IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

KENNETH L. SIMON, et al.,	:	
	:	
Plaintiffs,	:	Case No. 4:22-cv-612
	:	
v.	:	**CIRCUIT JUDGE JOAN L. LARSEN**
	:	**JUDGE SOLOMON OLIVER**
GOVERNOR MIKE DeWINE, et al.,	:	**JUDGE JOHN R. ADAMS**
	:	
Defendants.	:	

DEFENDANTS' RENEWED COMBINED MOTION TO DISMISS AND RENEWED MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PARTIAL SUMMARY JUDGMENT

Defendants Governor Mike DeWine, Secretary of State Frank LaRose, Auditor of State Keith Faber, House Speaker Jason Stephens, and Senate President Matt Huffman fully adopt and incorporate herein their original Combined Motion to Dismiss and Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, Partial Summary Judgment, and Immediate Appointment of a Special Master (Doc. 15), and their original Reply in Support of their Combined Motion (Doc. 23) filed on May 4, 2022 and June 3, 2022 respectively. Plaintiffs' Renewed Motions for Temporary Restraining Order, Preliminary Injunction and Partial Summary Judgment filed on May 7, 2024 (Doc. 39) are substantially similar to their original motions filed on April 15, 2022 (Doc. 4) which has been fully briefed. In addition to the reasons stated in their original combined motion, Defendants further move this Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss Plaintiffs' claim under Section 2 of the Voting Rights Act ("VRA") for the additional reason that, as a matter of law, no private right of action exists for claims under that provision.

Thus, for the reasons stated in the Defendants' original combined motion (Doc. 15), and for the additional reason set forth more fully in the attached memorandum in support, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint and Plaintiffs' Renewed Motions for Temporary Restraining Order, Preliminary Injunction and Partial Summary Judgment.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiffs, a group of registered Black voters in Mahoning County, Ohio, claim that their right to vote was violated when the Ohio Redistricting Commission enacted a congressional district map (the "March 2 Plan") without considering racial demographics. Compl., Doc. 1. Plaintiffs bring claims for violations of the Voting Rights Act of 1965, and Section 2 of the Fourteenth Amendment, the First Amendment, and the Fifteenth Amendment to the United States Constitution. *Id.* at PageID #21-25, ¶¶ 62-65.

Defendants herein adopt and incorporate their original Combined Motion to Dismiss and Memorandum in Opposition to Plaintiffs' Motions for Temporary Restraining Order, Preliminary Injunction, Partial Summary Judgment, and Immediate Appointment of a Special Master (*see* Doc. 15), and their Reply in Support of Joint Motion (*see* Doc. 23). Defendants further move, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for dismissal of Plaintiffs' claims under Section 2 of the Voting Rights Act ("VRA") as a matter of law as no private right of action exists under that statute.

Accordingly, for the reasons stated in Defendants' original combined motions and because there is no private right of action under Section 2 of the VRA, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint and deny Plaintiffs' Renewed Motions.

II. BACKGROUND

On April 15, 2022, Plaintiffs filed their Complaint against Defendants alleging that the U.S. Congressional Map adopted by the Ohio Redistricting Commission on March 2, 2022 violates the VRA, and the Fifteenth, Fourteenth and First Amendments to the U.S. Constitution. Compl. ¶¶ 62-65, 69-72, 76, & 78, Doc. 1, PageID# 21-25. Defendants herein adopt and incorporate the

factual background set forth in their original Combined Motion to Dismiss and Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, Partial Summary Judgment, and Immediate Appointment of a Special Master. Doc. 15 at PageID #1061-65.

Plaintiffs' renewed motions are substantively the same as their previous motions—like their original motions, Plaintiffs' renewed motions based on their theory that the Defendants violated Section 2 of the VRA of 1965, 52 U.S.C. § 10301 et. seq., and the Fourteenth Amendment. *Compare* Mots., Doc. 4 at PageID 488 *with* Renewed Mots., Doc. 39, at PageID #1224. The sole substantive difference is that they previously sought to enjoin certification of the results of the May 3, 2022 primary election for the Ohio 6th Congressional District, and now seek an order enjoining Defendants from "issuing a certificate of election for representative of the Ohio 6th Congressional District … in the June 11, 2024 special general election." Plaintiffs' Renewed Mots., Doc. 39 at PageID #1224.

