IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, *et al*, *Plaintiffs,* v. KYLE ARDOIN, *Defendant/Third-Party Plaintiff.* WILLIAM P. BARR, in his official capacity as Attorney General of the United States; and UNITED STATES DEPARTMENT OF JUSTICE, *Third-Party Defendants*.	CIVIL ACTION NO. 3:18-CV-625-SDD-EWD

MEMORANDUM IN SUPPORT OF MOTION BY ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE TO DISMISS THIRD-PARTY COMPLAINT

Third-Party Defendants, United States Attorney General William P. Barr and the United States Department of Justice (hereinafter, collectively, "DOJ"), respectfully submit this Memorandum in support of their motion to dismiss the Third-Party Complaint filed by Defendant Kyle Ardoin, Louisiana Secretary of State (hereinafter "SOS").

I. INTRODUCTION AND BACKGROUND

The private-party Plaintiffs Jamila Johnson, et al., brought this action to challenge Louisiana's 2011 congressional redistricting plan, La. Rev. Stat. § 18.1276.1, under Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301.[1] *See generally* Am. Compl. (ECF No. 19). Plaintiffs allege that the 2011 redistricting plan violates Section 2 by denying Black Louisiana

[1] The VRA is now codified at 52 U.S.C. § 10301 et seq. It was previously codified at 42 U.S.C. § 1973 et seq.

citizens an equal opportunity to elect candidates of their choice for the U.S. House of Representatives. *Id.* The SOS denies Plaintiffs' claims. *See generally* SOS Answer to Am. Compl. (ECF No. 106). This Court has stayed this action pending the Fifth Circuit's resolution in another case of several jurisdictional issues relevant to Plaintiffs' claims in this action. *See* Oct. 17, 2019 Order Granting Def's Mot. to Stay (ECF No. 133).

Shortly after filing his Answer to the underlying Amended Complaint, the SOS filed a Third-Party Complaint against U.S. Attorney General William P. Barr and the U.S. Department of Justice. *See* ECF No. 116. In it, the SOS seeks declaratory and monetary relief from DOJ (in the form of indemnification for attorneys' fees, expenses, and costs) should this Court enter judgment against the SOS and in favor of the Plaintiffs in the underlying Section 2 action. *Id.* at 7. The SOS also seeks attorneys' fees, expenses, and costs against DOJ in connection with his prosecution of the third-party complaint against DOJ. *Id.*

The SOS appears to base his claims for relief against DOJ on the novel and unsupportable theory that the Attorney General's 2011 administrative preclearance of Louisiana's 2011 Congressional redistricting plan pursuant to Section 5 of the VRA, 52 U.S.C. § 10304, means that DOJ should indemnify the SOS for litigation expenses in subsequent proceedings where that plan is found to violate some *other* provision of the VRA or the Constitution. *Id.* at 4-6. As discussed below, the SOS's third-party claims lack merit and are not legally cognizable, and therefore should be dismissed.

A. Preclearance Process Under Section 5 of the Voting Rights Act

From 1965 to 2013, Section 5 of the VRA required certain "covered" jurisdictions to submit changes affecting voting to the United States District Court for the District of Columbia or to DOJ to obtain a determination that such changes neither had the purpose nor would have the effect of denying or abridging the right to vote on account of race, color, or membership in a

language minority group before they could be enforced. 52 U.S.C. § 10304. This practice was commonly referred to as "preclearance." Louisiana was one of those covered jurisdictions. In *Shelby County v. Holder*, 570 U.S. 529 (2013), the Supreme Court held unconstitutional the coverage formula in Section 4 of the VRA that determined which jurisdictions were covered by Section 5. The Supreme Court's decision had the effect of removing all covered jurisdictions from the preclearance requirement of Section 5, including Louisiana. Hence, for more than six years, since June 25, 2013, Louisiana has not been subject to the preclearance requirement of Section 5, and the State has been free to enact and implement voting changes without the need for preclearance.

When Section 5 covered jurisdictions such as Louisiana, DOJ or the D.C. District Court would evaluate a submitted voting change against the "benchmark," *i.e.*, the last legally enforceable law or practice, to determine whether the submitted change would lead to "retrogression," *i.e.*, a diminution in the effective exercise of the electoral franchise of racial or language minority groups, including their ability to elect candidates of their choice. *See* 28 C.F.R. § 51.54. To determine whether a submitted change was enacted with a discriminatory purpose under Section 5, DOJ or the D.C. District Court would apply relevant judicial standards, including those set forth in *Village of Arlington Heights* v. *Metro. Hous. Dev. Corp.,* 429 U.S. 252 (1977). *See* 28 C.F.R. §§ 51.54–51.59.

1. Section 5 objections cannot be based on Section 2 violations.

In *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997), the Supreme Court made clear the limited nature of the review of voting changes to be undertaken under Section 5, and how an objection under Section 5 could not be based on a violation of Section 2 alone.

