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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

JAMES THOMAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:21-cv-1531-AMM
	)	
JOHN H. MERRILL, in his official capacity as Alabama Secretary of State, *et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

DEFENDANTS' MOTION TO PARTIALLY DISMISS

Plaintiffs in this case are four individuals and two organizations. Their original complaint against the Alabama Secretary of State and two State Legislators alleged that the 2021 Legislature created State House and Senate districts that violate the United States Constitution. After amending their Complaint, Plaintiffs now also allege that the State's Senate districts violate Section 2 of the Voting Rights Act. Because Section 2 of the VRA does not contain a private right of action, Plaintiffs' Section 2 challenge to Alabama's Senate districts must be dismissed.

Though the Supreme Court has "assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2," the existence of such a cause remains an "open question." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring). The three-judge

court in *Milligan v. Merrill* and single-judge court in *Caster v. Merrill*—both actions challenging Alabama's Congressional districts—seemingly rejected the argument that Section 2 lacks a private right of action, emphasizing that "no federal court anywhere ever has held that Section Two does not provide a private right of action" and that it was "not prepared to step down that road today." *Milligan*, No. 2:21-CV-1530, 2022 WL 265001 at *79 (N.D. Ala. Jan. 24, 2022); *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *81 (N.D. Ala. Jan. 24, 2022).[1]

Today, the first part of the *Milligan* court's statement no longer holds true. Last month, the District Court for the Eastern District of Arkansas issued a thorough opinion explaining that, under the Supreme Court's modern jurisprudence about private rights of action, Section 2 of the Voting Rights Act does not contain one. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 4:21-CV-01239-LPR, 2022 WL 496908 (E.D. Ark. Feb. 17, 2022). As that court explained—and as set out further below—Congress did not create a private cause of action in Section 2 of the Voting Rights Act. Because the Court cannot create a right of action where Congress did not, private plaintiffs may not sue under Section 2. Plaintiffs' Section 2 claims therefore must be dismissed.

[1] For brevity, subsequent references to the *Milligan* and *Caster* opinions will reference and cite only the *Milligan* decision.

BACKGROUND

According to the allegations in the Amended Complaint, on November 4, 2021, Governor Kay Ivey signed into law SB 1 of the 2021 Special Session of the Alabama Legislature. Doc. 54 ¶ 26; *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 the Complaint alleging that Alabama's 2021 maps for State House and Senate districts violated the Fourteenth Amendment to the United States Constitution. Doc. 1. A three-judge court was convened later that day. Doc. 5. Though Plaintiffs initially requested preliminary injunctive relief, Doc. 1 at 41, they later informed the Court that they did not intend to pursue a preliminary injunction, Doc. 34.

On December 8, 2021, Plaintiffs filed an Opposed Motion for Recusal demanding that Judge Maze recuse himself from this action. Doc. 40. Defendants submitted a response. Doc. 45. After an unopposed extension of their deadline, the Plaintiffs submitted a Reply on January 18, 2022. Doc. 50. In that Reply, Plaintiffs stated that they were "strongly considering amending their complaint to assert claims of vote dilution under Section 2 of the Voting Rights Act and intentional discrimination under the Fourteenth Amendment." Doc. 50 at 7 n.2.

Meanwhile, many[2] of the Plaintiffs in this action pursued separate claims in a separate lawsuit about the State's Congressional districts. *See Milligan*, 2022 WL 265001. In that case, Defendants argued that Section 2 of the VRA does not provide a private right of action. Defs' Opp. to Pls' Mot. for Prelim. Inj. 132-135, *Milligan*, No. 2:21-CV-1530 (Dec. 22, 2021) (ECF No. 78).

