Case No. 23-3910

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH L. SIMON, ET AL.,

Plaintiffs-Appellants

v.

MIKE DEWINE, ET AL.,

Defendants-Appellees.

On Appeal from the
United States District Court
for the Northern District of Ohio

Case No. 4:22-CV-00612-JRA

BRIEF OF APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Because this case raises important issues, Appellees request oral argument.

STATEMENT OF THE ISSUES

This appeal presents five questions:

1. Whether the district court properly found that, with respect to Appellants' Section 2 claims, the preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986), must be satisfied before the totality-of-the-circumstances test would apply;

2. Whether the district court properly found that Appellants failed to satisfy the *Gingles* preconditions test;

3. Whether the district court properly found that Appellants failed to plausibly allege a claim under the Fourteenth and Fifteenth Amendments;

4. Whether the district court correctly held that a three-judge panel was not required because Appellants' claims are wholly insubstantial; and

5. Whether a private cause of action exists for violations of Section 2 of the Voting Rights Act.

INTRODUCTION

Ohio passed a Congressional redistricting plan on March 2, 2022 and implemented it in time for the May 3 primary election. Dissatisfied with the plan, Appellants brought claims under Section 2 of the Voting Rights Act ("VRA") and asserted violations of rights under the First[1], Fourteenth, and Fifteenth Amendment. Appellants also requested a three-judge panel under 28 U.S.C. § 2284(a).

The district court properly denied their request and dismissed their claims. The district court correctly found that Appellants' claims are wholly insubstantial because Appellants' VRA claim falls "woefully short of meeting the *Gingles* test" and there are no supporting factual allegations for Appellants' constitutional claims.

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[1] While Appellants pleaded a First Amendment challenge in the Fourth Claim for Relief in their Complaint, they failed to object to the Magistrate's Report and Recommendation dismissing these claims and, as the district court properly found, waived any challenge to the dismissal of those claims. Order Adopting R&R, R. 33, PageID# 1210-1211. Moreover, Appellants do not reference their Fourth Claim for Relief in their brief nor do they make any attempt at developing any argument under the First Amendment or Section 1 of the Fourteenth Amendment. Any such arguments are therefore waived *See West v. Bode*, 162 Ohio St.3d 293, 305, 2020-Ohio-5473, ¶ 43, 165 N.E.3d 298, 309 (appellants did not preserve their due-process argument where they failed to "develop any specific argument with respect to due process" in their merit brief); *Util. Serv. Partners v. PUC*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 53 (argument effectively waived where "[n]o argument is supplied regarding whether the relevant case law, applied to the facts of this case, justifies a decision in [the party's] favor"). In any event, any First Amendment claim is meritless under *Rucho v. Common Cause*, 139 S.Ct. 2484, 2508, 204 L.Ed.2d 931 (2019), and any claim under Section 1 of the Fourteenth Amendment is meritless for the same reasons that apply to Appellants' remaining constitutional claims (discussed further in Section III, *infra*).

Moreover, in light of the recent ruling in the Eighth Circuit, Appellants' VRA claim should be dismissed as a matter of law as no private right of action exists under Section 2 of the VRA.

STATEMENT OF THE CASE AND FACTS

A. Congressional Redistricting Under Article XIX of the Ohio Constitution.

Article XIX of the Ohio Constitution provides the three-step framework for drawing Ohio's fifteen congressional districts. First, by September 30 of any year ending in the numeral one after the release of the federal decennial census, the General Assembly must pass a district plan in the form of a bill by a vote of at least three-fifths of the members of each of the two largest political parties. Ohio Const., art. XIX, § 1(A); *Adams et al. v. DeWine et al*., 167 Ohio St.3d 499, 2022-Ohio-89, ¶ 8, 195 N.E.3d 74. If the General Assembly passes a plan in this first step, the plan remains valid for ten years. *Id.*

Second, if the General Assembly fails to pass a plan in the first step by September 30, the Ohio Redistricting Commission must adopt a plan by October 31. Ohio Const., art. XIX, § 1(B), *Adams* at ¶ 9. The Commission must approve a plan by a majority vote, which must include at least two members from each of the two largest political parties. *Id.* If the Commission passes a plan in this second step by the required vote, the plan will also remain valid for ten years. *Id.*

Third, if the Commission does not pass a plan in the second step by October 31, the General Assembly must pass a plan as a bill by November 30. Ohio Const., art. XIX, § 1(C)(1), *Adams* at ¶ 10. If the General Assembly passes the plan by a three-fifths vote of each house, the plan is valid for ten years. Ohio Const., art. XIX, § 1(C)(2). A plan approved by a simple majority of each house is valid for four years. Ohio Const., art. XIX, § 1(C)(3).

Ohio Constitution article XIX, section 3, gives the Ohio Supreme Court exclusive, original jurisdiction over all cases involving the drafting of a congressional district plan and it sets forth the exclusive remedies should the Court invalidate a congressional plan. *See Adams* at ¶ 12. Section 3(B)(1) sets out a two-step process for remedying an invalidated plan. First, the General Assembly must pass a plan "in accordance with the provisions of this constitution that are then valid" within thirty days after the Ohio Supreme Court's invalidation order. Ohio Const., art. XIX, § 3(B)(1), *Adams* at ¶ 97. Second, if the General Assembly does not pass a plan within the thirty-day deadline, then the Ohio Redistricting Commission has thirty days to "adopt a congressional district plan in accordance with the provisions of this constitution that are then valid." Ohio Const., art. XIX, § 3(B)(2), *Adams* at ¶ 98.

B. The May 3 Primary Election Proceeded with the Second Congressional Plan passed by the Ohio Redistricting Commission on March 2, 2022.

"Based on the results of the 2020 census, Ohio was apportioned 15 congressional seats—one fewer than it was apportioned in 2011." *Adams* at ¶ 13. The General Assembly did not pass a new congressional plan by the September 30, 2021, deadline and the Ohio Redistricting Commission did not pass a plan by the October 31, 2021, deadline. *Adams* at ¶¶ 13-14; *see also* Ohio Const., art. XIX, §§ 3(B)(1) and (2). On the third step, however, the General Assembly adopted Ohio's Congressional Plan by a simple majority via S.B. No. 258 on November 16, 2021. *Adams* at ¶ 21.

Ten days later, two sets of petitioners brought lawsuits at the Ohio Supreme Court challenging the constitutionality of the November 16, 2021, Congressional Plan. *Adams* at ¶ 23. On January 14, 2022, the Ohio Supreme Court invalidated the November 16, 2021, Congressional Plan and ordered the General Assembly to pass a new congressional district plan. *Id.* at ¶ 102.

