IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown Plaintiffs, vs. Alvin Jaeger, in his official capacity as Secretary of State of North Dakota, Defendant.	Case No. 3:22-cv-00022 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

INTRODUCTION

On April 15, 2022, Defendant Alvin Jaeger, in his official capacity as Secretary of State of North Dakota ("Defendant Jaeger") filed *Defendant's Motion to Dismiss* (Doc. 17), requesting the Court dismiss Plaintiffs' *Complaint* (Doc. 1) in its entirety on grounds that the Voting Rights Act does not contain a private right of action for violation of Section 2, and therefore Plaintiffs have failed to state a claim and this Court lacks subject matter jurisdiction. Additionally, the Turtle Mountain Band of Chippewa Indians ("Turtle Mountain") and Spirit Lake Tribe ("Spirit Lake") are not "citizen[s] of the United States" under the Voting Rights Act, and the Tribes lack standing in any event. On May 13, 2022, Plaintiffs filed *Plaintiffs' Response in Opposition to the Defendant's Motion to Dismiss* (Doc. 24), opposing *Defendant's Motion to Dismiss* (Doc. 17). On May 20, 2022, the United States filed a *Statement of Interest of the United States* (Doc. 25), arguing that private parties can enforce Section 2 of the Voting Rights Act. "The United States takes no position on any other issue in this case." *Statement of Interest of the United States*, Doc. 25, fn. 1. Defendant Jaeger submits this reply memorandum in support of *Defendant's Motion to Dismiss* (Doc. 17) in order to address the arguments of Plaintiffs and the United States.

ARGUMENT

I. Plaintiffs Do Not Have A Private Right Of Action To Sue To Enjoin The Subject Redistricting Plan

a. Plaintiffs Cannot Enforce Their Section 2 Claim Under The Voting Rights Act

In his initial memorandum in support of this motion (Doc. 17), Defendant Jaeger cited the District Court's *Order* in *Arkansas State Conference NAACP, et. al. v. The Arkansas Board of Apportionment, et. al.* (Doc. 19-2), and relied on *Alexander v. Sandoval*, 532 U.S. 275 (2001) and its progeny, including *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)). Defendant Jaeger argued *Sandoval* and its progeny establish that the United States Supreme Court has shifted in recent years such that judicially implied private rights of action are now extremely disfavored. Section 2 of the Voting Rights Act does not contain an explicit private right of action, and the Court should refuse to imply one under *Sandoval*, as the District Court refused to do in the recent *Arkansas* case.

Plaintiffs and the United States argue that Plaintiffs do in fact have a private right of action to bring this lawsuit under Section 2 of the Voting Rights Act. Doc. 24, pp. 6-16; Doc. 25, pp. 4-18. In support of that proposition, Plaintiffs and the United States cite the United States Supreme Court case *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). Doc. 24, pp. 6-7; Doc. 25, pp. 4-7. In *Morse*, the district court had dismissed a claim under Section 10 of the Voting Rights Act relating to poll taxes "because that section only authorizes enforcement proceedings brought by the Attorney General and does not expressly mention private actions." *Id.* at 230. There is no majority opinion in *Morse*, however, Justice Stevens joined by Justice Ginsburg announced the judgment of the Court, reversing the district court judgment and implying a private right of action to enforce Section 10 of the Voting Rights Act relating to poll taxes. *Morse*, 517

U.S. at 190, 230, 235. Justice Stevens stated the district court's ruling regarding a private right of action under Section 10 "might have been correct if the Voting Rights Act had been enacted recently," but the district court's ruling "fail[ed] to give effect to our cases holding that our evaluation of congressional action 'must take into account its contemporary legal context.'" *Id.* at 230 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 698–699 (1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982). In other words, Justice Stevens recognized that Supreme Court jurisprudence in 1996 would be less likely to imply a private right of action in a federal statute, but he was accounting for the "highly liberal standard for finding private remedies" applied by the Supreme Court in the mid-1960s when the Voting Rights Act was passed. *Morse*, 517 U.S. at 231. When Congress passed the Voting Rights Act, it acted against a "'backdrop' of decisions in which implied causes of action were regularly found." *Id.* In implying a private right of action, Justice Stevens accounted for the "contemporary legal context" at the time of the passage of the Voting Rights Act in the mid-1960s. *Id.* at 230

However, *Morse* was decided years before *Sandoval*. As stated by the *Arkansas* court, "the *Morse* approach to the private-right-of-action analysis does not survive *Sandoval* and its progeny." Doc. 19-2 at p. 27. In *Sandoval*, the Court refused to "revert . . . to the understanding of private causes of action that held sway . . . when [the statute] was enacted." *Sandoval*, 532 U.S. at 287. The *Sandoval* Court found that in the context of implied-right-of-action cases, "contemporary legal context" is not relevant, except "to the extent it clarifies text." *Id.* at 288. Plaintiff's reliance on *Morse* ignores Defendant Jaeger's argument entirely, that the legal reasoning in *Morse* was subsequently abandoned by the United States Supreme Court in *Sandoval* and its progeny.