In *Bossier Parish*, the Supreme Court explained that it had "consistently understood § 5 and § 2 to combat different evils and, accordingly, to impose very different duties upon the

States." *Id*. at 471-472. The Court held that "the purpose underlying § 5" was "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities." *Id*.at 487 (internal quotations and citations omitted). "Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan…and necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured." *Id.* at 472. Thus, the "only 'effect' that violates § 5 is a retrogressive one." *Id*. at 487.

By contrast, the Court explained that Section 2 serves a different purpose and has a far "broader mandate." *Id.* at 480. The Section 2 analysis is also quite different, for example, since it "uses as its benchmark for comparison in vote dilution claims a hypothetical, undiluted plan." *Id*. at 472.[2]

Hence, even if a voting change violated Section 2, the Supreme Court made clear in *Bossier Parish* that such a violation, standing alone, would not be a lawful basis for interposing an objection under Section 5. *Id.* at 483 ("a violation of § 2 is not grounds in and of itself for denying preclearance under § 5"); *id.* at 485 ("All we hold today is that preclearance under § 5 may not be denied on that basis alone," *i.e.*, on the basis of a Section 2 violation).

Accordingly, the legal analysis undertaken in Section 5 reviews is very different from and far narrower than that which governs in a Section 2 case such as this one. *Bossier Parish* makes clear that the SOS is simply wrong in his assertion that DOJ should have reviewed for and

[2] The Supreme Court has elsewhere noted that Sections 2 and 5 of the VRA "differ in structure, purpose, and application," *Holder v. Hall*, 512 U.S. 874, 883 (1994), and noted that unlike Section 5, "[r]etrogression is not the inquiry in § 2 dilution cases." *Hall*, 512 U.S. at 884.

certified Section 2 compliance during its Section 5 review. Indeed, the governing rule is precisely the opposite.

DOJ incorporated this *Bossier Parish* rule about the very limited nature of Section 5 review into the guidance provided to covered jurisdictions. *See* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 F.R. 7470 (Feb. 9, 2011) ("The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630 (1993), or on the grounds that it violates Section 2 of the Voting Rights Act.")

2. Section 5 preclearance does not preclude subsequent legal challenges.

The Supreme Court also reaffirmed in *Bossier Parish* that preclearance under Section 5 does not preclude a subsequent challenge to a voting change: "the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted voting "qualification, prerequisite, standard, practice, or procedure" may violate that section." *Bossier Par. Sch. Bd.*, 520 U.S. at 485. The Court had previously made clear that after Section 5 preclearance, a voting change also "can be challenged in traditional constitutional litigation." *Morris v. Gressette*, 432 U.S. 491, 506-507 (1977).

That preclearance under Section 5 does not shield a voting change (or the jurisdiction enacting it) from subsequent suit under Section 2 or the Constitution comes straight from the statute's plain text. Section 5 specifies "neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object … shall bar a subsequent action to enjoin enforcement" of a voting change submitted to the Attorney General. 52 U.S.C. § 10304(a).

The Attorney General's Section 5 guidelines repeatedly note that preclearance does not preclude future legal challenges: 28 C.F.R. § 51.49 ("The preclearance by the Attorney

General of a voting change does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of section 5, and, as stated in section 5, '(n)either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.'"); 28 C.F.R. § 51.41 (DOJ's letters notifying jurisdictions of preclearance under Section 5 shall advise "that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change."); 28 C.F.R. § 51.55(b) ("Preclearance under section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change demonstrates that such action is appropriate."); *see also* Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 F.R. 7470 (Feb. 9, 2011) ("jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs.").

B. Louisiana's Preclearance Submission of its 2011 Congressional Plan

In June 2011, Louisiana submitted its 2011 congressional redistricting plan to DOJ for administrative review under Section 5. *Cf.* Third-Party Compl. at 5; *see also* La. Cover Ltr. to DOJ (Jun. 1, 2011), Preclearance Submission No. 2011-2066 (copy attached as Ex. 1). As the submission indicates, the Louisiana Legislature enacted the 2011 congressional redistricting plan pursuant to its state legislative authority. *Id.* at 3. DOJ's role was limited to conducting an administrative review under Section 5 of the plan once it was enacted and submitted by the state.

Under the benchmark (2002) plan, Louisiana had seven congressional districts, one of which (District 2) provided Black citizens with the ability to elect a candidate of choice. *Id.* at 4, 14-15. Under the 2011 plan, Louisiana was apportioned one fewer congressional seat after the

2010 census, for a total of six, and, the Legislature reconfigured District 2 to retain the ability of Black voters to elect their candidates of choice. *Id.*

On August 1, 2011, DOJ notified Louisiana via letter that the "Attorney General does not interpose any objection" to the 2011 congressional plan under Section 5. *Cf.* Third-Party Compl. at 5; *see also* DOJ Preclearance Ltr. to La. (Aug. 1, 2011), Preclearance Submission No. 2011-2066 (copy attached as Ex. 2). Consistent with Section 5's plain text and DOJ's administrative procedures, DOJ's preclearance letter to Louisiana regarding the 2011 congressional plan contained the following explicit reminder: "However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.41." *Id.* The same reminder appeared in literally hundreds of preclearance letters that Louisiana received from DOJ over decades.

