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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

KHADIDAH STONE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:21-cv-1531-AMM
	)	
Hon. WES ALLEN, in his official capacity as Secretary of State, *et al.*,	)	
	)	
	)	
Defendants.	)	

SECRETARY ALLEN'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs have dismissed all their constitutional challenges, all their challenges to Alabama State House Districts, and most of their challenges to State Senate Districts. In their Fourth Amended Complaint, the remaining Plaintiffs claim that the State's failure to draw additional majority-black State Senate Districts in the Montgomery and Huntsville areas constitutes vote dilution in violation of Section 2 of the Voting Rights Act. Plaintiffs' claim is due to be dismissed.

First, Plaintiffs cannot bring a Section 2 claim under the remedial vehicle of 42 U.S.C. § 1983 for a fundamental reason: Section 2 does not unambiguously confer new rights. Courts must look to "the text and structure of a statute in order to determine if it unambiguously provides enforceable rights." *31 Foster Child. v. Bush*, 329 F.3d 1255, 1270 (11th Cir. 2003). "If they provide some indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite 'clear voice.'" *Id.* And the text, structure, and history of the VRA provide at least "some indication" that Section 2 created no new private right. The VRA was enacted not to create new rights but rather, in the words of the Act's preamble, "to enforce" the preexisting rights guaranteed by "the fifteenth amendment to the Constitution." 79 Stat. 437. And the text places enforcement solely in the hands of the U.S. Attorney General, further "evidenc[ing] a congressional intent to avoid the multiple interpretations of

[the VRA] that might arise if the act created enforceable individual rights." *31 Foster Child.*, 329 F.3d at 1270. It is at least ambiguous whether Section 2 creates enforceable rights, and "[a]mbiguity precludes enforceable rights." *Id.*

Relatedly, it follows that Section 2 itself created no implied right of action, for if there is no new unambiguous right, "there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002). And the parties agree the text contains no express cause of action.

Finally, assuming that private persons may bring Section 2 claims, Plaintiffs have not plausibly alleged that black voters in the Montgomery and Huntsville areas have less opportunity than others to (1) participate in the political process, and (2) elect the candidates of their choice. Both showings are required, *see Chisom v. Roemer*, 501 U.S. 380 (1991), and the Supreme Court's decision in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), sets forth what the first entails. The *Whitcomb* plaintiffs' vote dilution claims failed because they did not show that black voters in 1960s Marion County, Indiana, were not allowed "to register [and] vote, to choose the political party they desired to support, to participate in its affairs [and] to be equally represented on those occasions when legislative candidates were chosen." 403 U.S. at 149. Plaintiffs here have similarly failed to allege such barriers to political participation in 2023 Alabama. As for opportunity to elect, Plaintiffs have not adequately alleged that black and white voters in the Montgomery and Huntsville

regions "*consistently* prefer different candidates" and that "white bloc voting *regularly causes* the candidate preferred by black voters" in those regions "to lose." *Johnson v. Hamrick*, 196 F.3d 1216, 1221 (11th Cir. 1999)

BACKGROUND

On November 4, 2021, Governor Kay Ivey signed into law Senate Bill 1 of the 2021 Second Special Session of the Alabama Legislature. Doc. 126, ¶¶ 23, 77; *see* Ala. Act No. 2021-558. That law provides for the electoral districts of the Alabama Senate. *See* Ala. Code § 29-1-2.3.

On November 16, 2021, Plaintiffs filed suit alleging 21 State House Districts and 12 State Senate Districts in Alabama's 2021 maps violated the Fourteenth Amendment as racial gerrymanders. *See* Doc. 1, ¶¶ 139-48. A three-judge court was convened later that day. Doc. 5. Plaintiffs added a Section 2 claim three months later. Doc. 54; *see also* doc. 57 (amended complaint correcting errors). The State Defendants moved to dismiss the Section 2 claim. Doc. 58. Plaintiffs filed a third amended complaint this summer, doc. 83, and Secretary Allen moved to dismiss all Plaintiffs' claims, doc. 92, as did the Legislators, doc. 93.

While those motions were pending, Plaintiffs filed the (operative) Fourth Amended Complaint on December 6, 2023, which voluntarily dismisses their constitutional claims and alters their Section 2 claim. Doc. 126. Plaintiffs now allege that black voters in Montgomery are carved out of Senate District 25 and packed

into District 26, *id.* ¶ 3, and that black voters in Huntsville are cracked into Senate Districts 2, 7, and 8, *id.* ¶ 4. There being no remaining constitutional claims, the three-judge court disbanded on December 7, 2023. Doc. 127.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "Plaintiffs must plead all facts establishing an entitlement to relief with more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324 (11th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

If a plaintiff has no statutory authority to seek judicial relief in federal court, his suit must be dismissed. *See Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992) (reversing denial of motion to dismiss on ground that Adoption Act neither confers an enforceable right under § 1983 nor contains an implied right of action).

ARGUMENT

I. Section 2 Does Not Unambiguously Confer New Individual Rights.

If a federal statute does not create "new individual rights" "in clear and unambiguous terms," then "there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286, 290 (2002); *accord Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).