The United States also cites *Allen v. State Board of Elections*, 393 U.S. 544 (1969), an even older case, for the proposition that Plaintiffs have a private right of action to bring this lawsuit

under Section 2 of the Voting Rights Act. Doc. 25, pp. 5-7. In *Allen*, the Supreme Court implied a private right of action to enforce Section 5 of the Voting Rights Act. However, as stated by the *Arkansas* court, "*Allen* has been relegated to the dustbin of history." Doc. 19-2 at p. 25. Under the landmark decision of the United States Supreme Court in *Shelby County v. Holder*, 570 U.S. 529 (2013), Section 5 of the Voting Rights Act effectively cannot be enforced at all, whether by private parties or the Attorney General of the United States. Further, the reasoning in *Allen* is outdated in light of *Sandoval* and its progeny. In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the United States Supreme Court even used *Allen* as an example of the outdated approach of courts implying causes of action not explicit in statutory text, stating:

> In the mid–20th century, the Court followed a different approach to recognizing implied causes of action than it follows now. During this "*ancien regime,* " *Alexander v. Sandoval,* 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make effective" a statute's purpose, *J.I. Case Co. v. Borak,* 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself. See, *e.g., id.,* at 430–432, 84 S.Ct. 1555 ; ***Allen v. State Bd. of Elections,* 393 U.S. 544, 557, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)** ; *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 239, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies").

Ziglar, 137 S. Ct. at 1855 (emphasis added). The legal reasoning of the United States Supreme Court in the cases cited by Plaintiffs and the United States, *Morse* and *Allen*, is outdated and should not be used to infer a private right of action in Section 2 of the Voting Rights Act despite the absence of explicit text in the statute creating a private right of action.

In any event, neither *Morse* nor *Allen* holds that there is a private right of action to enforce Section 2 of the Voting Rights Act. Relying on reasoning that has been subsequently abandoned by the United States Supreme Court, those cases hold only that Sections 10 and 5 respectively may be privately enforced. Any discussion of Section 2 in *Morse* and *Allen* is merely dicta.

Plaintiffs and the United States also cite the Eighth Circuit case *Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989). Doc. 24, pp. 7-8; Doc. 25, pp. 8-9. In that case, the Eighth Circuit Court of Appeals considered whether an unsuccessful candidate is an "aggrieved person" (a term used in Section 3 of the Voting Rights Act) who could bring a lawsuit under Section 2 of the Voting Rights Act. *Roberts*, 883 F.2d at 620-21. The court held that an unsuccessful candidate is not an "aggrieved person" because the candidate is not someone "whose voting rights have been denied or impaired." *Id.* at 624. The *Arkansas* court explained the limits of the *Roberts* holding:

> *Roberts*'s holding is simply that a losing candidate cannot bring suit to enforce § 2 of the Voting Rights Act. Even if one over-stretched the concept of a holding, *Roberts* at most controls the question of whether a losing candidate meets the definition of "aggrieved person" as that term is used in § 3. But *Roberts* did not purport to announce a sweeping rule that all voters can enforce § 2 of the Voting Rights Act. Even if it had wanted to do so, any such rule would have been unnecessary to the resolution of the case and would therefore have constituted non-binding dicta. *Roberts* is most fairly read as saying that *if* private enforcement of § 2 is authorized, then that authorization *would* be found in the "aggrieved person" language of § 3. And because an unsuccessful candidate does not fall within the definition of "aggrieved person," that candidate would not be authorized to sue *whether or not* § 3 in fact authorized or contemplated private enforcement of § 2 in other contexts.

Doc. 19-2 at p. 29. The discussion of private enforcement of Section 2 in *Roberts* is dicta, and similar to the reasoning in *Morse* and *Allen*, has been supplanted by more recent Supreme Court case law, including *Sandoval* and its progeny. "Under the current Supreme Court framework, it would be inappropriate to imply a private right of action to enforce § 2 of the Voting Rights Act." Doc. 19-2 at p. 30.