Even beyond this reminder, Louisiana was well aware of the principle that once precleared under Section 5, a redistricting plan was not thereby insulated from attack, and could later be challenged and struck down under Section 2 or the Constitution. Louisiana's post-1980 Census congressional redistricting plan was precleared by DOJ under Section 5 and later struck down under Section 2 in *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court). Louisiana's post-1990 congressional plan was precleared by DOJ under Section 5 and later struck down under the Constitution in *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996) (three-judge court), *appeal dismissed*, 518 U.S. 1014 (1996). Louisiana cited both of these cases in its submission letter of the 2011 congressional plan. *See* Ex. 1.

II. MOTION TO DISMISS STANDARD

To survive a motion to dismiss under Rule 12(b)(1), the party seeking to invoke the Court's jurisdiction must prove by a preponderance of the evidence that the Court has subject matter jurisdiction based on the complaint and evidence. *Gilbert v. Donahoe*, 751 F.3d 303, 307 (5th Cir. 2014), *cert. denied*, 574 U.S. 873 (2014). Under the heightened pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court should dismiss an action if it appears certain that a plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction. *See, e.g.*, *Davis v. United States*, 597 F.3d 646, 649 (5th Cir. 2009) (per curiam); *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012). "In considering a challenge to subject matter jurisdiction, the district court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case. A district court may dispose of a motion to dismiss for lack of subject matter jurisdiction based on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Flores v. Pompeo*, 936 F.3d 273, 276 (5th Cir. 2019) (internal citations and quotations omitted).

On a motion to dismiss under Rule 12(b)(6), the Court accepts "all well-pled factual allegations as true" and construes those allegations "in the light most favorable to the plaintiff." *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 379 (5th Cir. 2003) (internal quotations omitted); *accord Nobre v. La. Dep't of Pub. Safety*, 935 F.3d 437, 440 (5th Cir. 2019). Conclusory allegations "will not suffice to prevent a motion to dismiss," and "neither will unwarranted deductions of fact." *Willard*, 226 F.3d at 279; *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). "In deciding a 12(b)(6) motion to

dismiss, a court may permissibly refer to matters of public record." *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994).

III. ARGUMENT AND CITATION OF AUTHORITY

The SOS's claim for relief against DOJ hinges on this Court entering judgment against the SOS and in favor of the private plaintiffs in the underlying Section 2 case. Should that happen, the SOS seeks declaratory relief, indemnification, and an award of attorneys' fees and costs against DOJ based on the Attorney General's August 2011 preclearance of Louisiana's 2011 congressional redistricting plan pursuant to Section 5 of the VRA.

As explained below, the SOS's third-party complaint evinces no conceivable basis for invoking this Court's subject matter jurisdiction. The SOS's claims (to the extent they are cognizable at all) are barred by the doctrine of sovereign immunity, which has not been waived here; are specifically precluded by statute and Supreme Court precedent; and are barred by the applicable stature of limitations. Nor are costs and fees available to the SOS under any cognizable theory. Likewise, the SOS lacks Article III standing. Accordingly, the third-party complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

A. Sovereign Immunity Bars the SOS's Claims and No Waiver Applies

The United States, as sovereign, "may not be sued without its consent." *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Louisiana Dept. of Envtl. Quality v. EPA*, 730 F.3d 446, 448-49 (5th Cir. 2013). A waiver of sovereign immunity "is a prerequisite for jurisdiction," *Mitchell*, 463 U.S. 206, 212 (1983), and federal courts lack jurisdiction to hear suits against the United States, its agencies, or its officers in their official capacities, absent that express waiver. *United States v. King*, 395 U.S. 1, 4 (1969); *see Drake v. Panama Canal Commission*, 907 F.2d 532, 534 (5th Cir. 1990) (sovereign immunity "extends to the government's officers and

agencies."). The requisite waiver of sovereign immunity "cannot be implied," *King*, 395 U.S. at 4; rather, it "must be unequivocally expressed in statutory text," *Lane v. Pena*, 518 U.S. 187, 192 (1996). Any question as to whether a waiver exists "must be construed strictly in favor of the sovereign." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (internal quotations marks omitted). The party claiming a sovereign immunity waiver bears the burden of proving a waiver "in the specific context at issue"—here the Attorney General's determinations under Section 5 of the VRA. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 232 (2015); *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009). The government's sovereign immunity extends to claims for money damages and attorneys' fees. *FDIC v. Meyer*, 510 U.S. 471, 473 (1994) (declining to find an implied cause of action for damages against federal agencies); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (explicit waiver required for fee awards).

The SOS does not claim that there is a waiver of sovereign immunity here or even attempt to meet his burden of establishing any purported waiver. His third-party complaint is simply silent in this regard. *See* Third-Party Compl. at 4-5. While there are various limited statutory waivers of the United States' sovereign immunity that Congress has enacted, they are subject to explicit conditions and limitations, and none of them would authorize the kind of declaratory judgment, indemnity, and fees claims that the SOS seeks to bring here.

The SOS thus does not and cannot meet his burden of proving that the United States has waived its sovereign immunity here. That failure alone requires this Court to dismiss the SOS's third-party complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). *See, e.g., Louisiana Dep't of Envtl. Quality*, 730 F.3d at 448 (dismissing judicial review action for lack of jurisdiction where waiver of sovereign immunity had not been established).