The "*Gonzaga* test" is the "established method for ascertaining unambiguous conferral" of "individual rights upon a class of beneficiaries to which the plaintiff belongs." *Health and Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (internal quotation marks omitted). This "significant hurdle" is surmounted "where the provision in question is phrased in terms of the persons benefited and contains rights-creating, individual-centric language with an unmistakable focus on the benefited class." *Id.* at 183-84 (internal quotation marks omitted). Courts "are to look at the text and structure of a statute in order to determine if it unambiguously provides enforceable rights." *31 Foster Child. v. Bush*, 329 F.3d 1255, 1270 (11th Cir. 2003).

With this test, the Supreme Court "plainly repudiate[d] the ready implication of a § 1983 action" that earlier cases "exemplified." *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 330 n. (2015). No longer do federal "courts apply a multifactor balancing test to pick and choose which federal requirements may be enforced by § 1983 and which may not." *Gonzaga*, 536 U.S. at 286. Ultimately, "very few statutes are held to confer rights enforceable under § 1983." *Johnson v. Hous. Auth. of Jefferson Par.*, 442 F.3d 356, 360 (5th Cir. 2006).

Here, the text and structure of the Voting Rights Act reveal that Section 2 created no new individual rights. First, the VRA created new remedies enforceable by the U.S. Attorney General, not new rights enforceable by millions of private

plaintiffs. Second, the right to vote free from discrimination recognized and protected by Section 2 is not a *new* right; in other words, it was not created or conferred by the VRA. Finally, Section 2 does not have "an *unmistakable* focus on the benefited class," *Gonzaga*, 536 U.S. at 284, in lieu of a "general proscription" of "discriminatory conduct." *California v. Sierra Club*, 451 U.S. 287, 294 (1981).

A. Section 2, as an Exercise of Congress's Remedial Authority to Enforce the Fifteenth Amendment, Does Not Confer Substantive Rights on Private Individuals.

Unless a federal statute creates "substantive private rights," *Sandoval*, 532 U.S. at 290, it does not secure "rights enforceable under § 1983." *Gonzaga*, 536 U.S. at 285 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107-08 n.4 (1989)). Congress does not confer substantive rights when enforcing the provisions of the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."); U.S. Amend. XIV § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); U.S. Amend. XV § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). The VRA is an exercise of Congress's power to enforce the "constitutional prohibition against racial discrimination in voting" guaranteed by the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). As such, it created only

"new remedies," not new rights. *Id.* at 308, 315, 329-31.[1] Therefore, Section 2—one of its "remedial portions"—is not privately enforceable under § 1983. *Id.* at 316.

Congress's "parallel" enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment are "corrective or preventive, not definitional." *City of Boerne*, 521 U.S. at 518, 525. As the Supreme Court explained long ago, the Fourteenth Amendment invests Congress with the power only "to provide modes of relief against State legislation[] or State action" "when these are subversive of the fundamental rights specified in the amendment." *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *see also City of Boerne*, 521 U.S. at 524-25 (discussing *Civil Rights Cases*). "Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges." *Civil Rights Cases*, 109 U.S. at 11.

One such positive right is the right to vote free from discrimination. "The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been

[1] "Constitutional remedies, unlike statutory remedies, cannot be authorized as a derivative power based on the legislature's power over the substantive law because Congress has no power over the substance of constitutional rights." Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 701 (2001); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (plurality opinion) (contrasting Congress's broad power to define and prescribe remedies for statutory rights with Congress's limited power to enforce constitutional rights, *i.e.*, rights "not of congressional creation").

granted or secured by the Constitution of the United States; but the last has been." *United States v. Cruikshank*, 92 U.S. 542, 556 (1875); *see also United States v. Reese*, 92 U.S. 214, 217-18 (1875) (describing Fifteenth Amendment as securing a "new constitutional right"). From the ratification of the Fifteenth Amendment up until the passage of the Voting Rights Act of 1965, Congress attempted to secure the right to vote free from discrimination in myriad ways—all largely ineffective. *See Katzenbach*, 383 U.S. at 310-14 (chronicling Congress's "unsuccessful remedies" prescribed "to cure the problem of voting discrimination"). Private plaintiffs also turned, on occasion, to Section 1983 and its statutory predecessor to seek redress for violations of their Fifteenth Amendment rights. *See, e.g.*, *Lane v. Wilson*, 307 U.S. 268, 269 (1939); *cf. Maine v. Thiboutot*, 448 U.S. 1, 26-29 (1980) (Powell, J., dissenting) (relaying history of § 1983 and noting that "cases dealing with purely statutory civil rights claims remain nearly as rare as in the early years").

Despite these "corrective" and "preventive" measures, *City of Boerne*, 521 U.S. at 526, several States—regrettably, including Alabama—persisted in their "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 309. Something more was needed—more than the Enforcement Act of 1870, more than the Civil Rights Acts of 1957, 1960, and 1964, and more than § 1983. Consistent with the scope of its enforcement power, Congress passed in 1965 a "complex scheme" of "stringent new remedies" necessary to "banish the blight of

racial discrimination in voting." *Katzenbach*, 383 U.S. at 308, 315; *see also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (Congress promulgated "in the Voting Rights Act a detailed but limited remedial scheme.").