The General Assembly did not pass a new congressional plan within thirty days of the Ohio Supreme Court's January 14, 2022, invalidation order. Thus, the Ohio Redistricting Commission was reconvened and it passed a new Congressional Plan on March 2, 2022. *See* Compl. ¶ 5, R. 1, PageID# 4; Ex. B to Mtn. to Dismiss, R. 15-1, PageID# 1087; Ex. A to Mtn. to Dismiss, R. 15-2, PageID# 1089-91. On

the same day, the Secretary of State issued Directive 2022-27 where he instructed the county boards of election to implement the March 2 Plan in time for the May 3 primary election. *See id.*

C. Appellants filed suit against multiple state officials and the Ohio Redistricting Commission.

Dissatisfied with the March 2 Plan, Appellants filed suit against multiple state officials and the Ohio Redistricting Commission. The Appellants are a group of Black voters residing in the 6th U.S. Congressional District in the March 2 Plan, who allege violations of the Voting Rights Act, and the Fifteenth, Fourteenth and First Amendments to the U.S. Constitution. Compl. ¶¶ 62-65, 69-72, 76, & 78, R. 1, PageID# 21-25. Along with their Complaint, Appellants moved for a three-judge panel under 28 U.S.C. § 2284(a), a temporary restraining order, preliminary injunction, partial summary judgment, and the appointment of a special master based on their theory that the Appellees violated Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301 et. seq., by disregarding race in the drafting of the 6th Congressional District in the March 2 Plan. Pltfs.' Mtns., R. 2, PageID# 462; R. 4, PageID# 488. Appellees moved to dismiss Appellants' claims for failure to state a valid claim and responded to Appellants' Motions. Defs.' Mtn. To Dismiss, R. 15, PageID# 1048; Mtn. to Dismiss of Ohio Redistricting Commission, R. 18, PageID# 1094; Memo. In Opp., R. 14, PageID# 1045. In their Motion, Appellees argued that Appellants failed to establish the preconditions necessary to prevail on such a claim.

Appellees Mtn. To Dismiss, R. 15, PageID# 1068-71; Mtn. to Dismiss of Ohio Redistricting Commission, R. 18, PageID# 1094 (adopting and incorporating Defs.' Mtn. to Dismiss). Appellees also asserted that Appellants' constitutional claims failed because they failed to allege any set of facts that would establish those claims and that the claims were foreclosed by precedent. Defs.' Mtn. To Dismiss, R. 15, PageID# 1072.

D. Magistrate Recommended Appellants' Claims be Dismissed.

Appellees' Motions to Dismiss were referred to Magistrate Judge Knapp for a Report and Recommendation. Order, R. 25, PageID# 1158. On September 12, 2023, Magistrate Knapp issued her Report and Recommendation (R&R) to grant Appellees' Motions to Dismiss. R&R, R. 27, PageID# 1160. The Magistrate recommended that a three-judge panel was unnecessary because Appellants' constitutional claims are "wholly insubstantial and frivolous." *Id.* at PageID# 1161. The Magistrate also held that *Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986) applies to Appellants' Section 2 Voting Rights Act claim, and that Appellants failed to satisfy the required preconditions. *Id.* at PageID# 1166. As to Appellants' claims under the First, Fourteenth and Fifteenth Amendments, the Magistrate found that Appellants failed to provide any authority to support a cognizable claim. *Id.* at PageID# 1177. And the Magistrate concluded that, even if their constitutional claims were cognizable, Appellants still failed to

state a claim because they failed to allege any intentional discrimination by Appellees. *Id.* In response, Appellants filed a 3-page bullet-point objection to the Magistrate's Report and Recommendation. Pltfs.' Obj. to R&R, R. 31, PageID# 1193. According to the Appellants, the Magistrate erred in concluding that the district court complied with the requirement in 28 U.S.C. § 2284(a) to refer the matter to a three-judge panel, that the Magistrate erroneously applied the *Gingles* precondition requirements and erroneously found their claim not cognizable under the Fourteenth and Fifteenth Amendments. *Id.* Appellees responded, asserting that Appellants' objections were a mere rehashing of their prior failed arguments. Defs.' Response, R. 32, PageID# 1196.

E. District Court Denies Appellants' Motion for Three-Judge Panel and Adopts Magistrate's Report and Recommendation.

On October 12, 2023, the district court issued its Order adopting the Magistrate's Report and Recommendation. Order Adopting R&R, R. 33, PageID# 1207. First, the district court found that *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998) rather than *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991) was controlling to the claims raised in the complaint. *Id.* at PageID# 1209. The district court reasoned that the "R&R accurately detailed later developments in the law surrounding the Voting Rights Act from the U.S. Supreme Court [since *Armour*]." *Id.* The district court also found that Appellants' "nomination" claim was not distinct from an "influence" claim. *Id.* at PageID# 1209-1210. As to Appellants' objections

involving their Fourteenth and Fifteenth Amendment claims, the district court ruled that Appellants' claims were wholly conclusory and without any factual support. *Id.* at PageID# 1210. And, as to the First and Fourteenth Amendment claims, the district court held that Appellants waived any challenge to Report and Recommendation because they failed to object as to those claims. *Id.* at PageID# 1210-1211.

The district court also denied Appellant's Motion for Three-Judge Panel. *Id.* at PageID# 1211. Recognizing the strict standard of finding constitutional claims insubstantial for purposes of the three-judge-court statute, the district court found that the VRA claim raised by Appellants "fall woefully short of meeting the *Gingles* test." *Id.* Similarly, the district court found that Appellants' claims under the Fourteenth and Fifteenth Amendments "contained *no supporting factual* allegations." *Id.* at PageID# 1212 (emphasis in original).

On November 9, 2023, Appellants appealed.

SUMMARY OF ARGUMENT

I. Private plaintiffs lack a private right of action under Section 2 of the Voting Rights Act ("VRA"). While this Court generally will not review a new argument for the first time on appeal, such prohibition is not without exception. This Court may address a purely legal question if it was not available below, and to prevent a miscarriage of justice. *United States v. 429 S. Main St.*, 52 F.3d 1416, 1419 (6th Cir. 1995). While it has been widely assumed that a private cause of action

exists under Section 2 of the VRA, the issue has never been addressed by this Court or by the Supreme Court. And a recent ruling in the Eighth Circuit clearly reveals that the long-held assumption rests on a flimsy footing. *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir.2023).

First, on its face, Section 2 of the VRA does not provide for a private cause of action. Rather, the United States Attorney General holds the exclusive right to bring those actions. Second, Section 2 of the VRA fails the *Sandoval* test to establish that there is an implied private cause of action. *Alexander v. Sandoval*, 532 U.S. 275, 288-89, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

II. Even if the Court considers the merits of Appellants' Section 2 claim, they fail regardless. As the district court correctly held, this Court does not recognize "influence" claims, and any "vote-dilution" claims are subject to the *Gingles* preconditions, which Appellants cannot meet. Appellants' attempt to frame their claim as a "nomination" claim is without any legal support and contrary to established precedent. *Bartlett v. Strickland*, 556 U.S. 1, 6, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009); *Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998).

III. The district court correctly held that Appellants' constitutional claims failed because Appellants did not plausibly allege intentional or purposeful discrimination on the basis of race. In fact, Appellants alleged that Appellees did *not* consider racial or demographic data when creating the challenged plan.