B. DOJ's Preclearance Determinations Under Section 5 Are Discretionary and not Subject to Judicial Review

The SOS bases his claims for costs and fees on unspecified "errors" the SOS alleges were committed during DOJ's administrative review of Louisiana's 2011 redistricting plan. *See* Third-Party Compl. at 6 (seeking relief for "errors in [DOJ's] preclearance determination"). Because purported DOJ errors are essential to his liability and recovery theory, the SOS asks this Court to issue "a declaration that the Attorney General and DOJ erred in its [sic] preclearance review[.]" *Id.* at 7. But this Court lacks jurisdiction to review DOJ's Section 5 determinations or to provide declaratory relief in connection therewith. Accordingly, the third-party complaint should be dismissed.

First, it is true that in the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, Congress provided an express, limited waiver of its sovereign immunity that allows persons aggrieved by federal agency actions to obtain judicial review of those actions in some circumstances and, when appropriate, obtain declaratory or injunctive relief (but not money damages).

However, the Supreme Court has made clear, in a decision directly on point, that the Attorney General's decisionmaking under Section 5 is discretionary and unreviewable in any court under the APA. In *Morris v. Gressette*, 432 U.S. 491 (1977), the Supreme Court held that "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act" under Section 5. *Id*. at 507 n.24.[3] *Morris* directly precludes the SOS's claim for a declaration that the Attorney General's 2011 Section 5 preclearance of the

[3] In *Morris*, the Court noted that Section 5 did not require "an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect." *Id*. at 502. Rather, the Court said that "compliance with § 5 is measured solely by the absence, for whatever reason of a timely objection on the part of the Attorney General" once the jurisdiction makes a complete submission and the 60-day review period expires. *Id*.

2011 Louisiana congressional plan was erroneous. *Morris* also precludes the SOS's claim for indemnity and fees, since those claims also ultimately rest on the SOS's allegations of errors in DOJ's Section 5 review.

In *Morris*, the Supreme Court relied in part on the fact that the Attorney General's action under Section 5 is "not conclusive" regarding the legality of an enactment. *Id*. at 505. If the "discriminatory character of an enactment is not detected upon review by the Attorney General" during Section 5 administrative review, the voting change itself can later be challenged in further litigation, as Section 5's text clearly provides. *Id*. at 505, 506-507. Similarly, if the Attorney General objects to a voting change under Section 5, the jurisdiction could later seek a *de novo* judicial preclearance determination from the D.C. District Court. *Id*. at 505 n.21. Hence, *Morris* found there was no jurisdiction under the APA for subjecting DOJ's decisionmaking under Section 5 to judicial review. *Id*. at 500-501 & n.13 (defining the question at issue being "whether the *Harper* court had jurisdiction under the Administrative Procedure Act to review the Attorney General's failure to object").

The non-reviewability principle announced in *Morris* has been applied by federal courts repeatedly. It has even been recognized in litigation between Louisiana and the United States in this decade in a case involving its post-2010 state House plan. *See Louisiana House of Representatives v. United States*, No. 1:11cv770 (D.D.C. June 21, 2011) (three-judge court) ("The administrative preclearance by the Attorney General moots the need for the State to obtain declaratory relief from this Court prior to implementing its 2011 House redistricting plan. Such determination by the Attorney General is not appealable or reviewable by this Court") (copy attached as Ex. 3); *see also Harris v. Bell*, 562 F.2d 772, 773-74 (D.C. Cir. 1977); *Reaves v. United States Dep't of Justice*, 355 F. Supp. 2d 510, 514 (D.D.C. 2005) (three judge court)

("[T]he Supreme Court has clearly held that Congress intended the Attorney General's decision whether or not to object to a proposed voting change under Section 5 to be discretionary and unreviewable."); *Shaw v. Barr*, 808 F. Supp. 461, 467 (E.D.N.C. 1992) (three-judge court) ("The federal defendants also contend that to the extent the claim against them involves a challenge to the Attorney General's exercise of the discretionary power conferred on him by Section 5 to make preclearance decisions, it fails to state a cognizable federal claim. Specifically, they contend that *Morris*… long since has established that such discretionary decisions are not subject to judicial review in any court. We agree."), *aff'd in relevant part*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) ("In our view, the District Court properly dismissed appellants' claims against the federal appellees."); *County Council of Sumter County v. United States*, 555 F. Supp. 694, 706 (D.D.C. 1983) (three-judge court) ("we have no authority either to review, or to preview, decisions of the Attorney General under Section 5"). The *Morris* rule is also cited in DOJ's Section 5 Procedures. 28 C.F.R. § 51.49 ("The decision of the Attorney General not to object to a submitted change or to withdraw an objection is not reviewable.").

Accordingly, under *Morris*, this Court lacks jurisdiction to adjudicate the SOS's allegation of "errors" that form the basis of his claims. DOJ's 2011 administrative preclearance of Louisiana's Congressional redistricting plan under Section 5 is unreviewable as a matter of law.