For similar reasons, this Court should reject the argument of Plaintiffs and the United States that Congress has ratified a private right of action in Section 2 of the Voting Rights Act. Doc. 24, pp. 15-17; Doc. 25, pp. 9-10. Congress last amended Section 2 in 1982, which was 19 years before the *Sandoval* decision. Plaintiffs and the United States are inviting this Court to take into account

the contemporary legal context in which Congress passed and amended Section 2, and imply that Congress intended a private right of action despite the absence of express statutory language to that effect. This type of consideration is precisely what is what is rejected by *Sandoval* and its progeny. Under current United States Supreme Court jurisprudence, this Court should not imply a private right of action in Section 2 of the Voting Rights Act, regardless of the case law in effect at the times Section 2 of the Voting Rights Act was passed and amended.

Plaintiffs and the United States also rely on the "rights creating language" in Section 2 itself as allegedly establishing that Congress intended to create a private right of action. Doc. 24, pp. 9-19; Doc. 25, pp. 12-13. This argument ignores that *Sandoval* requires both rights-creating language in the statutory provision at issue and that Congress manifest an intent to create a private remedy. *Sandoval*, 532 U.S. at 288-89. With respect to Section 2, Congress has only manifested an intent that the Attorney General of the United States will enforce the provision, not private parties.

Plaintiffs and the United States also rely on the statutory language of Section 3 and Section 14 of the Voting Rights Act. Doc. 24, pp. 10-15; Doc. 25, pp. 12-13.[1] Their reliance on these other sections is misplaced. Section 3 authorizes proceedings by the Attorney General of the United States or "an aggrieved person". 52 U.S.C. § 10302. However, by its express terms, that section only applies to enforcement of "the voting guarantees of the fourteenth or fifteenth amendment". *Id.* Section 2 of the Voting Rights Act is not part of the Fourteenth or Fifteenth Amendment to the United States Constitution. In fact, Section 2 provides additional protection for voting rights not covered by the Constitution itself. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471,

[1] An analysis of the language of Section 12 is also provided in Defendant Jaeger's initial memorandum in support of this motion. Doc. 18, pp. 6-7.

482 (1997); *Chisom v. Roemer*, 501 U.S. 380, 393 (1991). Similarly, Section 14 of the Voting Rights Act states in part, "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs." 52 U.S.C. § 10310. Again, by its plain text, this section applies to actions or proceedings to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment, not Section 2 of the Voting Rights Act.

b. Plaintiffs Cannot Enforce Their Section 2 Claim Under 42 U.S.C. § 1983

Plaintiffs and the United States argue that even if the Voting Rights Act does not itself provide a private right of action, the Plaintiffs may still bring this action under 42 U.S.C. § 1983. Doc. 24, pp. 3-5; Doc. 25, pp. 19-21. However, the United States Supreme Court has held that when a federal statute creates rights, privileges, or immunities, Section 1983 claims are nevertheless precluded when the remedial devices provided in the federal statute are sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of a lawsuit under Section 1983. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981). The State may show Congress "shut the door to private enforcement…" "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983". *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002).

Section 12 of the Voting Rights Act provides a comprehensive scheme to enforce Section 2, among other sections, by the Attorney General of the United States. 52 U.S.C. § 10308. This includes a right of the Attorney General to seek an injunction, and potential penalties of a fine up to $5,000 and/or be imprisoned for up to five years. *Id.* With respect to Section 2, the plain language of the Voting Rights Act provides for enforcement by the Attorney General only, not by

private parties. Plaintiffs should not be permitted to circumvent the comprehensive enforcement scheme provided by Congress in the Voting Rights Act by using Section 1983.