IV. The district court properly dismissed Appellants' complaint without the appointment of a three-judge panel because Appellants' claims were wholly insubstantial. While a district court of three judges must be convened when an action challenges the constitutionality of the apportionment of congressional district, claims that are wholly insubstantial and frivolous may be dismissed by a single judge. *Loeber v. Spargo*, 391 F.App'x 55, 57 (2d Cir.2010); 28 U.S.C. § 2284(a).

For the foregoing reasons, this Court should affirm.

STANDARDS OF REVIEW

This Court's review of a district court's grant of a motion to dismiss for failure to state a claim is de novo. *Johnson v. Morales*, 946 F.3d 911, 917 (6th Cir. 2020). To survive a motion to dismiss, the plaintiff must "make sufficient factual allegations that, taken as true, raise the likelihood of a legal claim that is more than possible, but indeed plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A legal conclusion couched as a factual allegation, however, need not be accepted as true. *Twombly* at 555.

The test for determining whether the district court properly denied a motion to convene a three-judge court is whether "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to

foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" *Lay v. Kingsport*, 454 F.2d 345, 347 (6th Cir.1972), citing *Ex parte Poresky*, 290 U.S. 30, 32, 54 S. Ct. 3, 4, 78 L. Ed. 152 (1933).

ARGUMENT

I. A PRIVATE CAUSE OF ACTION DOES NOT EXIST FOR SECTION TWO OF THE VOTING RIGHTS ACT.

While it has been a long-held assumption that a private cause of action exists for Section Two of the Voting Rights Act ("VRA"), neither the Supreme Court nor this Court has directly addressed the issue. At most, this Court has assumed as much without any direct analysis. *Mixon v. Ohio*, 193 F.3d 389, 406-407 (6th Cir.1999). But the Eighth Circuit's ruling in *Arkansas State Conference NAACP v. Arkansas Board of Appointment, et al.,* 86 F.4th 1204 (8th Cir.2023) sheds light on the flimsiness of the *Mixon* assumption. First, the Eighth Circuit properly found that the Attorney General is explicitly named as the sole enforcer of Section 2 of the Voting Rights Act. *Id.* at 1208. Second, the Eighth Circuit also found no implied private right of action under *Alexander v. Sandoval*. *Id.* at 1209, citing *Alexander v. Sandoval*, 532 U.S. 275, 288-89, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

A. Whether a private cause of action exists under Section 2 of the Voting Rights Act is a purely legal issue that was not available below and justice now requires review.

Whether there is a private cause of action under Section 2 of the VRA is a purely legal issue that was not available at the time Appellees filed their motion to dismiss, and justice requires that this Court take up the issue. Generally, a new argument cannot be raised for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). However, this is a procedural rule rather than a jurisdictional bar, and it is not without exceptions. *Pinney Dock & Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.1988), citing *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037 (1941). Germanely, this Court may address purely legal questions for the first time on appeal if the questions were not available below and justice requires it. *United States v. 429 S. Main St.*, 52 F.3d 1416, 1419 (6th Cir.1995), citing *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir.1993); *Poss v. Morris (In re Morris)*, 260 F.3d 654, 664 (6th Cir.2001) ("We have typically applied the 'Pinney Dock exception' when the issue raised for the first time on appeal involves a question of law that requires no additional factual development.").

Courts have widely assumed, without a thorough analysis, that a private cause of action exists under Section 2 of the Voting Rights Act. In his concurring opinion in *Brnovich v. Democratic National Committee*, Justice Gorsuch (joined by Justice

Thomas) flagged the issue; noting that whether the VRA furnishes an implied cause of action under Section 2 is an "open question" and that the Supreme Court has assumed, without deciding, that such an implied cause of action exists. 141 S.Ct. 2321, 2350, 210 L.Ed.2d 753 (2021) (Gorsuch, J., concurring). Based on this long-held assumption, Appellees did not raise the argument against the existence of private cause of action at the time they filed their motions to dismiss.

The issue of whether an implied private cause of action exists under Section 2 was finally addressed in *Arkansas State Conference NAACP et al. v. the Arkansas Board of Apportionment et al.*, 86 F.4th 1204, 1208 (8th Cir.2023) ("The who-gets-to-sue question is the centerpiece of today's case."). Noting that for the last half-century courts have assumed that Section 2 is privately enforceable, the Eighth Circuit correctly held that assumptions—even discussing those assumptions—are "different from actually *deciding* that a private right of action exists," *Id.* at 1214-1215, and that "[a]ssumptions and statements of belief about other issues are not holdings, no matter how confident the court making them may sound." *Id.* at 1216. The Eighth Circuit concluded that no implied private right of action exists under Section 2 of the VRA based on the review of text and structure of the statute. *Id.* at 1216 ("Following [*Sandoval*'s] guideposts here leads to the conclusion that there is no 'private remedy' to enforce § 2, even assuming the existence of a 'private right.'").

This Court has never directly addressed whether a private right of action exists under Section 2 of the VRA and, at most, has simply assumed as much. *Mixon v. Ohio*, 193 F.3d 389, 406-407 (6th Cir.1999). In *Mixon*, the plaintiffs brought their claim under Section 1971. *Id.* at 406, fn. 12. Rather than ending its review after finding that Section 1971 prohibits private right of action, this Court instead chose to analyze the claims under Section 2 of the VRA under the assumption that it permits citizen suits. *Id.* Ultimately, this Court decided the case on different grounds: that Section 2 does not apply to appointive offices. ("For the reasons stated, we affirm the district court on this issue and hold that Section 2 of the Voting Rights Act does not apply to appointive offices."). *Id.* at 408. Accordingly, in light of the recent ruling from the Eighth Circuit, justice requires that this Court take a deeper look at the question of whether implied private rights of action under Section 2 exists.

B. The Voting Rights Act is explicitly clear that only the Attorney General has the right to enforce.

The VRA clearly sets out an express cause of action for the Attorney General of the United States, and no one else, to enforce Section 2 claims in Section 12 of the VRA. Where a statute expressly provides one method of enforcing a substantive rule, it is suggestive that Congress intended to preclude others. *Sandoval*, 532 U.S. at 290. Section 12 of the Voting Rights Act provides that:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by *section 2*, 3, 4, 5, 7, 10, 11 [52 USCS § 10301, 10302, 10303, 10304, 10306, 10307], or subsection (b) of this section, the *Attorney General* may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

52 U.S.C.S. 10308(d) (emphasis added). The language of Section 12 is substantially similar, if not essentially the same, as the language in 42 U.S.C. § 1971(a)(2)(B) (now 52 U.S.C. § 10101). Section 1971 provides that:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the *Attorney General* may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.