Second, another jurisdictional bar precludes this Court from issuing a "declaration that the Attorney General and DOJ erred" during the 2011 Section 5 review process. *Cf.* Third-Party Compl. at 7. Section 14(b) of the VRA provides that the D.C. District Court *alone* has jurisdiction to issue declaratory judgments under Section 5. *See* 52 U.S.C. § 10310(b). Section 14(b) states that:

> [n]o court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 10303 or 10304 of this title or any restraining order or temporary or permanent injunction against . . . any action of any Federal officer or employee pursuant hereto.

Id.; *see Perkins v. Matthews*, 400 U.S. 379, 385 (1971); *United States v. Saint Landry Parish Sch. Bd*, 601 F.2d 859, 863 (5th Cir. 1979). This Court thus lacks jurisdiction to issue the declaratory relief upon which the SOS's claims depend.

Nonetheless, it would be futile to transfer the Secretary's claims to the D.C. District Court under Section 14(b) because that court would also lack jurisdiction over these claims under *Morris* and a variety of other jurisdictional defects described in this brief. *Cf. Giles v. Ashcroft*, No. 3:01cv392 (S.D. Miss. Sep. 27, 2001) (copy attached as Ex. 4) (dismissing and declining to transfer challenge to VRA to D.C. District Court because plaintiff lacked standing and the claims were "completely without merit").

Third, yet another jurisdictional bar exists in the APA's general six-year statute of limitations for claims against the United States provided by 28 U.S.C. § 2401(a). *See, e.g.*, *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991). "The right to bring a civil suit challenging an agency action accrues 'upon the completion of the administrative proceedings.'" *Id.* at 716. Failure to bring an APA challenge within the applicable limitations period deprives the reviewing court of jurisdiction. *Dunn-McCampbell Royalty Interest v. National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997).[4] Because DOJ's administrative determination with respect to Louisiana's 2011 congressional redistricting plan was rendered on August 1, 2011, *see* Ex. 2, more than eight years ago, the SOS's APA challenge would be time-barred.

[4] To be clear: DOJ does not herein suggest that administrative preclearance determinations under Section 5 of the VRA are reviewable under the APA; they are not under *Morris*. But if they were so reviewable, they would be subject to the general limitations period of 28 U.S.C. § 2401(a).

Accordingly, this Court lacks jurisdiction to issue any declaratory relief regarding the Attorney General's review of Louisiana's 2011 districting plan. Accordingly, the SOS's third-party complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

C. No Claim is Available to the SOS for Monetary Indemnity or Fees

1. The Federal Tort Claims Act bars the SOS's damages claims.

Subject to several exceptions, the Federal Tort Claims Act ("FTCA") waives the United States' sovereign immunity "for money damages…for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C § 1346(b)(1); *see also* 28 U.S.C. § 2680. The FTCA does not allow liability here for at least seven reasons.

First, the SOS has sued the Department of Justice and the Attorney General in his official capacity—not the United States. But "[i]t is well established that FTCA claims may be brought against only the 'United States,' and not the agencies or employees of the United States." *Walters v. Smith*, 409 F. App'x 782, 783-84 (5th Cir. 2011) (per curiam). "Thus, an FTCA claim against a federal agency or employee as opposed to the United States itself must be dismissed for want of jurisdiction." *Galvin v. OSHA*, 860 F.2d 181, 183 (5th Cir. 1988).

Second, the FTCA waives sovereign immunity only for "injury or loss of property, or personal injury or death." 28 U.S.C § 1346(b)(1). The SOS's claims for litigation expenses are for pure economic loss, and do not constitute "injury or loss of property"; "personal injury" (to the extent that a State can experience "personal" injury); or "death." In *Idaho ex rel. Trombley v. United States Department of the Army, Corps of Engineers*, 666 F.2d 444 (9th Cir. 1982), for example, the Ninth Circuit held that Idaho's claim against the federal government for firefighting

expenses were not cognizable under the FTCA, despite the state's "attempt to classify these expenses as 'mitigation costs.'" *Id.* at 446. So too here, the SOS's alleged expenses in defending against Plaintiffs' lawsuit cannot be considered "injury or loss of property," "personal injury," or "death," and thus cannot be recovered under the FTCA.

Third, the FTCA only waives the United States' sovereign immunity "under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C § 1346(b)(1) (emphasis added). Put another way, "the federal government does not yield its immunity with respect to obligations that are peculiar to governments or official-capacity state actors and which have no private counterpart in state law." *Bolduc v. United States*, 402 F.3d 50, 57 (1st Cir. 2005). Private persons, of course, do not preclear voting changes by jurisdictions under Section 5 of the VRA—only the DOJ or the D.C. District Court can do so. As Section 5 preclearance is "peculiar to governments," *Bolduc*, 402 F.3d at 57, it cannot form the basis of an FTCA claim.

