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

DR. DOROTHY NAIRNE, *et al.*, *Plaintiffs,* v. R. KYLE ARDOIN, in his official capacity as Secretary of State of Louisiana, *Defendant.*	Civil Action No. 3:22-cv-00178-SDD-SDJ Chief Judge Shelly D. Dick Magistrate Judge Scott D. Johnson

JOINT MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT OR, IN THE ALTERNATIVE, JOINT MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Defendant R. Kyle Ardoin, in his official capacity as Secretary of State of Louisiana ("Defendant Ardoin"); Defendant Intervenors Patrick Page Cortez and Clay Schexnayder in their respective official capacities as President of the Louisiana Senate and Speaker of the Louisiana House of Representatives; and Intervenor-Defendant the State of Louisiana, through Louisiana Attorney General Jeff Landry (collectively, "Defendants"), respectfully move the Court to grant their Joint Motion to Dismiss Plaintiffs' Amended Complaint under Rule 12(b)(1) or, alternatively, Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, Joint Motion for Certification for Interlocutory Appeal.

The bases of Defendants' motion are set forth in the accompanying memorandum of law, which is incorporated herein by reference. For the reasons stated there, the motion should be granted.

Respectfully submitted, this the 29th day of November, 2023.

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

DR. DOROTHY NAIRNE, *et al.*, *Plaintiffs,* v. R. KYLE ARDOIN, in his official capacity as Secretary of State of Louisiana, *Defendant.*	Civil Action No. 3:22-cv-00178-SDD-SDJ Chief Judge Shelly D. Dick Magistrate Judge Scott D. Johnson

MEMORANDUM IN SUPPORT OF JOINT MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT OR, IN THE ALTERNATIVE, JOINT MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Defendant R. Kyle Ardoin, in his official capacity as Secretary of State of Louisiana ("Defendant Ardoin"); Defendant Intervenors Patrick Page Cortez and Clay Schexnayder in their respective official capacities as President of the Louisiana Senate and Speaker of the Louisiana House of Representatives; and Intervenor-Defendant the State of Louisiana, through Louisiana Attorney General Jeff Landry (collectively, "Defendants"), respectfully submit this Memorandum in Support of their Joint Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Rule 12(b)(1) or, alternatively, Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, Joint Motion for Certification for Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b).

INTRODUCTION AND BACKGROUND

Plaintiffs'[1] amended complaint contains one cause of action—that the Louisiana house and senate redistricting plans the Legislature enacted in 2022 violate Section 2 of the Voting Rights

[1] The amended complaint lists six individuals as Plaintiffs: Dr. Dorothy Nairne, Jarrett Lofton, Rev. Clee Earnest Lowe, Dr. Alice Washington, Steven Harris, and Alexis Calhoun. Doc. 14, Amended Compl., ¶¶ 14–25. The amended

Act (the "VRA"), 52 U.S.C. § 10301, and therefore should be declared invalid and enjoined in full.[2] Doc. 14, Am. Compl., Claim for Relief, Prayer for Relief, ¶¶ A and B. However, the Eighth Circuit Court of Appeals held on November 20, 2023, just seven days before trial in this matter, that there is no private right of action under Section 2 of the Voting Rights Act (the "VRA"), 52 U.S.C. § 10301, now creating a circuit split on the issue. *See Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, No. 22-1395, slip op. at 1 (8th Cir. Nov. 20, 2023). Thus, it is highly likely that the Supreme Court of the United States will soon be asked to rule definitively on whether Congress granted private plaintiffs the ability to sue under Section 2 of the VRA.[3]