52 U.S.C.S. 10101(c) (emphasis added). It is well established that Section 1971 provides no private cause of action because the statute is "enforceable by the Attorney General, not by private citizens." *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir.2000), citing *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996), citing *Good v. Roy*, 459 F.Supp. 403, 406 (D.Kan.1978) ("we believe that the unambiguous language of Section 1971 will not permit us to imply a private right of action."); *Sharma v. Trump*, E.D.Cal. No. 2:20-

cv-944-TLN-EFB PS, 2020 U.S. Dist. LEXIS 161674, at *4 (Sep. 3, 2020), citing 52 U.S.C. § 10101(c) ("52 U.S.C. § 10101 of the Voting Rights Act also does not provide plaintiff with a private right of action"); *Hayden v. Pataki*, S.D.N.Y. 2004 U.S. Dist. LEXIS 10863, at *16 (June 14, 2004); *but see Mixon* at 406, fn. 12 (finding that only the Attorney General can bring an action under Section 1971 but holding without analysis that the VRA permits citizen suits).

Accordingly, this Court should find that Section 12 of the VRA, like Section 1971, makes clear that only the Attorney General can enforce Section 2 claims.

C. No implied private cause of action under Section 2 of the VRA exists, because the *Sandoval* framework cannot be met.

Section 2 of the VRA does not supply an implied private cause of action because there is no suggestion that the Congress provided for a private remedy. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), citing *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 578, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979). And absent an express right of action, "a plaintiff suing under an implied right of action … must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002), citing *Sandoval*, 532 U.S. at 286 (emphasis in original); *Arkansas*, 86 F.4th at 1209, citing *Sandoval*, 532 U.S. at 288-89 ("Under the modern

test for implied rights of action, Congress must have *both* created an individual right *and* given private plaintiffs the ability to enforce it."). Without Congress' intent to create both a private right and a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-287. And in determining whether Congress created both an individual right and provided a private remedy, the courts must examine the "text and structure" of the statute, not "contemporary legal context." *Arkansas*, 86 F.4th at 1216, comparing *Sandoval*, 532 U.S. at 287-88 and *Morse v. Republican Party*, 517 U.S. 186, 230-231, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (the "Supreme Court made clear that 'text and structure' are the guideposts, not 'contemporary legal context.'"); *Sandoval*, 532 U.S. at 288, citing *Blatchford* v. *Native Village of Noatak,* 501 U.S. 775, 784, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991) (legal context, in interpreting statutes generally, matters only to the extent it clarifies text).

The text and structure of Sections 2 and 12 of the VRA clearly indicates that it is the Attorney General, and no one else, who can enforce Section 2. Neither its other sections, including Section 3, or its legislative history compel a different conclusion.

1. The text and structure of the VRA makes clear that no private remedy was created under Section 2.

The text and structure of VRA fails to indicate any Congressional intent to provide implied private rights of action under Section 2. The Eighth Circuit's recent ruling in *Arkansas* is instructive. *Arkansas*, *supra*. Recognizing the general principle that "private action to enforce federal law must be created by Congress[,]" *Sandoval*, 532 U.S. at 286, the Eighth Circuit found that VRA clearly does not provide a private remedy under the *Sandoval* framework. *Arkansas*, 86 F.4th at 1209-1211.

First, Section 2 itself contains no private enforcement mechanisms. It only provides what is unlawful—not who can enforce it. *Id.* at 1210; 52 U.S.C. § 10301(a) ("No … standard, practice, or procedure … shall be imposed or applied … [that] results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color."). Only Section 12 of the VRA specifically provides who can enforce a violation of Section 2: the Attorney General. *Id.*; 52 U.S.C. § 10308(d). And Section 12 makes absolutely no mention of any private remedies. *Id.* Moreover, Section 12 provides for criminal penalties of imprisonment and fines as remedy, 52 U.S.C. § 10308(c), which is rarely a remedy allowed in a private action. *Diamond v. Charles*, 476 U.S. 54, 64, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

The Attorney General's explicit authority to enforce Section 2 violations under Section 12 cuts deeply against the theory of an implied private right of action. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Taylor v. Brighton Corp.*, 616 F.2d 256, 262 (6th Cir.1980). In *Taylor*, this Court reviewed whether a private right of action exists under OSHA Section 11(c) (29 U.S.C. Section 660(c)) and held that it does not. *Id.* at 264. Section 11(c) of OSHA provides that an employee who believes he has been the victim of discrimination because of his OSHA-related activity may file a complaint with the Secretary of Labor. 29 USCS § 660 (c)(2). Once the complaint's validity is determined, and much like Section 12 of the VRA, OSHA's Section 11(c) provides exclusive authority to the Secretary to enforce the statute. *Taylor* at 259; 29 USCS § 660 (c)(2). And like Section 12, Section 11(c) does not provide any express authority for a private cause of action. Reviewing the legislative history and text of the statute, this Court held that when the Congress deliberately interposed the Secretary's investigation as a screening mechanism between complaining employees and the district courts, to allow those employees whose claims are screened out to file individual actions is simply inconsistent with the enforcement plan provided by Congress. *Taylor* at 262-263.

More recently, this Court again found that by explicitly delegating all authority to bring actions to restrain violations set forth in a federal statute to a state agency, "Congress implicitly precluded private-party injunction actions." *Michigan Corr. Org. v. Michigan Dept. of Corr.*, 774 F.3d 895, 903 (6th Cir.2014), citing *Luder v. Endicott*, 253 F.3d 1020, 1021 (7th Cir. 2001); *UCFW, Local 1564 v. Albertson's Inc*., 207 F.3d 1193, 1197-98 (10th Cir. 2000); *Powell v. Florida*, 132 F.3d 677, 678-79 (11th Cir. 1998) (collecting other cases); *see also Lorillard v. Pons*, 434 U.S. 575, 581, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). The central issue in *Michigan* was whether the FLSA creates a private right of action to enjoin wage-and-hour violations, and this Court held that it does not: "the implication of a private declaratory judgment action would not only be in tension with the statutory scheme but also would essentially contradict it." *Id.* at 903-04.

Like Section 11(C) of OSHA in *Taylor* and the FLSA in *Michigan*, Congress has explicitly granted the Attorney General the sole authority to enforce Section 2 of VRA. And "[i]f a statute fails to provide a private remedy, the federal courts may not create what Congress did not." *Michigan Corr. Org. v. Michigan Dept. of Corr.*, 774 F.3d 895, 903 (6th Cir.2014), citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc*., 552 U.S. 148, 164-65, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008). Indeed, the Eighth Circuit correctly found that the omission of any mention of private action in Section 12 was no accident. *Arkansas*, 86 F.4th at 1210, citing

Karahalios v. Nat'l Fed'n of Fed. Emps., Loc. 1263, 489 U.S. 527, 533, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989). The Eighth Circuit found that, under Section 12, federal observers (who monitor elections and report violations) have the duty to notify the Attorney General of "well[-]founded" allegations from people who allege that "they have not been permitted to vote." *Id.*; 52 U.S.C. §§ 10302(a), 10305, 10308(e). Like the Secretary for Section 11(c) OSHA violations, the Attorney General may then choose to file a fast-tracked lawsuit in federal court. *Id.* In jurisdictions without federal observers, the Attorney General still has the sole option under Section 12 to sue violators in a "preventive" action for an injunction or other similar relief to "permit" those subjected to discrimination "to vote." *Id.*; 52 U.S.C. § 10308(d). Accordingly, the text and structure of Section 12 clearly indicates that Congress did not intend to provide a private remedy under Section 2.