II. Turtle Mountain And Spirit Lake Lack Standing

a. *Parens Patriae*

Plaintiffs argue the Turtle Mountain and Spirit Lake Tribes have standing to sue on behalf of their members as *parens patriae*. Doc. 24, pp. 21-25. The United States Supreme Court and the Eighth Circuit Court of Appeals have never expressly recognized a tribe as having *parens patriae* standing in any case. The Eighth Circuit Court of Appeals has previously entertained but rejected arguments for tribal *parens patriae* in individual cases. Importantly, in its discussion of *parens patriae*, the Eighth circuit and other courts have applied a more restrictive test to Native American tribes than the United States Supreme Court has applied to states. Plaintiffs rely on *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). Doc. 24, p. 21-22. However, *Snapp* involved a claim of *parens patriae* standing by the Commonwealth of Puerto Rico, not a tribe. Throughout the opinion, the United States Supreme Court discussed *parens patriae* standing by states, and the Court held that the Commonwealth of Puerto Rico is similarly situated with the states with respect *parens patriae* standing. *Snapp*, 458 U.S. at 608, n. 15. The Court in *Snapp* did not recognize or lay out the specific test for *parens patriae* with respect to tribes. After the decision in *Snapp*, multiple courts, including the Eighth Circuit Court of Appeals, have discussed *parens patriae* asserted by tribes and found the alleged injury must be to <u>all</u> members of the population, not merely a subset of the population. *U.S. v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 734 (8th Cir. 2001); N*avajo Nation v. Superior Court of State of Wash. for Yakima Cty.*, 47 F. Supp.2d 1233, 1240 (E.D. Wash. 1999); *Kickapoo Traditional Tribe of Tex. v. Chacon*, 46 F. Supp.2d 644, 651 (W.D. Tex. 1999); *Ala. and Coushatta Tribes of Tex. v. Trustees*

of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1327 (E.D. Tex. 1993); *Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990).

Turtle Mountain and Spirit Lake make no allegations on behalf of the many thousands of tribal members not living on or near one of their respective reservations, or on behalf of the members living outside of the challenged districts. Plaintiffs have cited no legal authority establishing that voters have a legally cognizable interest in districting involving a district in which they do not reside, merely because they are members of a tribe which has a reservation in that district. Additionally, Turtle Mountain and Spirit Lake have not asserted a quasi-sovereign interest, such as an interest in the health or well-being of their residents. *Snapp*, 458 U.S. at 607.

b. Organizational Standing

Plaintiffs argue Turtle Mountain and Spirit Lake have standing based on alleged diversion of organizational resources. Doc. 24, p. 25-27. To establish organizational standing based on diversion of resources, the Turtle Mountain and Spirit Lake Tribes must allege they suffered "distinct and palpable injuries" that are "fairly traceable" to Defendant's alleged actions. *Ark. ACORN Fair Hous., Inc. v. Greystone Dev. Ltd. Co.*, 160 F.3d 433, 434 (8th Cir. 1998) (cleaned up). This can be shown where a plaintiff "devote[s] significant resources to identify and counteract a defendant's allegedly unlawful practices." *Id*. In this case, the alleged diversion of resources constituted nothing more than typical lobbying and testimony before the North Dakota Legislative Assembly redistricting committees, which occurred prior to the passage of the law establishing the challenged districts. Plaintiffs' lobbying efforts prior to the enactment of the law at issue in this case are not damages to be recovered, and do not establish organizational standing to challenge an enacted law. Plaintiffs do not allege the challenged law has caused Turtle Mountain and Spirit Lake to divert resources. Rather, they allege only that they undertook efforts to lobby the North

Dakota Legislative Assembly prior to the passage of the challenged law. They have cited no authority that such pre-enactment lobbying efforts establish organizational standing.

c. Associational Standing

Citing a Nevada district court case, Plaintiffs state, "The ability to assert standing no less applies to Tribes than it does to an association on behalf of its members." Doc. 24, p. 28 (citing *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1200 (D. Nev. 2009), aff'd in part, rev'd in part sub nom., *S. Fork Band Council Of W. Shoshone Of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009)). However, the case cited by Plaintiffs, *S. Fork Band*, provides no analysis and cites no authority, simply making the conclusory statement that the plaintiff tribes' "standing can be viewed as analogous to organizational standing." *S. Fork Band*, 643 F. Supp. 2d at 1200. *S. Fork Band* does not provide precedent that tribes may assert associational standing. Further, *S. Fork Band* is inapplicable as that case only discusses standing in the context of a claim by tribes against the federal government under the Religious Freedom Restoration Act, a federal law that includes a waiver of sovereign immunity and grants to tribes the right to bring claims for violations of the Act. *Id.* at 1200-02; 42 U.S.C.A. § 2000bb-1. Plaintiffs have cited no legal authority that they are an association entitled to assert associational standing.

CONCLUSION

For the foregoing reasons and the reasons discussed in the *Memorandum in Support of Defendant's Motion to Dismiss* (Doc. 18), Defendant Jaeger respectfully requests the Court dismiss Plaintiffs' *Complaint* (Doc. 1) in its entirety.

Dated this 27th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** was on the 27th day of May, 2022, filed electronically with the Clerk of Court through ECF:

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