Fourth, the FTCA waives the United States' sovereign immunity only "in accordance with the law of the place where the act or omission occurred." 28 U.S.C § 1346(b)(1). The Supreme Court has explained that the FTCA's "reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA." *FDIC v. Meyer*, 510 U.S. 471, 478 (1994). "It follows, of course, and has consistently been held, that the FTCA was not intended to redress breaches of federal statutory duties." *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) (en banc) (internal quotation marks omitted). Accordingly, the FTCA does not waive the United States' sovereign immunity to a claim that the federal government erred in its preclearance review under Section 5 of the federal VRA.

Fifth, the FTCA explicitly preserves the United States' sovereign immunity with respect to "claim[s] arising out of . . . misrepresentation." 28 U.S.C. § 2680(h). "[T]he essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies." *Block v. Neal*, 460 U.S. 289, 296 (1983). Here, the SOS argues that, to the extent that the SOS is found liable to Plaintiffs, the SOS's liability would stem from the United States' communication of supposed misinformation—the United States' preclearance letter—upon which the SOS relied. That is a classic misrepresentation claim for which the FTCA does not waive sovereign immunity. Nor can the misrepresentation exception be circumvented by arguing that the federal government assumed a duty to provide the information at issue. In *Baroni v. United States*, 662 F.2d 287 (5th Cir. 1981), for example, the plaintiff homeowners argued that the misrepresentation exception did not bar their flood-damage claims because the Federal Housing Administration had undertaken to determine whether their homes were located above the 50-year flood elevation. The Fifth Circuit flatly rejected this attempt to evade the FTCA's misrepresentation exception: "Assuming that the government's undertaking created a duty under state law to determine the flood level non-negligently, the damages complained of by the plaintiffs still result solely from the fact that the government communicated its miscalculation to the developer who relied on it, and that reliance eventually caused the plaintiffs' damage." *Id.* at 289.

Sixth, the FTCA also excludes from its waiver of sovereign immunity "[a]ny claim. . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). "The [discretionary-function] exception preserves the government's sovereign immunity when the plaintiff's claim is based on

an act by a government employee that falls within that employee's discretionary authority." *Tsolmon v. United States*, 841 F.3d 378, 382 (5th Cir. 2016). Congress enacted the discretionary function exception to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

"If a statute, regulation, or policy leaves it to a federal agency to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary." *Spotts v. United States*, 613 F.3d 559, 567 (5th Cir. 2010); *see Gonzalez v. United States*, 851 F.3d 538, 550 (5th Cir. 2017). As described above, Section 5 of the VRA clearly authorizes DOJ to exercise discretion in determining whether to interpose an objection to a submitted voting change. *See* 52 U.S.C. § 10304(a); 28 C.F.R. §§ 51.51–51.61. *Morris v. Gressette* and its progeny make clear that DOJ's administrative preclearance decisions under Section 5 are discretionary and shielded from judicial review. *See Morris*, 432 U.S. at 504-05; *Harris*, 562 F.2d at 773-74; *Reaves*, 355 F. Supp. 2d at 514. Accordingly, claims arising from DOJ's administrative preclearance decisions cannot be brought under the FTCA.

Finally, the SOS's claims for its own attorney's fees, costs, and expenses are barred by the FTCA. Attorney's fees are not recoverable under the FTCA. *See, e.g.*, *Anderson v. United* States, 127 F.3d 1190, 1191-92 (9th Cir. 1997); *Bergman v. United States*, 844 F.2d 353, 355 (6th Cir. 1988); *Joe v. United States*, 772 F.2d 1535, 1536-37 (11th Cir. 1985) (per curiam). And Louisiana law does not allow parties to recover their own attorney's fees and defense costs under equitable-indemnification theories. *See, e.g.*, *AFC, Inc. v. Mathes Brierre Architects*, Civ. A.

No. 16-16560, 2017 WL 2731028, at *3 (E.D. La. June 26, 2017); *Eaves v. Spirit Homes, Inc.*, 931 So. 22d 1173, 1180 (La. Ct. App. 2006).

2. The VRA has no cause of action for money damages.

Money damages are not available for alleged violations of the VRA, including Section 5. *See* 52 U.S.C. §§ 10304 & 10308(d); *Vondy v. White*, 719 F.2d 1265, 1266 (5th Cir. 1983) (Section 5 "does not authorize the award of damages"); *see also Olagues v. Russoniello*, 770 F.2d 791, 805 (9th Cir. 1985) ("The [VRA], however, does not specify any statutory damage remedies…. We decline to imply any action for damages."); *Foreman v. Dallas Co.*, 990 F. Supp. 505, 512 (N.D. Tex. 1998) (same). The VRA thus provides no basis for the SOS's indemnity claim against DOJ.

3. Attorneys' fees are unavailable to the SOS on his third-party claim.

The SOS seeks (*inter alia*) an award against DOJ for costs and attorneys' fees the SOS incurs in connection with his defending against the private plaintiffs' Section 2 claims and prosecuting of his claims against DOJ. *See* Third-Party Compl. at 6. The SOS cites no legal basis for its novel theory. None exists.

Unless it has waived its sovereign immunity, "the Government is immune from claims for attorney's fees." *Ruckelshaus*, 463 U.S. at 685. The principal limited waiver for attorney's fees claims against the United States resides in the Equal Access to Justice Act ("EAJA"). EAJA does not provide any support for the SOS's claim for fees.