2. The right of action of an "aggrieved person" under Section 3 of the VRA is remedial and does not create a new private cause of action under Section 2.

The right of action of an "aggrieved person" under Section 3 of the VRA does not create a new private cause of action under Section 2. Section 3 provides various forms of equitable relief and other relief "[w]henever the Attorney General or *an aggrieved person* institutes a proceeding under *any statute* to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court." 52 U.S.C.S. 10302(a) (emphasis added). Few sister courts

have determined that Section 3 provides for a private remedy based on the phrase "aggrieved person." *Alabama State Conference of the NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir.2020) ("The language of § 2 and § 3, read together, imposes direct liability on States for discrimination in voting and explicitly provides remedies to private parties to address violations under the statute."); *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir.2023) (holding that private plaintiffs had a right to bring their claims under Section 2 based on their reading of Section 3 that proceedings to enforce voting guarantees in any state or political subdivision can be brought by Attorney General or by an "aggrieved person"). But these courts' interpretation of Section 3 overlooks the critical language that the Eighth Circuit properly analyzed. Section 3 is triggered when an aggrieved person institutes "a proceeding under *any statute*," (emphasis added), which the Eighth Circuit properly found most reasonably refers to statutes that already allow for private lawsuits. *Arksanas* at 1211; 52 U.S.C. § 10302(a); *accord id.* § 10302(b)-(c). Accordingly, rather than creating a new private right of action under VRA, Section 3 merely permits an aggrieved person to initiate a proceeding under any statute that *already* allows a private cause of action to enforce voting guarantees of the Fourteenth and Fifteenth Amendments.

The history and structure of Section 3 supports this interpretation. As originally enacted, Section 3 did not include the phrase "or an aggrieved person." *Arkansas*, 86 F.4th at 1211. It was soon apparent that the statute needed to be revised

as the courts started to recognize that some voting rights were privately enforceable, including in the context of Section 1983 claims. *Id.* at 1211; 1213. Recognizing the problem, Congress added the reference to "aggrieved person[s]." *Id.*; 52 U.S.C. § 10302(a). Accordingly, Congress' addition of "or an aggrieved person" was a remedial measure to remove inconsistencies and confusion related to *other* causes of action, rather than to create a *new* cause of action. To interpret otherwise would allow the Attorney General a right to sue under any statute, including Section 1983, to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. But as the Eighth Circuit correctly found, this would create interpretive difficulties because the Attorney General cannot bring a Section 1983 action on behalf of someone else. *Arkansas*, 86 F.4th at 1212-1213; *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 711-12, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003) (explaining that a sovereign has no cause of action under Section 1983); *see* 42 U.S.C. § 1983.

Moreover, the Eighth Circuit correctly pointed out that it would make no sense to read Section 3 to create a cause of action in favor of the Attorney General, given that Section 12 does so expressly. *Id.* at 1211; 52 U.S.C. § 10308(d). Having two separate sections authorizing the Attorney General to sue would be redundant. *Id.* citing *City of Chicago v. Fulton*, 141 S. Ct. 585, 591, 208 L. Ed. 2d 384 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). Again, Section 12

explicitly provides that the Attorney General has the authority to enforce violations under Section 2. 52 U.S.C. § 10308(d). And when determining whether a generalized section or the specific provision controls, a basic principle of statutory construction is that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153, 96 S.Ct. 1989, 48 L.Ed.2d 540 (1976), citing *Morton v. Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Accordingly, if Congress wanted to create a new private right of action, Section 12, not Section 3, would have been the most appropriate section to add the phrase "or an aggrieved person." But Section 12 does not provide even a hint of a private right of action. As the Eighth Circuit found, simply adding a phrase "or an aggrieved person" to a provision that created no private right of action does not transform it into one that creates many. *Arkansas* at 1211-1212; 52 U.S.C. § 10302(a). This Court should also find that the history and the text and structure of Section 3 leans in favor of the Eighth Circuit's interpretation.

3. Committee reports offer little to no support in determining whether a private right of action under Section 2 exists.

Despite such interpretive difficulties, courts have looked to the House and Senate Judiciary committee reports to assume that Section 2 creates a private right of action. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 232, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (assuming that based on the committee reports,

Congress clearly indicated that Section 2 allows private enforcement). But in light of the new *Sandoval* standard, which was decided 5 years after the *Morse* decision, the Eighth Circuit correctly found that the legislative history tells us nothing about the "text and structure" of the VRA. *Arkansas*, 86 F.4th at 1214 ("*Sandoval* still sets the implied-cause-of-action ground rules, so the question is what—if anything—the legislative history tells us about the 'text and structure' of the Voting Rights Act. [citation omitted] The answer is nothing."). Specifically, the Eighth Circuit found that the committee reports "does not point to a single word or phrase in the Voting Rights Act in support of the conclusion that a private right of action has existed from the beginning." *Id.* citing S. Rep. No. 97-417, at 30; H.R. Rep. No. 97-227, at 32. "If the 1965 Congress clearly intended to create a private right of action, why not say so in the statute?" *Id.*

The Supreme Court in *Exxon Mobil Corp. v. Allapattah Servs.* recognized the danger of judicial reliance on legislative materials like committee reports. 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). In *Exxon*, the Supreme Court affirmed that 28 U.S.C. § 1367 authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy. *Exxon Mobil*, 545 U.S. at 549. The Court warned that "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or,

worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id.* at 568.

Here, the only legislative history that supports the idea that Section 2 provides for a private right of action is contained in the committee reports. But little to no weight can be given to committee reports that tell a different story from what is reflected in the text of what Congress passed. *Arkansas*, 86 F.4th at 1214; *Exxon Mobil*, 545 U.S. at 571 ("In sum, even if we believed resort to legislative history were appropriate in these cases—a point we do not concede—we would not give significant weight to the House Report.").

Because Section 2 does not provide a private cause of action to Appellants, the Court need not go further in analyzing those claims. Nonetheless, those claims (and Appellants' constitutional claims) also fail on their merits.

II. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' SECTION 2 CLAIMS BECAUSE APPELLANTS FAILED TO SATISFY THE PRECONDITIONS SET FORTH IN *THORNBURG V. GINGLES*

Appellants' failure to satisfy the preconditions set forth in *Thornburg v. Gingles* is fatal to their Section 2 claims. In their First Claim for Relief Appellants allege that Appellees violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, *et seq*. Compl. ¶¶ 60-66, R. 1, PageID# 21-22. Section 2 prohibits voting practices that "result[] in a denial or abridgment of the right . . . to vote on account of race or

color." 52 U.S.C. § 10301(a). A denial or abridgment under Section 2 is only established if the members "of a class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

The Supreme Court has provided a framework for evaluating claims under Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S. Ct. 2752 (1986). Initially, a plaintiff must "satisfy three 'preconditions'" to "succeed in proving a § 2 violation." *Allen v. Milligan*, 143 S.Ct. 1487, 1503 (2023) (quoting *Gingles*, 478 U.S. at 50). Specifically, a plaintiff must establish (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that [the minority group] is "politically cohesive;" and (3) that "the white majority vot[es] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075 (1993) (quoting *Gingles*, 478 U.S. at 50-51). "Unless each of the three *Gingles* prerequisites is established, there neither has been a wrong nor can be a remedy." *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (quotations omitted). Thus, failure to prove any one of the preconditions is fatal to a Section 2 claim.