On January 24, 2022, the *Milligan* court entered a preliminary injunction based in part on the *Milligan* Plaintiffs' Section 2 claims. *Milligan*, 2022 WL 265001. In the preliminary-injunction order, the court seemingly rejected Defendants' argument that Section 2 of the Voting Rights Act does not provide a private right of action. *Id.* at *79. The court gave two reasons for its decision: (1) "federal courts across the country . . . have considered numerous Section Two cases brought by private plaintiffs"; and (2) the court "respect[ed]" "dicta" relating to Section 2 from *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), a case in which the Supreme Court held that Section 10 of the Voting Rights Act—a provision targeting poll taxes—contained an implied private cause of action. *Id.* at 79. The court then explained that accepting Defendants' arguments "would work a major upheaval in the law, and [the court was] not prepared to step down that road today." *Id.*

[2] Plaintiffs Evan Milligan, Khadidah Stone, Greater Birmingham Ministries, and the Alabama State Conference of the NAACP are also plaintiffs in *Milligan v. Merrill*.

On February 7, 2022, the United States Supreme Court stayed the *Milligan* court's injunction pending further review. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). The Supreme Court has stated that *Merrill* and *Caster* will be argued in the October Term 2022, likely in October, when the Court will consider: "Whether the District Courts in these cases correctly found a violation of section 2 of the Voting Rights Act, 52 U. S. C. §10301." *Merrill v. Milligan*, No. 21-1086 (U.S. Feb. 22, 2022).

Meanwhile, in this case, on January 21, 2022, Defendants submitted their Answers to the Complaint. Docs. 52 & 53. On February 11, 2022, Plaintiffs filed their First Amended Complaint, adding Count Three: a claim that Alabama's 2021 Senate districts violate Section 2. Doc. 54 at 61-62. On February 25, Plaintiffs filed the Second Amended Complaint, Doc. 57, which "correct[ed] only formatting issues and typographical errors from their first amended complaint," Doc. 55 at 1.

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). The Court must "take the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Pielage v. McConnell,* 516 F.3d 1282, 1284 (11th Cir. 2008). This rule "is inapplicable to legal conclusions." *Iqbal,* 556 U.S. at 678.

ARGUMENT

"[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688 (1979). "A statute may, but does not necessarily, create a cause of action either expressly or by implication." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1294 (11th Cir. 2015). And though a statute *can* create a cause of action by implication, that is the exception to the rule. Courts "interpret statutes with a presumption against, not in favor of, the existence of an implied right of action." *In re Wild*, 994 F.3d 1244, 1274 (11th Cir. 2021) (en banc) (W. Pryor, J., concurring). Plaintiffs cannot satisfy their burden here.

First, Section 2 contains no express private right of action. The plaintiffs in *Milligan* did not argue that it did, Supreme Court opinions advocating for the existence of a private right of action indicate that it doesn't, and the Department of Justice recently conceded as much in separate litigation. Section 2's lack of an express private action is self-evident.

Second, Section 2 contains no implied private right of action, either. It is Congress that must create a right of action, even when the private right of action is implied. To do so, Congress must create a private right by specifically conferring it on a particular class of individuals with an unmistakable focus on those individuals, characteristics Section 2 lacks.

Further, to show an implied private right of action, Plaintiffs must show—from the text of the statute—a clear expression of congressional intent to authorize a private plaintiff to sue. The text and structure of the VRA show no such intent. Instead, the VRA provides a specific mechanism for the Attorney General to enforce Section 2 and sets out procedures for him to do so, strongly cutting against any argument that Section 2 must be enforceable by private plaintiffs, too. Outside of Section 2, VRA references to "aggrieved persons" do not create a new cause of action, but reference existing causes of action—such as the § 1983 claims that Plaintiffs bring in this very case.

Because Congress did not expressly or impliedly create for Section 2 a private cause of action, it does not contain one and Plaintiffs' Section 2 claim is due to be dismissed.

I. Section 2 does not expressly create a private right of action.

"To determine whether a statute provides an express right of action, [courts] look for an express provision granting a federal cause of action to enforce the provisions of that act." *PCI Gaming Auth.*, 801 F.3d at 1294 (cleaned up). Congress has expressly authorized rights of action in many contexts. *See, e.g.*, 15 U.S.C. § 15(a) ("[A]ny person who shall be injured . . . by reason of anything forbidden in the

antitrust laws may sue therefor in any district court of the United States. . . .").[3] But as the Department of Justice—which argues that Section 2 contains an *implied* private right of action—recently conceded, Section 2 contains no *express* private right of action. Statement of Interest of the United States at *9, *Arkansas NAACP*, No. 4:21-CV-01239-LPR (Jan. 28, 2022) (ECF No. 71).