EAJA does *not* provide a stand-alone claim for attorney's fees against the United States. Rather, every sub-provision of EAJA has its own specific requirements, but all depend on a showing that a claimant for fees has attained "prevailing party" status in civil litigation with the United States or its agencies and officers. The SOS cannot attain such status because there is no

substantive underlying claim on which he can "prevail" against DOJ, because the predicate Section 5 decision by DOJ is not subject to judicial review under *Morris*.

For example, EAJA(b) provides that where a party prevails in civil litigation with the United States, federal agencies and officials can be liable for attorneys' fees and costs "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b).[5] The SOS has not identified any cognizable statutory or federal common law theory whatsoever under which DOJ would or could be liable for attorneys' fees in connection with DOJ's Section 5 preclearance determinations—because, as demonstrated above, no such theory exists.

The SOS might argue that Section 14(e) of the VRA is a relevant underlying fees statute that grants district courts discretion to award attorneys' fees to prevailing parties (other than the United States) in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment" 52 U.S.C. § 10310(e). But the SOS cannot meet the Section 14(e) standard for several reasons.

First, like EAJA(b), Section 14(e) of the VRA itself is predicated on attaining "prevailing party" status, here on an underlying claim to enforce the voting guarantees. As we have explained, there is no way the SOS can attain prevailing party status on a substantive claim against DOJ because of *Morris*. But even worse, the SOS's claim for fees against DOJ here

[5] 28 U.S.C. § 2412(b) states in full:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys…to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

hinges not on his *success* as a "prevailing party" in a voting rights suit. Instead, the SOS's claim depends on his *losing* the underlying Section 2 action to the Johnson private plaintiffs. In other words, the SOS seeks relief from DOJ only if this Court declares that Louisiana's 2011 districting plan *violates* Section 2 of the VRA, making the Johnson plaintiffs prevailing against the SOS. *See* Third-Party Compl. at 6 (seeking relief "in the event of an adverse judgment" in the Section 2 claim). In that instance, the SOS clearly would not be a "prevailing party" entitled to fees from anyone under any theory.

Second, the underlying claim that the SOS contemplates against DOJ is not a claim to enforce the voting guarantees that would be covered by Section 14(e). The seminal case explaining why arises from the *Shelby County* litigation. There, Shelby County filed a claim for fees against DOJ after it prevailed on its underlying claim in having the coverage formula of Section 4 of the VRA struck down. Nonetheless, the courts held that Shelby County was not entitled to fees because the underlying claim on which it prevailed was not one brought to enforce the voting rights guarantees. *Shelby County v. Lynch*, 799 F.3d 1173, 1179 (D.C. Cir. 2015), *cert denied*, 136 S. Ct. 981 (2016). Under Section 14(e), "[a] party is entitled to fees only when it succeeds in litigation that advanced the goals Congress intended the relevant fee-shifting provision to promote." *Id.* at 1179. Congress enacted Section 14(e) to "secur[e] broad compliance" with the VRA. *Id.* at 1182 (*citing Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968)). Like Shelby County, the third party claim that the SOS seeks to bring against DOJ here is not a suit brought to "secure broad compliance" with the voting rights guarantees and advance Congress' intended goals. Hence, there would be no entitlement to fees even if the SOS could prevail on such a claim (which he cannot under *Morris*). *See Shelby County*, 799 F.3d at 1179 ("When a party's success did not advance [VRA] goals, it is not entitled to fees.").

D. The SOS Lacks Standing to Assert His Purported Claims Against DOJ

This Court's authority under Article III of the Constitution extends only to actual "cases" or "controversies." *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004). Thus, standing is "the threshold question in every federal case," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and the party initiating the suit must establish standing, *Newdow*, 542 U.S. at 11. To establish Article III standing, plaintiffs must plead three elements: (1) "injury in fact," (2) a "causal connection" between the injury and the challenged act, and (3) that the injury "likely" would be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted). In the standing context, the Supreme Court "presume[s] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler v. Cuno*, 126 S. Ct. 1854, 1861 n.3 (2006) (*quoting Renne v. Geary*, 501 U.S. 312, 316 (1991)). That presumption is borne out here. The SOS lacks standing.

1. The SOS has no actual or imminent injury.

An "injury in fact" in the standing context means "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted).

Under any reading of the facts here, the SOS has failed to allege an injury that is "actual or imminent," as distinct from a "conjectural or hypothetical," in connection with his indemnity claim. A "claim for indemnity arises only after the party seeking indemnity is held liable." *Hercules, Inc. v. Stevens Shipping Co.*, 698 F.2d 726, 732 (5th Cir. 1983) (en banc). No liability judgment has been rendered against the SOS in the underlying Section 2 lawsuit relating to Louisiana's 2011 congressional redistricting plan (which is presently stayed). Therefore, the SOS's third-party indemnity claim against DOJ would not yet be ripe for adjudication, even if it otherwise presented a justiciable case or controversy (which it does not). *See, e.g.*, *United States*

Fire Ins. Co. v. A-Port, LLC, 2015 U.S. Dist. LEXIS 39384, *6 (E.D. La. Mar. 26, 2015) (dismissing third-party indemnity claim on ripeness grounds and finding that "the duty-to-indemnify issue is premature and non-justiciable until the underlying issue of liability is resolved and the defendant is cast in judgment").