A. *Gingles* applies to Appellants' Section 2 claims.

Appellants attempt to sidestep the *Gingles* test by characterizing their Section 2 claim as a "nomination" claim rather than a "influence" claim.[2] *See* Appellants' Br. at 28-30. To this end, Appellants rely heavily on *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991). Their reliance is misplaced. As the trial court correctly noted, there has been significant development in federal case law interpreting and applying Section 2 since *Armour*. This forecloses Appellants' Section 2 arguments.

First, Appellants' argument that *Gingles* does not apply to single-member redistricting challenges, Appellants' Br. at 29, quickly fails. To be sure, the *Armour* court bypassed the *Gingles* preconditions in part because, at that point, *Gingles* had not been held to apply to single-member redistricting challenges. *Armour* at 1051. But since then, the Supreme Court has "unanimously held § 2 and *Gingles* '[c]ertainly ... apply' to claims challenging single-member districts." *Allen*, 143 S.Ct. at 1515 (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993) (bracket in original)). Appellants' attempt to distinguish *Gingles* in this regard is a nonstarter.

Second, Appellants' characterization of their claim as a "nomination" claim as opposed to an "influence" or "vote-dilution" claim, Appellants' Br. at 30-35, fails as well. The *Armour* court reasoned that *Gingles* did not address whether Section 2

[2] Appellants' Complaint, in contrast, alleged harm from the inability to *elect* representatives of their choice. *See* Compl. at ¶¶ 14, 39, 43, 47, 52-54, 56, R. 1, PageID# 7, 15-17, 19-20.

"permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.'" *Armour* at 1051 (quoting *Gingles* at 46 n. 12) (emphasis added). The court further noted that, in *Chisom v. Roemer*, the Supreme Court had "suggested that a dilution of minority influence may be sufficient to sustain a Section 2 results claim." *Id.*, (citing 501 U.S. 380). Based upon the foregoing, the court declined to apply the *Gingles* test and proceed to a totality-of-the-circumstances analysis. *Id.* at 1501-02.

However, this Court subsequently considered whether Section 2 permits such an action; that is, one based upon "an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it." *Cousin v. Sundquist*, 145 F.3d 818, 828 (6th Cir. 1998) (emphasis in original). Although the *Cousin* court noted that the Supreme Court had not yet decided the issue, it stated that it "would reverse any decision to allow such a claim to proceed" because it did "not feel that an 'influence' claim is permitted under the Voting Rights Act." *Id.* at 828-29. District courts within the Sixth Circuit have since relied on *Cousin* to find that Section 2 does not permit "influence" claims. *See, e.g., O'Lear v. Miller*, 222 F.Supp.2d 850, 861 (E.D. Mich. 2002); *Parker v. Ohio*, 263 F.Supp.2d 1100, 1105 (S.D. Ohio 2003). Notably, in *Parker*, a three-judge panel determined a Section 2

influence-dilution claim must fail because "influence claims are not cognizable in our circuit and the plaintiffs have failed to establish the first *Gingles* precondition." *Parker* at 1104-05. The Supreme Court summarily affirmed the *Parker* decision, *Parker v. Ohio*, 540 U.S. 1013 (2003), which at least one court has held effectively forecloses any recognition of "influence" claims under Section 2. *See Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 366 F.Supp.2d 887, 907 (D. Ariz. 2005).

Following *Armour*, the Supreme Court also subsequently rejected the notion that such "influence" claims are exempt from the *Gingles* framework. *Bartlett v. Strickland*, 556 U.S. 1, 6, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009). In *Bartlett*, the Court considered whether Section 2 "can be invoked to require state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be draw." *Id.* (plurality). The Supreme Court of North Carolina had held it cannot; instead, "'a minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 … requires the creation of a legislative district to prevent dilution of the votes of that minority group.'" *Id.* at 9 (quotations omitted). The Supreme Court affirmed. *Id.* at 9. The plurality in *Bartlett* applied *Gingles* and reaffirmed that "[o]nly when a geographically compact group of minority voters

could form a majority in a single-member district has the first *Gingles* requirement been met." *Id.* at 26. Further, the Court recently affirmed that vote-dilution claims are cognizable under Section 2, and the *Gingles* framework applies to such claims. *Allen v. Milligan*, 599 U.S. 1, 143 S.Ct. 1487, 1502-07, 216 L.Ed.2d 60 (2023). In sum, post-*Armour* Supreme Court and Sixth Circuit precedent makes clear that "influence" claims are not cognizable under Section 2 and the *Ginges* preconditions must be still be met in vote-dilution claims. *Id.*; *Bartlett*, 556 U.S. at 9; *Cousin*, 145 F.3d at 828.

Gingles cannot be avoided based on Appellants' chosen label of a "nomination" claim rather than an "influence" or "vote-dilution" claim. First, recall that *Armour* itself drew no such distinction between "nomination" and "influence" claims: it dealt with a voter-dilution claim related to the ability of a minority group to *influence* election outcomes by combining its votes with a predictable number of crossover voters. *Armour* at 1051 (quoting *Gingles* at 46 n. 12; 50 n. 16); 1059-60. Next, Appellants concede that Black voters in Warren, Ohio and Youngstown, Ohio would not constitute a majority in their proposed district, but would be "sufficiently large and compact to prevail in a single-member primary election." Appellants' Br. at 23. Appellants do not argue that Black voters will constitute a majority in their proposed district, but that they "can be successful politically" in their proposed district. *Id.* at 33. The problem in adopting Appellants' approach and bypassing

Gingles because they "can be successful politically" was well-illustrated in *Bartlett*. *Bartlett* 556 U.S. at 17. This approach would "place in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* Courts are "inherently ill-equipped" to "make decisions based on highly political judgments" of the type that Appellants' approach would require. *See id.* (quotations omitted). Appellants' approach would "call into question the entire *Gingles* framework[,]" which is why the *Bartlett* plurality rejected that approach in favor of the "clear line drawn by" the *Gingles* preconditions. *Id.* at 4.

Put simply, Appellants seek recognition of their novel "nomination" claim under Section 2 with no legal support. Appellants' statutory-construction arguments, Appellants' Br. at 34-35, are not persuasive in this regard. In fact, the statute makes clear that a Section 2 challenge requires the same showing whether the plaintiff is challenging "the political processes leading to nomination or election . . . ." 52 U.S.C. § 10301(b). In either scenario, the statute requires the plaintiff to show "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* This requirement is where the "geographically compact majority" precondition was drawn from in *Gingles*, 478 U.S. at 50, n. 17, and it applies with equal force to "nomination" *or* "election" by the statute's plain terms. Appellants' theory would require the court to read a distinction into the statute for which there is zero support.