To name only a few of these new remedies: Section 4(a), the "first of the remedies," banned literacy tests and other discriminatory voting qualifications, *Katzenbach*, 383 U.S. at 316; Section 5 created the "preclearance remedy" that required covered States and local governments to obtain approval for voting changes from a federal court or the Attorney General, *Shelby County v. Holder*, 570 U.S. 529, 551 (2013); Sections 6(b), 7, 9, and 13(a) assigned federal examiners on certification by the Attorney General, *Katzenbach*, 383 U.S. at 316; Section 8 authorized federal poll watchers, *id.*; and Section 2 "broadly prohibit[ed] the use of voting rules to abridge exercise of the franchise on racial grounds," *id*. With these "new, unprecedented remedies," Congress enforced the provisions of the Fifteenth Amendment without making "a *substantive* change in the governing law." *City of Boerne*, 521 U.S. at 519, 526.

This crucial distinction between substance and remedy is on full display in Section 2. As originally enacted, "the coverage provided by § 2 was unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Chisom v. Roemer*, 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."). Section 2 obviously made no "substantive change in the governing law." *City of Boerne*, 521 U.S. at 519. As such, its inclusion in the VRA, by itself, would have done nothing to redress violations of the underlying right to vote free from discrimination that wasn't already being done through § 1983 actions to enforce the Fifteenth Amendment. But Section 2 paired with Section 12 did a new thing: grant the federal government the power to bring civil and criminal actions to secure Fifteenth Amendment rights. *Katzenbach*, 383 U.S. at 316.

In 1982, Congress amended Section 2 by replacing the language "to deny or abridge" with the language "in a manner which results in a denial or abridgement" to reflect its 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). Consequently, "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). But changing the evidentiary bar for proving a Section 2 claim did not confer new substantive rights. Instead, it created at most a prophylactic remedy to protect the underlying constitutional right. *See City of Boerne*, 521 U.S. at 518 (collecting examples of similar remedies promulgated to protect voting rights). Crucially, such "prophylactic legislation" may not "substantively redefine the States' legal

obligations." *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 722 (2003) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

The "stringent new remedies" of the VRA worked. *Katzenbach*, 383 U.S. at 308. As the Supreme Court recognized in 2009, "[v]oter turnout and registration rates now approach parity," blatant "discriminatory evasions of federal decrees are rare," and "minority candidates hold office at unprecedented levels." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (touting "[t]hese improvements" "as a monument to [the VRA's] success"). The success of the VRA is on vivid display in Alabama. As Plaintiffs recount, in Selma, Alabama in 1965 black voter registration rates were below 5%. Doc. 126, ¶ 120. But according to the United States Census Bureau, for the November 2022 election, nearly 63% of black Alabamians were registered to vote, and black voters in Alabama voted at higher rates than black voters nationally and at higher rates than white voters in Alabama.[2]

Finally, where a statute provides a "federal review mechanism," the Supreme Court has been less willing to identify "individually enforceable private rights."

[2] *See* U.S. Census Bureau, Table 4b, *Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2022*, https://bit.ly/3Ts9Gpr (last visited Dec. 17, 2023). The Court may take "take[] judicial notice of these reliable sources of information from" government websites. *Lowe v. Pettway*, No. 2:20-CV-01806-MHH, 2023 WL 2671353, at *13 n.13 (N.D. Ala. Mar. 28, 2023); *see also Shelby Cnty.*, 570 U.S. at 548 (relying on voter turnout data from the Census Bureau).

Gonzaga, 536 U.S. at 289-90.[3] For example, the *Gonzaga* Court held that the Family Educational Rights and Privacy Act's nondisclosure provisions created no rights enforceable under § 1983 *Id.* at 290-91. The Court's conclusion was "buttressed by the mechanism that Congress chose to provide for enforcing those provisions. Congress expressly authorized the Secretary of Education to '*deal with violations*' of the Act …." *Id.* at 289.

The Court contrasted FERPA's authorization of federal enforcement with provisions in the Public Housing Act and the Medicaid Act that lacked a "federal review mechanism." *Id.* at 280, 290. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the Court held that the rent-ceiling provision of the Public Housing Act was enforceable under § 1983 in "significant" part because "the federal agency charged with administering the Public Housing Act had never provided a procedure by which tenants could complain to it about the alleged failures of state welfare agencies to abide by the Act's rent-ceiling provision." *Gonzaga*, 536 U.S. at 280 (internal quotation marks omitted and alterations adopted). And in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the Court also held that a reimbursement provision of the Medicaid Act was privately enforceable in part because there was "no sufficient administrative means

[3] This argument is distinct from the second prong of the § 1983 enforceability inquiry, which asks whether Congress, *after* conferring new individual rights, "specifically foreclosed a remedy under § 1983." *Gonzaga*, 536 U.S. at 284 n.4.

of enforcing the requirement against States that failed to comply." *Gonzaga*, 536 U.S. at 280-81.

Here, like in FERPA, Congress expressly provided for federal enforcement of the VRA's provisions. Pursuant to his powers granted under Section 12 of the VRA, the U.S. Attorney General can and does enforce Section 2 against the States. *See* 52 U.S.C. 10308; *see also* Voting Section Litigation, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, https://www.justice.gov/crt/voting-section-litigation#sec2cases (last visited Dec. 15, 2023). As the Eighth Circuit recently summarized, "If the text and structure of § 2 and § 12 show anything, it is that Congress intended to place enforcement in the hands of the Attorney General, rather than private parties." *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1211 (8th Cir. 2023) ("*Arkansas NAACP*"). This inclusion of a robust and express "federal review mechanism" suggests further that Congress did not confer privately enforceable rights.