Section 2 of the Voting Rights Act prohibits "any State or political subdivision" from imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure" if it "results in 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). Though this language imposes a duty on States, it says nothing about whether private parties may bring suit to enforce that duty. Because Section 2 contains no express provision granting private plaintiffs a federal cause of action, it does not create an express right of action. *PCI Gaming Auth.*, 801 F.3d at 1294; *see also Morse*, 517 U.S. at 232 ("§ 2, like § 5, provides no right to sue on its face.") (opinion of Stevens, J.).

[3] *See also* 18 U.S.C. § 2520(a) ("[A]ny person whose wire, oral, or electronic communication is intercepted . . . may in a civil action recover . . . such relief as may be appropriate."); 29 U.S.C. § 1132(a)(1)(B) ("A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan. . . ."); 42 U.S.C. § 1983 ("Every person who, under color of any statute . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . shall be liable to the party injured in an action at law. . . .").

II. The text and structure of the Voting Rights Act show that Section 2 does not contain an implied private right of action.

The three-judge court in *Milligan* emphasized that "federal courts across the country, including both the Supreme Court and the Eleventh Circuit, have considered numerous Section Two cases brought by private plaintiffs." *Milligan*, 2022 WL 265001, at *79 (collecting cases). But the Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 353 n.2 (1996). Likewise, a court passing on a Section 2 claim brought by a private plaintiff does not, without more, show that Congress created a private right of action for violations of Section 2. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). And neither the Supreme Court nor the Eleventh Circuit has answered whether Section 2 contains a private right of action.[4] The answer to the question lies in the text of the statute.

[4] In a judgment that the Supreme Court later vacated, the Eleventh Circuit held that the VRA validly abrogated state sovereign immunity because it "clearly expresses an intent to allow private parties to sue the States. 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." *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 2618, (2021); *but see id.* at 656-57 (Branch, J., dissenting) ("[T]he text of Section 2 contains no language whatsoever—either explicitly or by implication—that allows private plaintiffs to sue a State in federal court.").

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "A reviewing court must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right *but also a private remedy*." *In re Wild*, 994 F.3d at 1255 (quoting *Sandoval*, 532 U.S. at 286). The creation of each—both a right and a remedy—is necessary for Congress to imply a cause of action to enforce a federal statute. *Id.* Because Section 2 contains neither a private right nor a private remedy, it contains no implied private right of action.

A. Section 2 does not create a new individual right.

To determine whether a statute creates a right, courts "look to the statutory text for 'rights-creating' language." *Love v. Delta Air Lines*, 310 F.3d 1347, 1352 (11th Cir. 2002) (quoting *Sandoval,* 532 U.S. at 288). "'Rights-creating language' is language explicitly conferring a right directly on a class of persons that includes the plaintiff in a case." *Love*, 310 F.3d at 1352 (cleaned up). A statute may create an individual right where it has "an *unmistakable focus* on the benefitted class." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Cannon,* 441 U.S. at 692 n. 13). But "laws enacted for the protection of the general public" or a statute written "simply as a ban on discriminatory conduct by recipients of federal funds" provides "far less reason to infer a private remedy in favor of individual persons." *Cannon*, 441 U.S. at 691; *Sandoval,* 532 U.S. at 289 ("Statutes 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.'") (quoting *California v. Sierra Club,* 451 U.S. 287, 294 (1981)).

The text of Section 2 focuses on regulating and prohibiting certain actions by State governments, not providing new benefits to individual voters. By its terms, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision[.]" 52 U.S.C. 10301(a). This restriction on State governments does not expressly create any new individual rights. To be sure, that restriction is limited to that which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." *Id.* But the reference to "any citizen of the United States" hardly shows an unmistakable focus on a particular class; instead, the provision was "enacted for the protection of the general public," indicating that it does not create any individual right. *Cannon*, 441 U.S. at 691.