While Plaintiffs have set their sights on a new election, the arguments made in Defendants' original briefing nonetheless apply with equal force. For all the reasons set forth therein, Plaintiffs have still failed to a state a claim upon which relief can be granted under either the VRA or the U.S. Constitution. And, merits aside, Plaintiffs run headlong into the same equity-balancing problem they had before: they request this Court change the procedure for an election that is less than a month away. The resultant risk of increased voter confusion and decreased voter confidence and turnout is palpable—and "[a]s [t]he election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Thus, Plaintiffs not only fail on the merits—the relief they seek would also be manifestly unfair to Ohio voters and candidates and would destroy public confidence

in the integrity of Ohio elections. The Court should deny Plaintiffs' renewed motions and dismiss their complaint in its entirety.

III. LAW AND ARGUMENT

A. Plaintiffs' Voting Rights Act claim fails for the additional reason that only the Attorney General has the right to enforce it.

Plaintiffs' claims under Section 2 of the VRA fail because Section 2 of the VRA does not provide a private cause of action. While it has been a long-held assumption that a private cause of action exists for Section 2 of the VRA, neither the Supreme Court nor the Sixth Circuit has directly addressed the issue. Indeed, in his concurring opinion in *Brnovich v. Democratic National Committee*, Justice Gorsuch (joined by Justice Thomas) flagged the issue; noting that whether the VRA furnishes an implied cause of action under Section 2 is an "open question" and that the Supreme Court has assumed, without deciding, that such an implied cause of action exists. 141 S.Ct. 2321, 2350, 210 L.Ed.2d 753 (2021) (Gorsuch, J., concurring). The issue of whether an implied private cause of action exists under Section 2 was finally addressed in *Arkansas State Conference NAACP et al. v. the Arkansas Board of Apportionment et al.*, 86 F.4th 1204, 1208 (8th Cir.2023) ("The who-gets-to-sue question is the centerpiece of today's case."). That case is instructive here. Noting that for the last half-century courts have assumed that Section 2 is privately enforceable, the Eighth Circuit correctly held that assumptions—even discussing those assumptions—are "different from actually *deciding* that a private right of action exists," *Id.* at 1214-1215, and that "[a]ssumptions and statements of belief about other issues are not holdings, no matter how confident the court making them may sound." *Id.* at 1216. The Eighth Circuit concluded that no implied private right of action exists under Section 2 of the VRA based on the review of text and structure of the statute. *Id.* at 1216 (citing *Alexander v. Sandoval*, 532 U.S. 275,

278 (2001) ("Following [*Sandoval*'s] guideposts here leads to the conclusion that there is no 'private remedy' to enforce § 2, even assuming the existence of a 'private right.'").

A closer look at the issue makes clear that no private cause of action exists under Section 2 of the VRA. First, the VRA does not textually provide a private cause of action—by its plain language, the statute is enforceable only by the Attorney General and not by private citizens. Second, nor does Section 2 of the VRA supply an implied private cause of action because the text and structure of the VRA do not indicate any Congressional intent to provide one.

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

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

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

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

52 U.S.C. § 10101(c) (emphasis added). It is well established that Section 1971 provides no private cause of action because the statute is "enforceable by the Attorney General, not by private citizens." *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir.2000), citing *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996), citing *Good v. Roy*, 459 F.Supp. 403, 406 (D.Kan.1978) ("we believe that the unambiguous language of Section 1971 will not permit us to imply a private right of action."); *Sharma v. Trump*, E.D.Cal. No. 2:20-cv-944-TLN-EFB PS, 2020 U.S. Dist. LEXIS 161674, at *4 (Sep. 3, 2020), citing 52 U.S.C. § 10101(c) ("52 U.S.C. § 10101 of the Voting Rights Act also does not provide plaintiff with a private right of action"); *Hayden v. Pataki*, S.D.N.Y. 2004 U.S. Dist. LEXIS 10863, at *16 (June 14, 2004); *but see Mixon* at 406, fn. 12 (finding that only the Attorney General can bring an action under Section 1971 but holding without analysis that the VRA permits citizen suits).