In sum, even if text or structure "provide some indication that Congress may have intended to create individual rights" through Section 2, they undoubtedly provide "some indication it may not have," which "means Congress has not spoken with the requisite 'clear voice.'" *31 Foster Child.*, 329 F.3d at 1270. That "[a]mbiguity precludes enforceable rights." *Id.*

B. Section 2 Does Not Unambiguously Confer *New* Rights.

Even if Congress conferred substantive rights with the passage of the VRA, only "*new* rights" are enforceable under § 1983. *Sandoval*, 532 U.S. at 290 (emphasis added). Section 2 protects the right of any citizen to vote free from discrimination. Protecting an existing right is not creating a new one, and the right to vote free from discrimination was enshrined more than 150 years ago in the Fifteenth Amendment. *See Reese*, 92 U.S. at 217-18. Section 2 protects that preexisting 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. Thus, because Section 2 conferred no "new rights," it cannot be privately enforceable under § 1983.

Compare Section 2, which protects an old right, with 52 U.S.C. § 10101(a)(2)(B) (the "Materiality Provision," formerly set forth under Section 101 of the Civil Rights Act of 1964, 42 U.S.C. § 1971), which the Eleventh Circuit has held created a new federal right enforceable under § 1983. *See Schwier v. Cox*, 340 F.3d 1284, 1296-97 (11th Cir. 2003). The Materiality 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 right ostensibly recognized in this text—the right

of a voter not to be disqualified "because of his or her failure to provide unnecessary information on a voting application," *Schwier*, 340 F.3d at 1297—had not been articulated before 1964. If the statute created a right, it was a new right.

Similarly, provisions of Titles VI and IX, which the Supreme Court has cited as statutes containing "explicit rights-creating terms," conferred *new* rights never before articulated in federal law. *Gonzaga*, 536 U.S. at 284. Title VI, for example, conferred the new right not to be "excluded [on the ground of race, color, or national origin] from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.[4] And Title IX established the new 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). These stand in stark contrast to Section 2, which largely "parrot[ed] the precise wording" of the Fifteenth Amendment when enacted, *Kimel*, 528 U.S. at 81, and which did no more than change the evidentiary bar when amended in 1982. *See supra*, at 12. Section 2 does not unambiguously confer new rights.

[4] Harkening back to the point made about Congress's enforcement authority, *supra*, at 8-9, it is worth noting that Titles VI and IX are Spending Clause legislation, not legislation enforcing the Fourteenth or Fifteenth Amendments. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). As such, Titles VI and IX are not purely "remedial" in nature.

C. Section 2 Does Not Unambiguously Confer *Individual* Rights.

Finally, unless a federal statute confers "individual rights," *Gonzaga*, 536 U.S. at 285-86, it does not secure "rights enforceable under § 1983." *Id.* at 285 (quoting *Golden State Transit Corp.*, 493 U.S. at 107-08 n.4). Statutes that "have an aggregate focus," in that "they are not concerned with whether the needs of any particular person have been satisfied … cannot give rise to individual rights." *Id.* at 288 (internal quotation marks omitted). Similarly, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (internal quotation marks omitted); *accord Gonzaga*, 536 U.S. at 273 (The text must be "phrased in terms of the persons benefited.").

Section 2(a) references "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). But there is no presumption of § 1983 enforceability just because a statute "speaks in terms of 'rights.'" *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 18-20 (1981) (holding that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act was not enforceable under § 1983). Rather, courts must take "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created

enforceable rights, privileges, or immunities within the meaning of § 1983." *Suter*, 503 U.S. at 357 (internal quotation marks omitted).

As explained above, the "right" referenced in the text of Section 2(a) is the preexisting right to vote free from discrimination conferred by the Fifteenth Amendment.[5] If Section 2 created a right, it must be something different. And if this different right exists, it must be "unambiguously conferred." *Gonzaga*, 536 U.S. at 282. That federal judges have disagreed over this question is evidence of ambiguity.

In *Georgia State Conf. of NAACP v. Georgia*, the court compared Section 2's text to that of Section 601 of Title VI and concluded that "both provisions clearly confer private rights." 2022 WL 18780945, at *4 (N.D. Ga. Sept. 26, 2022) (three-judge court). The court identified Section 2's new right as "a right not to have one's vote denied or abridged on account of race or color." *Id.*

In contrast, the majority in *Arkansas NAACP* came to a different conclusion. 86 F.4th at 1209-10. It too compared Section 2 to Title VI, but it noticed some important dissimilarities. Section 601 of Title VI begins, "[n]o person … shall … be subjected to discrimination." 42 U.S.C. § 2000d. The "unmistakable focus" is "on the benefited class," not the regulated party. *Gonzaga*, 536 U.S. 286 (internal quotation marks omitted). But Section 2 begins, "No voting qualification … shall be

[5] There is no disputing that the underlying constitutional right to vote free from discrimination, which includes the right to an undiluted vote, is an individual right. *See Shaw v. Hunt*, 517 U.S. 899, 917 (1996); *LULAC v. Perry*, 548 U.S. 399, 437 (2006).

imposed … by any State." 52 U.S.C. § 10301. The focus here is on the conduct prohibited and the party regulated. "It is a 'general proscription' of 'discriminatory conduct, not a grant of a right 'to any identifiable class.'" *Arkansas NAACP*, 86 F.4th at 1209 (quoting *Sierra Club*, 451 U.S. at 294, *Gonzaga*, 536 U.S. at 284). But a phrase or two later Section 2 adjusts its focus to the person benefited—"any citizen." 52 U.S.C. § 10301(a). The majority decided that it "is unclear what to do when a statute focuses on both" the person regulated *and* the individual protected.