Even if Section 2 did identify a particular class of people it benefits, it is not enough that a statute refer to individuals the statute benefits; those individuals must be the *unmistakable focus* of the statute. For example, in finding no creation of a private right in the Family Educational Rights and Privacy Act, the Supreme Court distinguished FERPA from other statutory provisions in which Congress *did* create a private right:

> Unlike the individually focused terminology of Titles VI and IX ("No person ... shall ... be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "[n]o funds shall be made available" to any "educational agency or institution" which has a prohibited "policy or practice [of permitting the release of education records ... of students without the written consent of their parents to any individual, agency, or organization.]" 20 U.S.C. § 1232g(b)(1).

Gonzaga, 536 U.S. at 287 (last alteration added).[5] Like FERPA, the focus of Section 2 is not on the individuals it would benefit, but on the entity being regulated: "No voting qualification . . . shall be imposed or applied *by any State or political subdivision*[.]" 52 U.S.C. 10301(a) (emphasis added). Section 2 therefore does not contain an "unambiguously conferred right" that could support a private right of action. *See also Univs. Rsch. Ass'n, Inc. v. Coutu*, 450 U.S. 754, 772 (1981) ("Section 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals.").

B. Section 2 does not contain a private right of action.

To discern whether a statute creates a private right of action, statutory intent—as adduced from the statute's text—is determinative. *In re Wild*, 994 F.3d at 1255. Without a "clear expression of congressional intent to authorize a would-be plaintiff

[5] In *Gonzaga*, the Supreme Court considered whether a plaintiff could enforce a purported statutory right under 42 U.S.C. § 1983. 536 U.S. at 276. Whether considering the enforcement of a statutory right under § 1983 or via an implied private right of action, the analysis regarding *the creation* of a right is the same. *Id.* at 285-86, 290.

to sue, '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.'" *Id.* (quoting *Sandoval*, 532 U.S. at 286-87). Courts may not "plumb a statute's supposed purposes and policies in search of the requisite intent to create a cause of action." *Id.* at 1255. Instead, "the inquiry both begins and ends with a careful examination of the statute's language." *Id.* Provisions in the statute that "prescribe—and circumscribe—judicial involvement and enforcement" are likely to show whether the provision at issue contains a private remedy. *Id.* at 1256. A close look at the text and structure of the VRA shows "no clear evidence that Congress intended to authorize" a private remedy. *Id.* Each VRA provision that could even arguably weigh in favor of an implied private right of action will be considered in turn.

1. Section 2 itself says nothing about a private right of action. Its first subsection prohibits a State or political subdivision from imposing or applying any voting qualification, prerequisite, standard, practice, or procedure "which results in 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). The second subsection elaborates on how to prove a violation of the "results test" set forth in the first subsection. *Id.*(b). But nothing in Section 2 speaks to the consequences of a violation.

2. That issue is addressed by Section 12—entitled "Civil and criminal sanctions"—which, true to name, sets forth civil and criminal consequences for

those who violate Section 2 or certain other VRA provisions. 52 U.S.C. § 10308. Notably, this provision focuses on enforcement proceedings instituted by the Attorney General of the United States. And because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others," *Sandoval*, 532 U.S. at 290, this provision indicates that in passing the Voting Rights Act, Congress *did not* make a remedy available to private plaintiffs.

Consider subsections (a) and (c) of Section 12, which concern criminal enforcement. Those subsections provide that anyone who violates, attempts to violate, or conspires to violate Sections 2, 3, 4, 5, 10, or 11 of the Act shall be fined up to $5,000 and/or be imprisoned for up to five years. 52 U.S.C. § 10308. And, given the potential punishment of fines and imprisonment, it can't be that Congress would intend for private parties to pursue these remedies under Section 12. *See Chapa v. Adams*, 168 F.3d 1036, 1038 (7th Cir. 1999) ("Criminal statutes, which express prohibitions rather than personal entitlements and specify a particular remedy other than civil litigation, are accordingly poor candidates for the imputation of private rights of action.").

