice Thomas, in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2350 (2021), that "[the Supreme Court's] cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2." According to Plaintiffs, the Supreme Court decided this question back in 1996 in a divided 2-3-4 decision involving not Section 2, but the private enforceability of Section 10.

Plaintiffs first contend that various comments made by Justice Stevens and Justice Breyer about Section 2 were necessary to their respective conclusions that Section 10 contains an implied right of action. Thus, argue Plaintiffs, any statement about Section 2 is binding on this Court. Pls.' Br. at 17–19. To the contrary, under the *Marks* test, any purported agreement about Section 2 among the fragmented Court is too broad a position to constitute the Court's holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Further, Justice Stevens's analysis hinged upon the use of "contemporary legal context" to inform Congress's intent. *See Morse*, 517 U.S. at 230–31 (plurality opinion). The passing comment about Section 2 that followed was not essential to his conclusion and, as such, is dictum. *See id.* at 232. Similarly, Justice Breyer, joined by two justices, found an implied right of action in Section 10 because "the rationale of [*Allen*] applies with similar force." *Id.* at 240 (Breyer, J., concurring in

the judgment). His reference to Section 2 was not essential to his determination and is also dictum. The question presented in *Morse* concerned Section 10, not Section 2; the narrowest position of agreement among the five justices concurring in the judgment concerned Section 10, not Section 2; thus, any reference to the private enforceability of Section 2 is dictum. *See Ga. State Conf. of NAACP*, 2022 WL 18780945, at *7 n. 6.

Plaintiffs retort that even so, Supreme Court dicta is binding on this Court. Pls.' Br. at 20. They cite Judge Ed Carnes's famous line, "there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). The particular dictum in question in *Schwab* was "not subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta," but rather "well thought out, thoroughly reasoned, and carefully articulated analysis by the Supreme Court describing the scope of one of its own decisions" that comprised "more than five hundred words." *Id.* In contrast, the dictum in *Morse* bears the "throw-away" traits, not the "carefully articulated" ones. Further, it diverges from the text and is based upon repudiated methods of interpretation. As such, it may be "cast aside." *Id.*[4]

[4] Plaintiffs' third response to Defendants' handling of *Morse* is the admonition that *Sandoval* did not overrule *Morse*. Pls.' Br. at 20–21. Defendants agree. Nevertheless, *Morse* does not bind this Court to recognize an implied right of action in Section 2.

Flying under the banner of statutory stare decisis, the gist of Plaintiffs' final point is as follows: congressional inaction following judicial inaction requires further judicial inaction. Pls.' Br. at 21–23. In other words, although the Supreme Court has never decided whether Section 2 contains an implied right of action, Congress has never said otherwise, so lower courts are obligated to maintain the status quo.

True, "Congress' acquiescence to a settled judicial interpretation can suggest adoption of that interpretation." *AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341, 1351 (2021). But it is also true that when "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a court's] statutory interpretation." *Id.* (quoting *Sandoval*, 532 U.S. at 292). Here, because the question has been routinely assumed without having been decided, there is no "settled judicial interpretation" to which Congress has acquiesced. *Id.* Put differently, the Supreme Court never "tossed [the ball] into Congress's court." *Kimble v. Marvel Ent.*, 576 U.S. 446, 456 (2015).

In sum, Defendants here make the same argument as the appellees did in *Allen*. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 556 n.20 (1969) ("Appellees argue that § 5 only conferred a new 'remedy' on the Attorney General of the United States. They argue that it gave citizens no new 'rights,' rather it merely gave the

Attorney General a more effective means of enforcing the guarantees of the Fifteenth Amendment."). The *Allen* court ignored that argument. *Id.* ("It is unnecessary to reach the question of whether the Act creates new 'rights' or merely gives plaintiffs seeking to enforce existing rights new 'remedies.' However the Act is viewed, the inquiry remains whether the right or remedy has been conferred upon the private litigants."). Since *Sandoval*, federal courts can no longer skip to the end. Here, the text of Section 2 conclusively demonstrates that Congress created neither new individual rights nor new private remedies. As such, Plaintiffs' Section 2 claim should be dismissed as a matter of law.