Accordingly, like Section 1971, the plain language of Section 2 of the VRA makes clear that only the Attorney General can enforce Section 2 claims.

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

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

the modern test for implied rights of action, Congress must have *both* created an individual right *and* given private plaintiffs the ability to enforce it."). Unless Congress intended to create both a private right and a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-287. And in determining whether Congress intended to create both an individual right and provided a private remedy, the courts must examine the "text and structure" of the statute, not "contemporary legal context." *Arkansas*, 86 F.4th at 1216, comparing *Sandoval*, 532 U.S. at 287-88 and *Morse v. Republican Party*, 517 U.S. 186, 230-231, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (the "Supreme Court made clear that 'text and structure' are the guideposts, not 'contemporary legal context.'"); *Sandoval*, 532 U.S. at 288, citing *Blatchford* v. *Native Village of Noatak,* 501 U.S. 775, 784, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991) (legal context, in interpreting statutes generally, matters only to the extent it clarifies text).

The text and structure of Sections 2 and 12 of the VRA are clear; they indicate that it is the Attorney General, and no one else, who can enforce Section 2. Neither its other sections (including Section 3) nor its legislative history compels a different conclusion.

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

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

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

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

screening mechanism between complaining employees and the district courts, to allow those employees whose claims are screened out to file individual actions is simply inconsistent with the enforcement plan provided by Congress. *Taylor* at 262-263.

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

Like Section 11(C) of OSHA in *Taylor* and the FLSA in *Michigan*, Congress has explicitly granted the Attorney General the sole authority to enforce Section 2 of VRA. And "[i]f a statute fails to provide a private remedy, the federal courts may not create what Congress did not." *Michigan Corr. Org. v. Michigan Dept. of Corr.*, 774 F.3d 895, 903 (6th Cir.2014), citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc*., 552 U.S. 148, 164-65, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008). Indeed, the Eighth Circuit correctly found that the omission of any mention of private action in Section 12 was no accident. *Arkansas NAACP*, 86 F.4th at 1210, citing *Karahalios v. Nat'l Fed'n of Fed. Emps., Loc. 1263*, 489 U.S. 527, 533, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989). The Eighth Circuit found that, under Section 12, federal observers (who

monitor elections and report violations) have the duty to notify the Attorney General of "well[-]founded" allegations from people who allege that "they have not been permitted to vote." *Id.*; 52 U.S.C. §§ 10302(a), 10305, 10308(e). The Attorney General may then choose to file a fast-tracked lawsuit in federal court—just as OSHA Section 11(c) allows the Secretary to do. *Id.* And in jurisdictions *without* federal observers, the Attorney General still has the sole option under Section 12 to sue violators in a "preventive" action for an injunction or other similar relief to "permit" those subjected to discrimination "to vote." *Id.*; 52 U.S.C. § 10308(d). Accordingly, the text and structure of Section 12 show that Congress did not intend to provide a private remedy under Section 2.