Section 12(d) likewise cuts strongly against attempts to read a private right of action into Section 2:

> 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 [§§ 2, 3, 4, 5, 10, or 11], section 1973e of Title 42, 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 chapters 103 to 107 of this title to vote and (2) to count such votes.

52 U.S.C. § 10308(d). So, when "there are reasonable grounds to believe" that a violation of Section 2 is forthcoming, Section 12(d) affirmatively authorizes the Attorney General of the United States to seek a preliminary or permanent injunction to prevent the violation. But Section 12(d) makes no mention of private parties, which strongly implies their exclusion. *See Sandoval*, 532 U.S. at 290; *see also Karahalios v. Nat'l Fed'n of Fed. Emps.*, 489 U.S. 527, 533 (1989) ("[I]t is . . . an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.") (quoting *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *McDonald v. S. Farm Bureau Life Ins. Co.*, 291 F.3d 718, 725 (11th Cir. 2002) ("When Congress creates certain remedial procedures, we are, 'in the absence of strong indicia of contrary congressional intent, . . . compelled to conclude that Congress provided precisely the remedies it considered appropriate.'") (quoting *Karahalios*, 489 U.S. at 533); *Love*, 310 F.3d at 1353 (Courts "ought not imply a

private right of action" where the "statutory structure provides a discernible enforcement mechanism.").

Section 12(f) also warrants discussion. It provides:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of chapters 103 to 107 of this title shall have exhausted any administrative or other remedies that may be provided by law.

52 U.S.C. § 10308(f). Read in isolation, this subsection might indicate that Congress thought any person could bring suit to enforce Section 2, which is part of Chapter 103. After all, it is private litigants who generally must exhaust administrative remedies.

But a closer look at the structure of Section 12 shows that subsection (f) indicates no such thing. Read in light of Section 12(e), it is apparent that Section 12(f) does not create, recognize, or assume a private right of action. Section 12(e) provides:

> Whenever . . . there are observers appointed . . . [and] any persons allege to such an observer within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under chapters 103 to 107 of this title or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the observer shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The

> district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

52 U.S.C. 10308(e). The "person asserting rights" language in Section 12(f) does not describe a hypothetical private plaintiff in a Section 2 enforcement proceeding. Instead, "the person asserting rights" language in Section 12(f) is referencing a person on whose behalf the Attorney General of the United States brings suit under § 12(e).

In the context of Section 12(e), Section 12(f)'s discussion of exhaustion of remedies makes perfect sense. The Attorney General of the United States should not have to wait to pursue a Section 12(e) action until the individual voter exhausts administrative remedies or other legal remedies (such as state law remedies or Section 1983 litigation). Correspondingly, Section 12(e) reserves for the voter "remed[ies] available under State or Federal law," but it does not create any new remedies. Sections 12(e) and (f) work in combination such that the Attorney General can quickly bring a Section 12(e) suit on behalf of a voter, while the voter can individually bring his or her own suit under state law or other federal law if such law provides a private right of action. Nothing about this set-up suggests—much less requires—the conclusion that Section 12(f) recognizes or assumes the private enforceability of Section 2.

3. Next consider Section 3 of the Voting Rights Act, which appears to authorize specific relief in certain lawsuits brought by either the Attorney General of the United States or an "aggrieved person." 52 U.S.C. § 10302. Under this provision, a district court is permitted to "retain jurisdiction for such period as it may deem appropriate" over "proceedings instituted by the Attorney General or an aggrieved person under any statute to enforce the guarantees of the fourteenth or fifteenth amendment in any State or political subdivision" if the court "finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision." 52 U.S.C. § 10302(c). During the period in which a court exercises jurisdiction pursuant to this provision, "no qualification or prerequisite or voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced" unless the court finds that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or the voting requirement in question "has been submitted by the chief legal officer or other appropriate official of such State or subdivision" to the Attorney General and obtained preclearance. *Id.*