Appellants' "nomination" claims can therefore only be recognized as either Section 2 "influence dilution" claims or "vote dilution" claims. They fail either way. Any influence dilution claim is foreclosed by *Bartlett* and *Cousin*. And, under *Allen*, any vote dilution claim is still subject to the *Gingles* preconditions—which Appellants concede are not met. At bottom, Appellants offer no authority that might exempt their claims from the *Gingles* preconditions that are applied to all Section 2 vote-dilution claims. As the district court correctly found, *Gingles* applies and Appellants' failure to satisfy its preconditions is fatal to their Section 2 claims.

B. Appellants failed to meet the *Gingles* preconditions.

Appellants failed to plausibly allege in their Complaint that their minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." Appellants did allege that they "presented a proposed district to Defendants" that "would constitute a district with a black voting majority" and cited to Exhibit D to their Complaint. Compl. ¶ 47, R. 1, PageID# 17. But Exhibit D ostensibly shows that the African American population in the proposed district is 284,938, while the White population in the proposed district is 333,776. Compl. Ex. D, R. 1-5.[3] Thus, the Appellants' own exhibit contradicts their allegation—the Black population in the proposed district does not constitute a majority. *Id.*

[3] The PageID numbers assigned to the Exhibits to Appellants' Complaint are not discernible.

Appellants also alleged that these voters "constitute a *determinative* vote in a Congressional District," rather than a majority vote. *See* Compl. ¶ 50, R. 1, PageID# 19 (emphasis added). This is just another way of saying the minority group constitutes an influential vote in an attempt to avoid *Cousin* and the bright-line *Gingles* preconditions. As shown, an "influence" claim where the minority group would not be a majority of voters is not permitted under the Voting Rights Act. *See, e.g., Cousin*, 145 F.3d 818, 828 (6th Cir. 1998); see also *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 425, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006); *Nixon v. Kent Cnty*., 76 F.3d 1381, 1386 (6th Cir. 1996).

Appellants argue that Exhibit D to their Complaint "*suggests* a district where Black voters would satisfy the first *Gingles* precondition, in a primary election, where party nominees are selected." Appellants' Br. at 23 (emphasis added). But the first *Gingles* precondition requires more than a "suggestion" that minority voters would be successful in electing the candidate of their choice in their proposed district—it requires a showing that the minority group "sufficiently large and geographically compact to constitute a majority" in that district. By their own admission, Appellants have not met this necessary precondition.

As a result, the district court correctly found that Appellants failed to allege a plausible Section 2 claim and properly dismissed Appellants' First Claim for Relief.

III. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' CONSTITUTIONAL CLAIMS BECAUSE APPELLANTS FAILED TO PLAUSIBLY ALLEGE A DISCRIMINATORY PURPOSE.

A. Appellants failed to plausibly allege facts supporting a Fourteenth Amendment claim.

In their Second Claim for Relief, Appellants allege that "[t]he March 2 Plan violates Section 2 of the Fourteenth Amendment to the United States Constitution because the plan abridges the rights of Black Ohioans to vote because the Plan was devised without consideration of the circumstances applicable to Black voters." Compl. ¶ 71, R. 1, PageID# 23. Appellants further claim that intentional discrimination can be inferred from the *Armour* case, an alleged discriminatory impact by the March 2 Plan, and a "tenuous and pretextual nature" of the Plan's stated justification. *Id*. at ¶ 72, PageID# 24. Appellants' Second Claim fails on both the law and the facts.

Appellants offer no legal authority that Section 2 of the Fourteenth Amendment enjoys any legal relevance to their vote dilution claim as set forth in their Complaint, or that the facts alleged in their Complaint even make out a viable claim under that provision of the U.S. Constitution.

Moreover, even if Appellants could establish that Section 2 of the Fourteenth Amendment is a viable legal claim, they still fail to allege facts sufficient to establish intentional racial discrimination. "[M]ultimember districts violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial

discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (internal quotations omitted). These cases are "subject to the standard of proof generally applicable to Equal Protection Clause cases." *Id.* (citations omitted). A constitutional violation under the Equal Protection Clause "is established only where there is proof of a racially discriminatory intent or purpose." *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (citing *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 265, 91 S.Ct. 555, 50 L.Ed.2d 450 (1977)). Appellants simply failed to plausibly allege facts of a racially discriminatory intent or purpose.

Appellants actually alleged the opposite: that Appellees reported they "did not use demographic data or racial data" in the production of their plans. Compl. ¶ 17, R. 1, PageID# 8-9. Appellants offer no authority that *not* considering racial data is proof of a racially discriminatory intent or purpose. The remaining allegations regarding discriminatory purpose—that Ohio has a history of racial discrimination in the elections context, that there are reasonably foreseeable discriminatory impacts of implementing the March 2 Plan, and that the justifications therefor are "tenuous and pretextual"—are simply conclusory and fail to state a claim upon which relief can be granted. Thus, the trial court correctly held that Appellants' claims under Section 2 of the Fourteenth Amendment fail as a matter of law.

B. Appellants failed to plausibly allege facts supporting a Fifteenth Amendment claim.

Appellants allege in their Third Claim for Relief that the Appellees violated the Fifteenth Amendment in enacting the March 2 Plan. Compl. ¶ 73-76, R. 1, PageID# 24-25. But a claim under the Fifteenth Amendment is not cognizable here because Appellants' "freedom to vote has not been denied or abridged by anyone"—that is, they do not claim that they are unable to "register and vote without hindrance." *Reno v. Bossier Parish Sch. Bd*., 528 U.S. 320, 334 n.3, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980)); *see Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000) ("When a legislative body is apportioned into districts, every citizen retains equal rights to vote for the same number of representatives, even if not for all of them, and every citizen's ballot is equally weighed.").

Instead, Appellants allege a vote-dilution claim under the Fifteenth Amendment. *See* Compl. ¶¶ 7, 15, 47, 52, R. 1, PageID# 5, 7, 17, 19. But precedent forecloses that argument. *See Bossier Parish Sch. Bd*., 528 U.S at 334 n. 3 ("W[e] have never held that vote dilution violates the Fifteenth Amendment . . . [and] we have never even 'suggested' as much.") (internal citations and quotations omitted); *see also Tigrett v. Cooper*, 855 F. Supp. 2d 733, 748 (W.D. Tenn. 2012) ("Under current law, vote dilution does not give rise to a cause of action under the Fifteenth Amendment. Unless and until a court with higher authority rules to the contrary, for

the Court to allow Plaintiffs' Fifteenth Amendment claim to proceed under a vote dilution theory would be to step beyond the bounds of clearly delineated precedent into the sphere of speculation."). Indeed, the Supreme Court has "never [] held any legislative apportionment inconsistent with the Fifteenth Amendment." *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). Appellants' claims are no different than those rejected by the Supreme Court. Moreover, even if Appellants had alleged a cognizable Fifteenth Amendment claim, they would still need to show "that the redistricting and reapportionment plan was intentionally discriminatory toward African–Americans." *Parker*, 263 F. Supp. 2d at 1106–07 (citing *Voinivich*, 507 U.S. at 159). As discussed in Section II(B), *supra*, Appellants did not plausibly allege intentional discrimination and, in fact, alleged only that Appellees "did not use demographic or racial data" when creating their maps. Compl. ¶ 17, R. 1, PageID# 8-9.