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

The right of action of an "aggrieved person" under Section 3 of the VRA does not create a new private cause of action under Section 2. Section 3 provides various forms of equitable relief and other relief "[w]henever the Attorney General or *an aggrieved person* institutes a proceeding under *any statute* to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court." 52 U.S.C. § 10302(a) (emphasis added). Few circuit courts have determined that Section 3 provides for a private remedy based on the phrase "aggrieved person." *Alabama State Conference of the NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir.2020) ("The language of § 2 and § 3, read together, imposes direct liability on States for discrimination in voting and explicitly provides remedies to private parties to address violations under the statute."); *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir.2023) (holding that private plaintiffs had a right to bring their claims under Section 2 based on their reading of Section 3 that proceedings to enforce voting guarantees in any state or political subdivision can be brought by Attorney General or by an "aggrieved person"). But these courts' interpretation of Section 3 overlooks the critical

language that the Eighth Circuit properly analyzed. Section 3 is triggered when an aggrieved person institutes "a proceeding under *any statute*," (emphasis added), which the Eighth Circuit properly found most reasonably refers to statutes that *already allow* for private lawsuits. *Arksanas* at 1211; 52 U.S.C. § 10302(a); *accord id.* § 10302(b)-(c).

The history and structure of Section 3 support this interpretation. As originally enacted, Section 3 did not include the phrase "or an aggrieved person." *Arkansas NAACP*, 86 F.4th at 1211. The need for revision became apparent as courts started to recognize that some voting rights were privately enforceable, including in the context of Section 1983 claims. *Id.* at 1211; 1213. Recognizing the problem, Congress added the reference to "aggrieved person[s]." *Id.*; 52 U.S.C. § 10302(a). Accordingly, Congress' addition of "or an aggrieved person" was a remedial measure to remove inconsistencies and confusion related to *other* causes of action, rather than to create a *new* cause of action. To interpret otherwise would allow the Attorney General a right to sue under any statute, including Section 1983, to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. But as the Eighth Circuit correctly found, this would create interpretive difficulties because the Attorney General cannot bring a Section 1983 action on behalf of someone else. *Arkansas NAACP*, 86 F.4th at 1212-1213; *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 711-12, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003) (explaining that a sovereign has no cause of action under Section 1983); *see* 42 U.S.C. § 1983.

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

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

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

Despite such interpretive difficulties, courts have looked to the House and Senate Judiciary committee reports to assume that Section 2 creates a private right of action. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 232, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (assuming that based on the committee reports, Congress clearly indicated that Section 2 allows private enforcement). But in light of the new *Sandoval* standard, which was decided 5 years after the *Morse* decision, the Eighth Circuit correctly found that the legislative history tells us nothing about the "text and structure" of the VRA. *Arkansas NAACP*, 86 F.4th at 1214 ("*Sandoval* still sets the implied-cause-of-action ground rules, so the question is what—if anything—the legislative history tells us about the 'text and structure' of the Voting Rights Act. [citation omitted] The

answer is nothing."). Specifically, the Eighth Circuit found that the committee reports "does not point to a single word or phrase in the Voting Rights Act in support of the conclusion that a private right of action has existed from the beginning." *Id.* citing S. Rep. No. 97-417, at 30; H.R. Rep. No. 97-227, at 32. "If the 1965 Congress clearly intended to create a private right of action, why not say so in the statute?" *Id.*

The Supreme Court in *Exxon Mobil Corp. v. Allapattah Servs.* recognized the danger of judicial reliance on legislative materials like committee reports. 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). In *Exxon*, the Supreme Court affirmed that 28 U.S.C. § 1367 authorized supplemental jurisdiction over all claims by diverse parties arising out of the same Article III case or controversy. *Exxon Mobil*, 545 U.S. at 549. The Court warned that "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id.* at 568.

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

Accordingly, Section 2 does not provide a private cause of action to Plaintiffs, and this Court should dismiss their claims under Section 2 of the VRA also for these reasons.

C. Plaintiffs' new demand to immediately enjoin the Secretary of State from certifying the results of the June 11, 2024 election fails for all of the same reasons set forth in Defendants' original Combined Motion to Dismiss and Memorandum in Opposition (Doc. 15).

The only substantive difference between Plaintiffs' motions filed in 2022 and their renewed motions is that, instead of seeking an immediate order enjoining the Defendants from certifying the results of the May 3, 2022 primary election, they now seek an order enjoining Defendants from certifying results in the upcoming June special election. *Compare* Mots., Doc. 4 and Renewed Mots., Doc. 39. Other than those dates, Plaintiffs' argument is substantially the same as their original motions, which has been fully briefed.