This provision contemplates suits brought by "aggrieved persons" to enforce the guarantees of the Fourteenth and Fifteenth Amendments under "any statute" that gives private litigants a cause of action to enforce those Amendments. But it does

not create—even implicitly—a wholly *new* cause of action under the VRA. The purpose of Section 3(c) is to allow a district court to "assume for that jurisdiction a function identical to that of the District Court for the District of Columbia in § 5 preclearance proceedings" once it "has struck down an unconstitutional practice." *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 333, n. 2 (2000). This preclearance function presupposes, rather than creates, jurisdiction over *constitutional*[6] claims brought by "aggrieved persons." For example, Plaintiffs in this action have requested relief under Section 3(c), Doc. 57 at 63 ¶ G, a remedy distinct from the declaratory and injunctive relief purportedly sought under Section 2, *id.* at 62-63 ¶¶ C-D. The availability of such a remedy under Section 3 presupposes the existence of another cause of action brought by an aggrieved person—such as Plaintiffs' Section 1983 claims, *see* Doc. 57 ¶¶ 222-231—but says nothing about the existence of a claim brought under Section 2.

[6] Indeed, it appears that counsel for Plaintiffs has indicated that Section 3(c) is available only for constitutional violations, not Section 2 violations. LDF, *Standing in the Breach: Using the Remaining Tools in the Voting Rights Act to Combat Voting Discrimination* at *4 (Jan. 5, 2021) ("Following the Supreme Court's devastating ruling in *Shelby County, Alabama v. Holder*, Section 3(c), which had rarely been the subject of litigation, remains an avenue to 'bail in' jurisdictions and require them to preclear voting changes as a *remedy* to a finding of *intentional* discrimination in violation of the U.S. Constitution.") (available at https://www.naacpldf.org/wp-content/uploads/LDF-Sections-2-and-3c-VRA-primer-1.5.21.pdf); *see also* Brian F. Jordan, *Finding Life in Hurricane Shelby: Reviving the Voting Rights Act by Reforming Section 3 Preclearance*, 75 OHIO ST. L.J. 969, 979 (2014) ("Section 3 authorizes federal judges to submit states or other jurisdictions to preclearance if the court finds violations of the Fourteenth or Fifteenth Amendments. In other words, the court must first find that the jurisdiction engaged in intentional discrimination[.]").

To the extent Section 3 is read to refer to claims brought by private plaintiffs under the VRA, "[t]he most logical deduction from the inclusion of 'aggrieved person' in [§ 3] 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 Supreme Court] might recognize in the future." *Morse*, 517 U.S. at 289 (Thomas, J., dissenting, joined by Rehnquist, C.J., Scalia, and Kennedy, JJ.). There is no reason to think that Section 3 itself implies the creation of a *new* cause of action in Section 2.

4. Finally, an examination of Section 14 yields the same result. That provision allows for attorneys' fees, expert fees, and other litigation costs to be awarded to the "prevailing party, other than the United States," in "action[s] or proceeding[s] to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). By its text, Section 14—like Section 3—is concerned only with actions or proceedings brought to enforce the Fourteenth or Fifteenth Amendments. *See supra* n.6.

Further, the text of Section 14 permits attorney fees for *any* "prevailing party" other than the United States, not just a private plaintiff. So long as the "*lawsuit* could be described as 'an action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment,'—without regard to who filed the case or who was seeking fees," the text of Section 14 seemingly permits attorney fees to any

prevailing party. *See Shelby Cnty. v. Holder*, 43 F. Supp. 3d 47, 62 (D.D.C. 2014) (noting that such interpretation is "faithful to the statutory text"). To be sure, the court in *Shelby County* did not award fees to Shelby County, but only because Shelby County was not "entitled" to fees—the court "le[ft] for another day" the question of whether Shelby County was "eligible" for fees. *Id.* at 61; *see also Shelby Cnty. v. Lynch*, 799 F.3d 1173 (D.C. Cir. 2015) (affirming district court and assuming without deciding that Shelby County was "eligible" for fees because it was not "entitled" to fees).