If unmistakable clarity and unambiguity is the standard for conferring individual rights enforceable under § 1983, Section 2 does not meet it. "Basic federalism principles confirm" this. *Carey v. Throwe*, 957 F.3d 468, 483 (4th Cir. 2020) ("To the extent [the *Gonzaga*] standard permits a gradation, we think it sound to apply its most exacting lens when inferring a private remedy [that] would upset the usual balance of state and federal power."). "Redistricting is primarily the duty and responsibility of the State, and federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (internal quotation marks omitted and alteration adopted). To scrutinize Section 2 with anything less than the "most exacting lens," *Carey*, 957 F.3d at 483, for the presence of a privately enforceable federal right would "subject to judicial oversight" every state redistricting map "at the behest of a single citizen," *Chapman*

v. Houston Welfare Rights Org., 441 U.S. 600, 645 (1979) (Powell, J., concurring). Section 2's text does not make unmistakably clear Congress's intent to "upset the usual constitutional balance of federal and state powers" in that way. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

II. The VRA Contains No Clear Evidence That Congress Intended To Authorize Private Suits Under Section 2.

"[C]reating a cause of action is a legislative endeavor," *Egbert v. Boule*, 596 U.S. 482, 491 (2022), because to do so "is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation," *id.* at 503 (Gorsuch, J., concurring). Put simply, "private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. The sole role played by a federal court is to look to the "text and structure" of the statute for "clear evidence that Congress intended to authorize" private suits. *In re Wild*, 994 F.3d 1244, 1255-56 (11th Cir. 2021) (en banc).

Congress can make the court's job easy by communicating its intent expressly, as it did in Title II of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000a-3(a) ("Whenever any person has engaged … in any act or practice prohibited by … this title, a civil action for preventive relief … may be instituted by the person aggrieved."). Or Congress can do so by (1) unambiguously conferring a new individual right on a particular class of persons, *Gonzaga*, 536 U.S. at 283, 285, and then (2) "clearly and affirmatively manifest[ing] its intent" "to authorize a would-be

plaintiff to sue," *In re Wild*, 994 F.3d at 1256. Either way, a federal court will not read into a statute that which does not exist clearly and unambiguously on its face. Gone are the days when federal courts "'provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." *Sandoval*, 532 U.S. at 287 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

Plaintiffs have conceded that Congress has not *expressly* authorized private persons to sue under Section 2, as it did in the Civil Rights Act of 1964. Doc. 112-1, at 25. And "a careful examination of the statute's language" reveals no unambiguous conferral of new individual rights nor a clear authorization for plaintiffs to seek judicial enforcement of Section 2. *In re Wild*, 994 F.3d at 1255.

As explained above, Section 2 does not confer "new individual rights" "in clear and unambiguous terms." *Gonzaga*, 536 U.S. at 286, 290. A court's "role in discerning whether personal rights exist in the implied right of action context" does "not differ from its role" "in discerning whether personal rights exist in the § 1983 context." *Id.* at 285. Thus, where Congress confers only new remedies and not new rights, as it did with Section 2, there can be no implied right of action.

Section 3 of the VRA does not change the analysis. That section confers certain powers on a court if, for example, it finds a constitutional violation in a "proceeding instituted by the Attorney General or an aggrieved person." 52 U.S.C. § 10302(c). But Section 3's "aggrieved person" language at most recognizes the

existence of statutes by which private parties could enforce the Fourteenth and Fifteenth Amendments, like Section 1983, which predated the VRA. To the extent Section 3's "aggrieved person" language, added in 1975, refers to VRA actions, "[t]he most logical deduction … is that Congress meant to address those cases brought pursuant to the private right of action that this Court had recognized as of 1975, *i.e.*, suits under § 5, as well as any rights of action that [the Court] might recognize in the future." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 289 (1996) (Thomas, J., dissenting). Thus, while Section 3 recognizes that other private rights of action exist, the provision does not create a new one or show that Section 2 creates one. *See also Arkansas NAACP*, 86 F.4th at 1211.

Finally, this question remains an open one in this Circuit. The Supreme Court has only ever "assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring) (citing *Bolden*, 446 U.S. at 60 n.8 (plurality op.)). Plaintiffs previously argued that the Supreme Court's decided this question in 1996 in a divided 2-3-4 decision involving the private enforceability of Section 10. *See* Doc. 112-1 at 18-22. But they are mistaken.