II. Plaintiffs have not plausibly alleged intentional discrimination so as to state a claim under the Equal Protection Clause.

Plaintiffs double down on their bet that a racial gerrymandering claim requires no showing of discriminatory intent. But the law is clear enough: the "Equal Protection Clause forbids 'racial gerrymandering,' that is, *intentionally* assigning citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (emphasis added); *see also Jacksonville Branch of NAACP*, 2023 WL 119425, at *4 n.1 (Newsom, J., dissenting) ("But proof of racial gerrymandering *requires* proof of intentional discrimination."). Of course it does, because "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Plaintiffs do not allege and refuse to

argue, even in the alternative, that the Legislature intentionally discriminated on the basis of race. Pls.' Br. at 35 ("Plaintiffs need not and do not allege intentional discrimination."). Plaintiffs' Equal Protection claim should be dismissed as a matter of law.

Plaintiffs devote the bulk of their response to imploring the court to ignore Defendants' cited authorities because those Equal Protection cases were not of the same precise ilk as Plaintiffs' Equal Protection case. Pls.' Br. at 36–39. Remarkably, Plaintiffs reject out of hand *Arlington Heights*, *Washington v. Davis*, and *Feeney* from the Supreme Court as inapposite. Pls. Br. at 39. And because *League of Women Voters* and *Greater Birmingham Ministries* from the Eleventh Circuit concerned voting restrictions and not racial gerrymandering, Plaintiffs refuse to engage with them as well.[5] *Id.* This should signal that Plaintiffs believe their claim will fail if its feet are held to the same fire as other Equal Protection claims. But the Equal Protection Clause does not mean one thing for Plaintiffs and another thing for everyone else. Discriminatory intent is always a required showing, and Plaintiffs' failure to allege or argue it is fatal.

[5] Plaintiffs also dismiss as inapposite the highly analogous case *Simpson v. Hutchinson*, 636 F. Supp. 3d 951 (E.D. Ark. 2022) (three-judge court), because it involved a vote dilution claim. That distinction is irrelevant; Judge Stras, writing for a unanimous court, employed the very test Plaintiffs invoke here. *See id.* at 956 ("race must be the '*predominant* factor'").

At bottom, Plaintiffs must plead facts plausibly showing that the Legislature as a whole was motivated predominantly by race when drawing the Maps. *Cooper v. Harris*, 581 U.S. at 285, 291 (2017). In other words, the Maps must be "unexplainable on grounds other than race." *Easley v. Cromartie*, 532 U.S. 234, 252 (2001). Plaintiffs' burden is made heavier by the "presumption of good faith that must be accorded legislative enactments," which applies even at this early stage of litigation. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). But Plaintiffs allege nothing more than "racial disparities" and "racial impacts," which are never sufficient alone. Pls.' Br. at 40, 42; *Arlington Heights*, 429 U.S. at 265–66, 271 (Any "discriminatory 'ultimate effect' is without independent constitutional significance."). No real attempt is made to draw the necessary line between alleged discriminatory effects and the intent of those who adopted the Maps. Pls.' Br. at 40, 42.

Further, the twenty-one instances of "packing," the seven of "cracking," and the thirteen of "race was the predominant factor" saturating Plaintiffs' complaint constitute nothing but non-cognizable legal conclusions. And even assuming for the sake of argument that the facts alleged are consistent with a racial gerrymander, "consistent with" is not good enough because it "stops short of the line between possibility and plausibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

CONCLUSION

The Third Amended Complaint is due to be dismissed in full.

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CERTIFICATE OF SERVICE

I certify that on October 13th, 2023, I electronically filed the foregoing notice with the Clerk of the Court using the CM/ECF system, which will send notice to all counsel of record.

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