Moreover, 42 U.S.C. "§ 1988 … authorizes a fee award to a prevailing defendant," *Fox v. Vice*, 563 U.S. 826, 833 (2011), not just a prevailing plaintiff. That provision too includes familiar "prevailing party" language, which "Congress has included … in various fee-shifting statutes, and it has been the [Supreme] Court's approach to interpret the term in a consistent manner." *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 422 (2016). This precedent thus strongly suggests that under VRA Section 14, a State that prevails in an action brought by the United States Attorney General could be a prevailing party potentially eligible for a fee award. And because parties other than the United States *or* a would-be private plaintiff—that is, either a defendant or a Section 5 plaintiff like Shelby County—can be prevailing parties under Section 14, that provision does not presuppose that Section 2 includes a right of action for private plaintiffs.

* * *

In short, no part of the VRA shows that Congress implied a private right to sue for violations of Section 2. Instead, the VRA's text and structure show that Congress intended the Attorney General to enforce Section 2, strongly implying the exclusion of any private remedy. Though certain provisions of the VRA could be read to refer to the existence of a private remedy, the statute lacks the "clear expression of congressional intent to authorize a would-be plaintiff to sue" under Section 2 that is required to find an implied private right of action. *In re Wild*, 994 F.3d at 1255. Because Congress did not create a right for private plaintiffs to enforce Section 2, Plaintiffs' Section 2 claims must be dismissed.

III. Supreme Court precedent does not establish the existence of a private right of action.

The *Milligan* court stated that the Supreme Court in *Morse* decided a "close cousin" of the question whether Section 2 contains a private right of action and opined that precedent "strongly suggests" that Section 2 provides such a right. 2022 WL 265001 at *79. But *Morse*'s dictum suggesting an implied cause of action to enforce the guarantees of Section 2 was a self-conscious extension of *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), in which the Supreme Court held that there is an implied private cause of action to enforce Section 5 of the VRA, 52 U.S.C. § 10304. *Morse*, 517 U.S. at 231-32; 240. So, then, an analysis of *Morse* (and understanding the force of its reasoning) begins with an analysis of *Allen*.

In *Allen*, the Supreme Court implied a private right of action to enforce Section 5 of the Voting Rights Act. 393 U.S. at 555. The *Allen* Court readily acknowledged that Congress did not include a private right of action in the text of the VRA. *Id.* at 554. Nevertheless, the Court created just such a private right of action based on policy considerations:

> The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government.
>
> . . . .
>
> The guarantee of [§] 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to [§] 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.

Id. at 556-57. Since then, the Supreme Court has repeatedly discredited and disavowed this reasoning. The Court has made clear that private rights of action are not to be implied merely because they are "desirable . . . as a policy matter, or [] compatible with the statute." *Sandoval*, 532 U.S. at 286-87. *Allen* is the epitome of this sort of freewheeling approach. In fact, the Supreme Court has specifically identified *Allen* as the defective product of an outdated jurisprudence that too loosely implied private rights of action where Congress had created none:

> During this "*ancien regime*," the Court assumed it to be a proper judicial function to "provide such remedies as are necessary to make

> effective" a statute's purpose. Thus, as a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017). In short, *Allen* was decided long before *Sandoval* and its progeny, which established an undeniably stricter standard to show the creation of an implied private right of action. *Allen*'s discredited reasoning, then, is not helpful in figuring out whether Section 2 contains a private right of action.

All this leads to *Morse*. That decision had no majority opinion. Five of the Justices, however, agreed to imply a private right of action to enforce Section 10 of the VRA. 517 U.S. 186. The Supreme Court reversed a district court that had held that Section 10 of the VRA contains no implied private right of action. *Id.* at 230. Justice Stevens, writing for himself and Justice Ginsburg, acknowledged that the district court's ruling "might have been correct if the Voting Rights Act had been enacted recently" but concluded that the 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 230-31 (quoting *Cannon*, 441 U.S. at 698-99).