Plaintiffs contended 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 and that any statement about Section 2

is binding on this court. *Id.* But 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 was dictum. *See Ga. State Conf. of NAACP*, 2022 WL 18780945, at *7 n. 6; *Arkansas NAACP*, 86 F.4th at 1215-16.

While "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 does not bind this Court.

Rather, the question requires an answer. And the text of Section 2 demonstrates that Congress created neither new individual rights nor new private remedies. As such, Plaintiffs' Section 2 claim should be dismissed.

III. Plaintiffs Fail To State A Claim Under The Text Of Section 2.

Even assuming that private plaintiffs have statutory authority to bring a Section 2 claim, Plaintiffs here have failed to state a claim that the challenged electoral systems are not "equally open" to minority voters. Plaintiffs must allege facts plausibly showing that members of a minority group "have less opportunity than other members of the electorate [1] to participate in the political process *and* [2] to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). In *Chisom v. Roemer*, the Supreme Court clarified that Section 2 did "not create two separate and distinct rights." 501 U.S. 380, 397 (1991). Rather, "the opportunity to participate and the opportunity to elect" form a "unitary claim." *Id.* at 397-98. Thus, proving only the second—less opportunity to elect—"is not sufficient to establish a violation unless … it can also be said that the members of the protected class have less opportunity to participate in the political process." *Id.* at 397.

Here, Plaintiffs have proven neither. The facts alleged, if true, do not plausibly show that black voters have less opportunity to participate in the political process, or that legally significant racial bloc voting "*consistently*" occurs and "*regularly causes* the candidate preferred by black voters to lose" in the Montgomery or Huntsville regions. *Johnson v. Hamrick*, 196 F.3d 1216, 1221 (11th Cir. 1999).

A. Plaintiffs Fail to Plead Facts Showing an Unequal Opportunity "to Participate in the Political Process."

To determine if Plaintiffs have plausibly alleged that black voters have "less opportunity than other members of the electorate to participate in the political process," 52 U.S.C. § 10301(b), it is first important to determine what that text means. The Supreme Court's decision in *Chisom* points to the answer. The 1982 amendments to "§ 2 [were] intended to 'codify' the results test employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973)." *Chisom*, 501 U.S. at 394 n.21 (quoting *Gingles*, 478 U.S. at 83-84 (O'Connor, J., concurring in the judgment)). Those two decisions supplied Section 2's key language. And because the phrase "is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (internal quotation marks omitted). Thus, "it is to *Whitcomb* and *White* that [courts] should look in the first instance in determining how great an impairment of minority voting strength is required to establish vote dilution in

violation of § 2." *Gingles*, 478 U.S. at 97 (O'Connor, J., concurring in the judgment).[6]

Whitcomb helps make clear what is *not* enough to establish a vote dilution claim. The plaintiffs in *Whitcomb* challenged the use of a multimember districting scheme in Marion County, Indiana, to elect the county's "eight senators and 15 members of the house," alleging the system illegally "diluted the force and effect of" a heavily black and poor part of Marion County "termed 'the ghetto area.'" 403 U.S. at 128-29. In identifying the "racial element" of plaintiffs' claim, the district court determined the area was "inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom." *Chavis v. Whitcomb*, 305 F. Supp. 1364, 1373 (S.D. Ind. 1969). And the district court found that voters in that area had "almost no political force or control over legislators under the present districting scheme because the effect of their vote is cancelled out by other contrary interest groups in Marion County." *Id.* at 1368. The court concluded further that the plaintiff group's "voting strength … is severely minimized … by virtue of": (1) the control exerted by "party organizations" over nominations in the

[6] *See also Nipper v. Smith*, 39 F.3d 1494, 1517 (11th Cir. 1994) (en banc) (plurality opinion) (same); *LULAC v. Clements*, 999 F.2d 831, 851 (5th Cir. 1993) (en banc) (same).

primary election; (2) the inability of black voters "to be assured of the opportunity of voting for prospective legislators of their choice"; and (3) "the absence of any particular legislator accountable" to black voters residing in the area. *Id.* at 1386; *see also Whitcomb*, 403 U.S. at 135-36 (summarizing district court's conclusions).

Then, there was the lack of proportionality. For "the period 1960 through 1968," the relevant area made up "17.8% of the population" of Marion County, but was home to only "4.75% of the senators and 5.97% of the representatives." *Whitcomb*, 403 U.S. at 133. Part of the disproportionality arose because the voters there "voted heavily Democratic," while "the Republican Party won four of the five elections from 1960 to 1968" and did not slate anyone from the area in several of those elections. *Id.* at 150-52. The district court found vote dilution and ordered single-member districting, under which voters from plaintiffs' area "would elect three members of the house and one senator." *Id.* at 129.

The Supreme Court reversed. Critical to the Court's holding was the lack of "evidence and findings that ghetto residents had less" "opportunity to participate in and influence the selection of candidates and legislators." *Id.* at 149, 153. The Court made clear what these words meant by describing what plaintiffs failed to prove:

> We have described nothing in the record or in the court's findings indicating that poor [blacks] were not allowed [1] to register or vote, [2] to choose the political party they desired to support, [3] to participate in its affairs or [4] to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto

> were [5] regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Id. at 149-50.