Moreover, Plaintiffs grossly misguide this Court in claiming that enjoining the certification of the June 11 election results would not cause harm to others. June 11, 2024 is less than a month away. The Supreme Court has expressly warned federal courts of the risk in issuing orders that would affect quickly approaching elections: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). To enjoin certification of the results of an election that is less than a month away will only cause voter confusion. It would actively harm the public interest by damaging voter confidence and the public's perception of election integrity—which further risks incentivizing voters to stay at home.

Plaintiffs also suggest that the harm is somehow less because they are not seeking to enjoin the election itself, but just the certification. Plaintiffs' Renewed Mots., Doc. 39, PageID #1241. But as briefed in Defendants' original motions, to allow Ohio voters to participate in an election and then enjoin the results afterwards would arguably cause more voter confusion than the other

way around. It would cripple Ohioans' trust and confidence in their elections. What is more, Plaintiffs give no suggestion to the Court as to how to implement and oversee such an injunction.

Neither can Plaintiffs demonstrate they will suffer irreparable harm if the June 11 election results are certified. Article I, Section V of the U.S. Constitution provides that each House "shall be the Judge of the Elections, Returns and Qualifications of its own Members[.]" Thus, the House is "clothed with plenary power to seat whomever it pleases—certificate or no certificate." *Terr. ex rel. Sulzer v. Canvassing Bd.*, 1917 U.S. Dist. LEXIS 1509, *48-49; *Roudebush v. Hartke*, 405 U.S. 15, 25-26, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972) (holding that the Senate is free to accept or reject the State's count, "and, if it chooses, to conduct its own recount."); *Keogh v. Horner*, 8 F.Supp. 933, 934-935 (S.D.Ill.1934) ("If the Governor refused or was prohibited from issuing such certificates of election and the situation was presented to the House of Representatives, I do not doubt but what the House would have the right to seat the members elected without any certificate just as it could refuse to seat the members with a certificate, if it chose so to do. In other words, the power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme[.]"); *McIntyre v. Fallahay*, 766 F.2d 1078, 1086 (7th Cir.1985) ("Whether or not the House conducts its own count, the state's count and the certificate of election are just advice from the state to Congress. The final decision always is that of the House, no matter who counts the ballots and no matter how many times they are tallied."). Plaintiffs cannot demonstrate that they will suffer irreparable harm without enjoining the certificate of election because the House is not bound by the certification in determining who to seat.

Relatedly, the House's sole authority to seat elected members presents a standing problem in terms of the relief requested in Plaintiffs' renewed motions. Plaintiffs characterize their claimed injury as a "dilut[ion]" of their "voting strength." Plaintiffs' Renewed Mots., Doc. 39 at PageID

#1225. But the state's certification is "just advice from the state to Congress," *McIntyre v. Fallahay*, 766 F.2d at 1086, and simply enjoining the formality of certification alone offers no redress for that injury. The House is free to seat candidates with or without certification.

Accordingly, Plaintiffs not only fail on the merits, but the remaining preliminary-injunction factors also weigh heavily against granting their requested relief, and Plaintiffs lack standing to pursue that relief regardless for want of redressability. Thus, for the reasons stated in Defendants' original Combined Motion to Dismiss and Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, Partial Summary Judgment, and Immediate Appointment of a Special Master (Doc. 15), and their original Reply in Support of their Combined Motion (Doc. 23), this Court should deny Plaintiffs' Renewed Motions.

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs fail to state a claim upon which relief can be granted. For the same reasons, the Plaintiffs are not entitled to partial summary judgment. Further, and the merits of Plaintiffs' claims aside, the remaining injunctive-relief factors heavily favor denying their requested injunctive relief. Therefore, Plaintiffs' renewed motions should be denied, and their complaint should be dismissed.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, the foregoing was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

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