Despite this recognition, Justice Stevens believed that the implied-right-of-action analysis should still account for the "highly liberal standard for finding private remedies" that was commonplace in the 1960s. *Id.* at 231. According to Justice Stevens, considering this "contemporary legal context" was the proper way to

determine what Congress wanted when it passed the Voting Rights Act. *Id.* So, for example, it was important to Justice Stevens that Congress "acted against a 'backdrop' of decisions in which implied causes of action were regularly found." *Id.* The three Justices concurring in the judgment—Justices Breyer, O'Connor, and Souter—were far more succinct. Essentially, they found "that the rationale of [*Allen*] applies with similar force" to Section 10. *Id.* at 240 (Breyer, J., concurring in the judgment) (citing S. Rep. No. 97-417, pt. 1, p. 30 (1982)).

Much like that of *Allen* itself, the *Morse* approach to the private-right-of-action analysis does not survive *Sandoval* and its progeny. In *Sandoval*, the Supreme Court expressly refused to "revert . . . to the understanding of private causes of action that held sway . . . when [the statute] was enacted." 532 U.S. at 287. The Court was explicit that use of "contemporary legal context" to smuggle the old ways of judicial invention into modern times was a non-starter. *Id.* at 288. "[C]ontemporary legal context" is only relevant "to the extent it clarifies text." *Id.* It cannot be used to read into a statute a private remedy that is not there.

To be sure, *Allen* and *Morse* are binding precedent insofar as they held that Sections 5 and 10 are privately enforceable. But these cases cannot be stretched any further. *See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 165 (2008); *see also* Bryan Garner et al., The Law of Judicial Precedent 79 (2016) ("Modes of analysis aren't binding on future courts in the same way legal rules are."). Any

discussion about private enforcement of Section 2 in those cases is not only dicta, but dicta based on methods of interpretation that the Supreme Court has long since abandoned. Absent binding precedent that extends *Allen* or *Morse* to Section 2, those cases are inapplicable here.

* * *

Courts "interpret statutes with a presumption against, not in favor of, the existence of an implied right of action." *In re Wild*, 994 F.3d at 1274 (W. Pryor, J., concurring). A close look at the text and structure of the Voting Rights Act cannot support an argument that overcomes this weighty presumption. Without clear statutory indication of a private right of action, "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 286-87. Because the VRA contains no such clarity, Plaintiffs here have no cause of action under Section 2 and their claim must be dismissed.

Done this 11th of March, 2022.

Steve Marshall
Attorney General

Edmund G. LaCour Jr. (ASB-9182-U81L)
Solicitor General

James W. Davis (ASB-4063-I58J)
Deputy Attorney General

A. Barrett Bowdre (ASB-2087-K29V)
Thomas A. Wilson (ASB-1494-D25C)
Deputy Solicitors General

/s/ A. Reid Harris

Misty S. Fairbanks Messick (ASB-1813-T71F)
A. Reid Harris (ASB-1624-D29X)
Brenton M. Smith (ASB-1656-X27Q)
Benjamin M. Seiss (ASB-2110-O00W)
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov
Barrett.Bowdre@AlabamaAG.gov
Thomas.Wilson@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Misty.Messick@AlabamaAG.gov
Reid.Harris@AlabamaAG.gov
Brenton.Smith@AlabamaAG.gov
Ben.Seiss@AlabamaAG.gov

Counsel for Secretary of State Merrill

s/ *Dorman Walker*
Dorman Walker (ASB-9154-R81J)
BALCH & BINGHAM LLP
Post Office Box 78 (36101)
105 Tallapoosa Street, Suite 200
Montgomery, AL 36104
Telephone: (334) 269-3138
Email: dwalker@balch.com

Counsel for Sen. McClendon and Rep. Pringle

CERTIFICATE OF SERVICE

I certify that on March 11, 2022, 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/ A. Reid Harris
Counsel for Secretary of State Merrill