This is what "equal opportunity to participate in the political process" means—the ability to register and vote, choose the party one desires to support, participate in its affairs, and have an equal vote when the party's candidates are chosen. The political party the plaintiffs in *Whitcomb* favored in 1960s Marion County was the Democratic Party, and it was "reasonably clear" that their "votes were critical to Democratic Party success." *Id.* at 150. Thus, the Supreme Court explained, "it seem[ed] unlikely that the Democratic Party could afford to overlook the ghetto in slating its candidates." *Id.*

It made *no* difference to the Court that the Democratic Party had lost "four of the five elections from 1960 to 1968." *Id.* The record suggested that "had the Democrats won all of the elections or even most of them, the ghetto would have had no justifiable complaints about representation." *Id.* at 152. That the area did not "have legislative seats in proportion to its populations emerge[d] more as a function of losing elections," not built-in racial bias. *Id.* at 153. The plaintiffs' alleged denial of equal opportunity was "a mere euphemism for political defeat at the polls." *Id.* That was not enough to establish vote dilution.

White v. Regester provides a helpful contrast. There, black voters of Dallas County, Texas, favored the Democratic Party, but at-large elections and "a white-

dominated organization that is in effective control of Democratic Party candidate slating in Dallas County" combined to deny black voters equal opportunity to participate in the political process. 412 U.S. at 766-67. The district court had found that "the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election" and "the so-called 'place' rule limiting candidacy for legislative office from a multimember district to a specified 'place' on the ticket" "enhanced the opportunity for racial discrimination." *Id.* at 766. But "[m]ore fundamentally," the Democratic Party "did not need the support of the [black] community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the [black] community." *Id.* at 767. Because "the black community" was "effectively excluded from participation in the Democratic primary selection process," it "was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." *Id.* Similarly, Mexican-American residents of Bexar County, Texas, were "excluded … from effective participation in political life" by virtue of "cultural incompatibility … conjoined with the poll tax and the most restrictive voter registration procedures in the nation." *Id.* at 768-69. The Supreme Court agreed that plaintiffs had proven an unequal opportunity to participate in the political process. *Id.* at 765-70.

In contrast with the plaintiffs in *White*, Plaintiffs here have not alleged that black voters in Alabama more generally, or Montgomery and Huntsville more

specifically, "have less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). What few allegations are present fail to suggest that black voters in Montgomery or Huntsville have been "denied access to the political system." *Whitcomb*, 503 U.S. at 155. There are no allegations that black voters in the two challenged areas are "not allowed to register to vote, to choose the political party they desire[] to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen." *Id.* at 149.

The most Plaintiffs allege is that in Alabama generally "disparities in voter turnout and voter registration rates remain." Doc. 126, ¶ 153 (alleging that in the 2020 election black voter registration and turnout lagged about nine percent lower than white voter registration and turnout). But this statewide allegation does not satisfy the "intensely local appraisal" demanded by Section 2. *Allen v. Milligan*, 599 U.S. 1, 19 (2023). And even those numbers were relevant to this Montgomery- and Huntsville-focused suit, the same Census records from which Plaintiffs pulled their data show that they fall far short of *Whitcomb*'s standard. For example, Alabama in 2018 had the second highest black voter registration rate in the entire county.[7] And in 2016, black voter turnout in Alabama surpassed white voter turnout by 4%; while

[7] U.S. Census Bureau, Table 4b: *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2018*, https://bit.ly/3v9lWRF (last visited Dec. 18, 2023).

nationally, there was a 4% gap going the other way.[8] The 9-point registration and 8-point turnout gaps in 2020 cannot show a denial of access to the political process[9] when black voters in Alabama in 2022 registered and voted at higher rates than black voters nationally and voted at higher rates than white voters in Alabama.[10]

Plaintiffs also generally allege that socioeconomic "disparities hinder Black Alabamians' opportunity to participate in the political process today." Doc. 126, ¶ 152 (quoting *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1022 (N.D. Ala. 2022)). They allege that "'white Alabamians tend to have more education and therefore higher income' than Black Alabamians," which makes them "'better able than Black Alabamians to afford a car, internet service, a personal computer, or a smart phone; take time off from work; afford to contribute to political campaigns; afford to run for office; [and] have access to better healthcare.'" *Id*. (quoting *Singleton*, 582 F. Supp. 3d at 1022). Plus, "[e]ducation has repeatedly been found to correlate with income [and] independently affects citizens' ability to engage politically." (quoting *Singleton*, 582 F. Supp. 3d at 1022).

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[8] *See* U.S. Census Bureau, Table 4b: *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2016*, https://bit.ly/476t8Lu (last visited Dec. 18, 2013.

[9] U.S. Census Bureau, Table 4b: *Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2020*, https://bit.ly/3RR93UY (last visited Dec. 18, 2013).

[10] *See* U.S. Census Bureau, Table 4b, *Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2022*, https://bit.ly/3Ts9Gpr (last visited Dec. 17, 2023). The Court may take "take[] judicial notice of these reliable sources of information from" government websites. *Lowe*, 2023 WL 2671353, at *13 n.13.