2. Any injury is traceable to the State and not DOJ.

The SOS cannot establish that any alleged injury to his interest is, or would be, "fairly traceable to the [third-party] defendant's allegedly unlawful conduct." *Daimler Chrysler*, 126 S. Ct. at 1856 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Despite the SOS's blunt recasting of DOJ's role in the preclearance process, *see* Third-Party Compl. at 4-5, that role is governed and constrained by statute. *See* 52 U.S.C. § 10304; 28 C.F.R. Part 51.

To support his novel liability theories, the SOS conjures several erroneous legal principles he now believes should have governed DOJ's actions in the Section 5 review process. *See* Third-Party Compl. at 4-6. These purported principles are clearly in the nature of erroneous assertions about the law rather than factual allegations, and they can be adjudged and dismissed on the face of the complaint. For instance, the SOS alleges that Section 5 imposes upon DOJ a "statutorily imposed obligation *to assist* covered jurisdictions to achieve compliance with voting rights requirements." *Id.* at 4, par. 2 (emphasis added). The SOS also claims that the DOJ had an "affirmative obligation" to ensure that voting changes "comported with … the Voting Rights Act and the Constitution[.]" *Id.* at 4, par. 5. The SOS posits that Section 5 requires Attorney General to "determine … whether voting changes conformed to the Constitution and the Voting Rights Act." *Id.* at 4, par. 6. The SOS also claims that DOJ's "preclearance review "found the plan to be without constitutional or Voting Rights Act infirmities." *Id.* at 5, par. 11. The SOS also claims that "[t]hrough the preclearance review process," DOJ "contributed to and participated in the formulation and implementation of U.S. congressional districts in

Louisiana…." *Id.* at 5, par. 12. Finally, the SOS claims that he "relied" on "DOJ preclearance review" and "continued to rely" on it in conducing elections through the decade. *Id.* at 5, par. 14-15.

The SOS's views find no support in the law and they are clearly precluded by the statutory language of Section 5, the definitive case law interpreting it, and DOJ's Section 5 procedures. Louisiana and its officials alone developed and enacted Louisiana's 2011 congressional redistricting plan and were alone responsible for implementing the plan. Only after the State enacted the plan and submitted the enacted plan for administrative review pursuant to Section 5, did DOJ fulfill its sole role to conduct its quite limited review of whether it complied with Section 5, *Bossier Parish*, 520 U.S. at 483. DOJ cannot review plans or object under Section 5 based on Section 2 or various other constitutional bases, and preclearance does not preclude future litigation on those bases. Likewise, DOJ's role in preclearing the plan is not subject to review under *Morris*, 432 U.S. at 507 n.24.

To the extent that the SOS claims he "relied" (and "continued to rely" for six years and three federal election cycles after Section 5 no longer applied to the state) on a completely erroneous and unreasonable view of what Section 5 review signified, despite all the well-established authority to the contrary, that does not establish any liability on the part of DOJ.

Accordingly, should this Court determine that Louisiana's 2011 Congressional plan violates Section 2 of the VRA, any injury to the SOS would be "fairly traceable" not to DOJ, but rather to the Louisiana Legislature, which developed and enacted the plan. *See Reaves*, 355 F. Supp. 2d at 515 ("[I]t is not the allegedly unlawful conduct of the federal defendants but that of the State of South Carolina that allegedly caused injury to plaintiffs.").

Because the SOS cannot establish his standing, he cannot establish this Court's subject matter jurisdiction under Article III of the Constitution. This action should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

IV. CONCLUSION

For the foregoing reasons, Third-Party Defendants, Attorney General William P. Barr and the United States Department of Justice, respectfully request that this Court grant the motion to dismiss pursuant to Rules 12(b)(1) and/or 12(b)(6), Fed. R. Civ. P.

Respectfully submitted this 9th day of December, 2019.

BRANDON J. FREMIN
United States Attorney
Middle District of Louisiana

s/ Ellen M. Kinney
JOHN J. GAUPP, LBN 14976
ELLEN M. KINNEY, LBN 34679
Assistant United States Attorneys
(Local Counsel)
777 Florida Street, Suite 208
Baton Rouge, Louisiana 70801
Telephone: (225) 389-0443
Fax: (225) 389-0685
E-mail: ellen.kinney@usdoj.gov

ERIC S. DREIBAND
Assistant Attorney General
Civil Rights Division

ELLIOTT M. DAVIS
Acting Principal Deputy
Assistant Attorney General
Civil Rights Division

s/ Bradley E. Heard
T. CHRISTIAN HERREN, JR.
RICHARD DELLHEIM
BRADLEY E. HEARD (Lead Attorney)
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
4 Constitution Square
150 M Street NE, Rm 8.923
Washington, D.C. 20530
Telephone: (202) 305-4196
Fax: (202) 307-3961
E-mail: Bradley.Heard@usdoj.gov