Accordingly, the district court correctly found that Appellants failed to state a claim under the Fourteenth and Fifteenth Amendments.

IV. THE DISTRICT COURT CORRECTLY HELD THAT A THREE-JUDGE PANEL IS NOT REQUIRED BECAUSE APPELLANTS' CLAIMS ARE WHOLLY INSUBSTANTIAL.

The district court properly dismissed Appellants claims without requiring a three-judge panel because it correctly found that all their claims are wholly insubstantial and frivolous. While a panel must be convened in an action that

challenges the constitutionality of the apportionment of a congressional district, claims that are wholly insubstantial and frivolous may be dismissed by a single judge. *Loeber v. Spargo*, 391 F.App'x 55, 57 (2d Cir.2010); 28 U.S.C. § 2284(a). When a three-judge panel is requested, the single-court judge has a duty to first examine the allegations in the complaint to determine whether there exists a substantial question of constitutionality. *Shapiro v. McManus*, 577 U.S. 39, 44, 136 S.Ct. 450, 193 L.Ed.2d 279 (2015). And "[t]he existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint." *Ex parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 78 L.Ed. 152 (1933), citing *Mosher v. [City of] Phoenix*, 287 U.S. 29, 30, 53 S. Ct. 67, 77 L. Ed. 148; *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105, 53 S. Ct. 549, 550, 77 L. Ed. 1062. A claim is insubstantial when it is obviously without merit, or "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby v. Osser*, 409 U.S. 512, 518, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973); *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S. Ct. 326, 54 L. Ed. 482 (1910). "[A]bsence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)

The district court correctly found that Appellants' Section 2 claims are foreclosed as a matter of settled law and they fail to state a cognizable claim under the Fourteenth and Fifteenth Amendments. As to Appellants' Section 2 claim, the district court correctly concluded that "the VRA claim raised by Plaintiffs fall woefully short of meeting the *Gingles* test." Order Adopting R&R, R. 33 PageID #1211. As explained in Section II, *supra*, Appellants ignored developments in Section 2 case law that are fatal to their claims: namely, that the *Gingles* preconditions apply to the type of Section 2 claim they assert. And, by their own admission, Appellants fail to meet those preconditions.

As to Appellants' Fourteenth and Fifteenth Amendment claims, the district court correctly held that Appellants failed to provide any supporting factual allegations. As explained in Section III, *supra*, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, is required to establish that the state or political subdivision acted with *a discriminatory purpose*. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481-482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (citing *Mobile* v. *Bolden,* 446 U.S. 55, 62, 66, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980) (plurality opinion); *see also Turner v. Fayette Cty. Sheriff's Dept.*, 6th Cir. No.93-5949, 1993 U.S. App. LEXIS 32659, at *4 (Dec. 10, 1993), citing *Johnson v. Morel,* 876 F.2d 477, 479 (5th Cir. 1989) (en banc) (plaintiff's claim clearly does not exist where he claims a violation of the Fourteenth

Amendment yet alleges neither intentional discrimination nor membership in a protected class). Appellants failed to plausibly allege any facts supporting intentional discrimination and conceded that Appellees "did not use demographic or racial data" when creating the challenged maps. Compl., R. 1 at ¶ 17, PageID #8-9. Without more, mere allegations that race was not considered when Appellees drafted their plans fail to plausibly demonstrate that a discriminatory purpose was a "motivating factor" in Appellees' actions or decisions. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016) (quoting *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 265-66 (1977)). As Appellants fail to raise a colorable constitutional claim, these claims are also insufficient to warrant the appointment of a three-judge panel as set forth in 28 U.S.C. § 2284(a).

Accordingly, all of Appellants' claims are wholly insubstantial and frivolous, and the district court correctly concluded that the three-judge panel was unnecessary. This Court should affirm.

CONCLUSION

The Court should affirm the district court denial of Appellants' request for three-judge panel and granting of Appellees' motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this *Brief of Appellees* complies with the type-volume requirements for a principal brief and contains 10,266 words. *See* Fed. R. App. P. 32(a)(7)(B)(i).

/s/ Bryan B. Lee
BRYAN B. LEE (0090716)

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2024, this *Brief of Appellees* was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Bryan B. Lee
BRYAN B. LEE (0090716)

DESIGNATION OF DISTRICT COURT RECORD

Appellants, pursuant to Sixth Circuit Rule 30(g), designate the following filings from the district court's electronic records:

***Simon, et al.*, *v. DeWine, et al.*, Nos. 23-3910**

Date Filed	R. No.; PageID#	Document Description
4/15/2022	R.1; PageID# 1-	Complaint
4/15/2022	R. 1-5; PageID# -	Exhibit D to Complaint
4/15/2022	R. 2; PageID# 462	Pltfs.' Mtn. for Three-Judge Court
4/15/2022	R. 4, PageID# 488	Pltfs.' Mtn. for Temporary Restraining Order, Preliminary Injunction, Partial Summary Judgment, and Immediate Appointment of a Special Master
5/04/2022	R. 14, PageID# 1045-1046	Defs. Memo. in Opp. to Mtn. for Three-Judge Panel
5/04/2022	R. 15; PageID# 1048-1084	Defs.' Joint Combined Mtn. to Dismiss and Memo. in Opp.
5/04/2022	R. 15-1; PageID# 1087	Defs.' Joint Combined Mtn. to Dismiss and Memo. in Opp., Exhibit A
5/04/2022	R. 15-2; PageID# 1089-1091	Defs.' Joint Combined Mtn. to Dismiss and Memo. in Opp., Exhibit B
5/11/2022	R. 18, PageID# 1094	Mtn. to Dismiss of Ohio Redistricting Commission
5/20/2022	R. 20, PageID#	Pltfs.' Memo. in Opp. to Mtns. to Dismiss
6/03/2022	R. 23, PageID#	Defs.' Reply in Support of Mtn. to Dismiss

Date Filed	R. No.; PageID#	Document Description
6/12/2023	R. 25; PageID# 1158	Order Referring Mtns. to Magistrate
9/12/2023	R. 27; PageID# 1160-1186	Magistrate's Report and Recommendation ("R&R)"
9/26/2023	R. 31; PageID# 1193-	Pltfs.' Obj. to R&R
10/10/2023	R. 32; PageID# 1196	Defs.' Response to Pltfs.' Obj. to R&R
10/12/2023	R.33; PageID# 1207-1212	Order Adopting R&R