But the same could undoubtedly be said for poor black residents of Marion County in the 1960s. After all, the *Whitcomb* plaintiffs' claim was on behalf of a "minority group[] with lower than average socioeconomic status." *Whitcomb*, 403 U.S. at 132 n.8. *Whitcomb* shows that access to "the political process" means access to voter registration, voting, and participating in the political party of one's choosing, not access to a car or campaign cash. *Id.* at 149. Like the *Whitcomb* plaintiffs, Plaintiffs here plead facts about socioeconomic disparities, but not about disparities when it comes to voting rights. Their Voting Rights Act claim fails.

Based solely on the Amended Complaint, there is every reason to believe that "had the Democrats won all of the elections or even most of them," in Districts 2, 7, 8, and 25, black voters in Montgomery and Huntsville "would have had no justifiable complaints about representation." *Id.* at 152. Thus, "the failure of [black voters] to have legislative seats in proportion to [their] populations emerge more as a function of losing elections," not built-in racial bias. *Id.* at 153. And losing in the political process is not the same as being excluded from it. *See id.*

This conclusion is required not only by the text of Section 2; it is required to ensure that the VRA's "current burdens" are "justified by current needs." *Shelby Cnty.*, 570 U.S. at 536. Permitting Section 2 suits by plaintiffs who enjoy equal access to the political process "would spawn endless litigation." *Whitcomb*, 403 U.S. at 157. And "the authority to conduct race-based redistricting cannot extend

indefinitely into the future." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring). Plaintiffs' claim should be dismissed.

B. Plaintiffs Fail to Plead Facts Showing Less Opportunity to Elect.

Plaintiffs must allege facts plausibly showing that members of a minority group "have less opportunity than other members of the electorate … to elect representatives of their choice." 52 U.S.C. § 10301(b). To make that necessary (but not sufficient) showing, a plaintiff must satisfy the *Gingles* preconditions. *See Gingles*, 478 U.S. at 50 (describing the preconditions as "necessary for … districts to operate to impair minority voters' ability to elect representatives of their choice"). The second and third preconditions are needed to establish that "submergence in a white … district impedes [the minority group's] *ability to elect* its chosen representatives," *id.* at 51 (emphasis added), by thwarting "a distinctive minority vote at least plausibly on account of race," *Allen*, 599 U.S. at 19 (internal quotation marks omitted). "[R]acial bloc voting … never can be assumed, but must be proved in each case," *Shaw v. Reno*, 509 U.S. 630, 653 (1993) Evidence of racial bloc voting in one part of a State cannot provide a "strong basis in evidence for concluding that a § 2 violation exists [elsewhere] in the State." *Shaw v. Hunt*, 517 U.S. 899, 916 (1996). And "to establish the third *Gingles* factor, a plaintiff must show not only that whites vote as a bloc, but also that white bloc voting *regularly causes* the candidate preferred by black voters to lose; in addition, plaintiffs must show not only that

blacks and whites sometimes prefer different candidates, but that blacks and whites *consistently* prefer different candidates." *Johnson v. Hamrick*, 196 F.3d 1216, 1221 (11th Cir. 1999).

First, Plaintiffs focus on "the Montgomery … region," which they apparently define as Montgomery County and District 25. Doc. 126, ¶¶ 2-3. Regarding voting patterns in the region, Plaintiffs allege that during the last ten years "in Montgomery County" elections "at least 85% and usually over 90% of Black voters in Montgomery have consistently supported the same candidates, while white voters' support for those candidates consistently fell below 20%." *Id.* ¶ 97. Plaintiffs, however, do *not* allege that "white bloc voting *regularly causes* the candidate preferred by black voters [in Montgomery County] to lose." *Johnson*, 196 F.3d at 1221. Plaintiffs next allege that for District 25, in 2018, "over 80% of Black voters supported Black candidate David Sadler for Senate District 25, while less than 20% of white voters supported him," and Sadler was defeated. Doc. 126, ¶ 97. But even if one election in which roughly 1 in 5 black voters votes for the "white-preferred candidate" and 1 in 5 white voters votes for the "Black candidate" constituted racially polarized voting, *one* election cannot show that "white bloc voting *regularly causes* the candidate preferred by black voters [in District 25] to lose." *Johnson*, 196 F.3d at 1221. Finally, Plaintiffs try to make up for that fact by alleging that "[i]n races in the current majority-white SD 25, Black candidates and Black-favored

candidates have never won election to the state Senate over the past decade-plus." Doc. 126, ¶ 98. But Plaintiffs never allege that "white bloc voting … *cause[d]*" those other results. *Johnson*, 196 F.3d at 1221. Thus, Plaintiffs have failed to adequately allege legally significant racially polarized voting in the "Montgomery region."

Second, Plaintiffs' allegations about "the Huntsville region" suffer a similar mismatch problem. Doc. 126, ¶ 4. They allege that "[i]n the Huntsville region, SB 1 unnecessarily cracks Black voters in State Senate Districts 2, 7, and 8 in Huntsville …." *Id.* But their "voting patterns" allegations focus instead on "Madison County," not Districts 2, 7, and 8, and not some broader definition of the Huntsville region. Doc. 126, ¶ 99. Allegations about one part of "the Huntsville region" do not satisfy Section 2's "intensely local appraisal." *Allen*, 599 U.S. at 19.

CONCLUSION

The Fourth Amended Complaint should be dismissed.

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CERTIFICATE OF SERVICE

I certify that on December 20, 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.

/s/ Edmund G. LaCour Jr.
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