In *Robinson v. Ardoin*, the Fifth Circuit vacated the preliminary injunction entered in that case against Louisiana's enacted Congressional plan, and its decision included a brief discussion of this issue. No. 22-30333, -- F.4th --, 2023 WL 7711063, *5 (5th Cir. Nov. 10, 2023). The panel's discussion concluded that Section 2 had a private right of action, essentially following *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017), a decision the *Robinson* panel viewed as "binding" on it and had done "most of the work" in deciding that issue. 2023 WL 7711063, at *5. However, the Fifth Circuit granted the State of Louisiana a brief extension of time to file its Petition for En Banc Rehearing of the *Robinson* panel decision. *See id.* at Doc. 352-1. In its request, the State of Louisiana forecasted that the central issue for rehearing en banc is whether Section 2 of the VRA confers a private right of action, an issue on which a circuit split has now evolved. *Id.*

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complaint also lists two Entity Plaintiffs: Black Voters Matter Capacity Building Institute ("BVM") and the Louisiana State Conference of the National Association for the Advancement of Colored People (the "Louisiana NAACP"). *Id.* ¶¶ 26, 39. Plaintiffs Lofton and Calhoun have since voluntarily dismissed their claims. *See* Doc. 133.

[2] While Plaintiffs Claim for Relief also included "42 U.S.C. § 1983" in the title of Count 1, *see* Doc. 14, Amended Compl., Claim for Relief, Plaintiffs have only indicated in their filings before the Court that "Plaintiffs challenge the redistricting plans for the Louisiana House of Representatives and Louisiana Senate because they dilute the voting strength of Black voters, in violation of Section 2 of the Voting Rights Act of 1965." *See* Doc. 173, at 2; *see also Vega v. Tekoh*, 597 U.S. 134, 150 n.6 (2022) ("Section 1983 does not provide an avenue for relief every time a state actor violates a federal law.") (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005)) (cleaned up).

[3] Appellants have 90 days from the entry of the Order to file a petition for a writ of certiorari with the Supreme Court of the United States, *see* Rule 13 of the Rules of the Supreme Court.

As such, in this matter, Defendants filed a Joint Motion to Stay Proceedings pending resolution by the Supreme Court or the Fifth Circuit of whether Section 2 grants a private right of action and, thus, whether Plaintiffs have standing to pursue their VRA claim. On November 27, 2023, this Court orally denied Defendants' motion to stay proceedings. [D.E. 186].

ARGUMENT

I. Plaintiffs' Section 2 Claim Should Be Dismissed Because Section 2 of the Voting Rights Act Does Not Contain a Private Right of Action.

Rule 12(b)(1) of the Federal Rules of Civil Procedure ("Rule") allows for a party to seek dismissal based on the court's "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Mississippi v. City of Madison*, 143 F.3d 1006 (5th Cir. 1998) (citation omitted). "[A] factual attack under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist." *In re Southern Recycling, LLC*, 982 F.3d 374, 386 (5th Cir. 2020) (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)) (alterations in original). Rule 12(b)(6) allows for a party to seek dismissal based upon a plaintiff's failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Here, Section 2 of the VRA does not contain an express private right of action, nor an implied private right of action. Therefore, Plaintiffs do not have authority to bring their Section 2 claim, and their Amended Complaint must be dismissed with prejudice under Rule 12(b)(1) or, alternatively, Rule 12(b)(6). This also raises serious concerns with respect to standing because without a private right of action, there can exist no legally cognizable injury nor anything to be redressed.

A. Section 2 of the Voting Rights Act Does Not Expressly Create a Private Right of Action.

It cannot be disputed that there is no express cause of action under Section 2. *See Robinson v. Ardoin*, No. 22-30333, 2023 WL 7711063, at *4 (5th Cir. Nov. 10, 2023) ("There is no cause of action expressly created in the text of Section 2."); *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 22-1395, 2023 WL 8011330, at *4 (8th Cir. Nov. 20, 2023). Section 2 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 State to vote on account or race or color." 52 U.S.C. § 10301(a). Thus, because Section 2 does not contain an express provision for a cause of action, it cannot and does not create an express private right of action.

B. Congress Did Not Intend to Create an Implied Private Right of Action for Section 2 of the Voting Rights Act.

"[T]he fact that a federal statute has been violated and some persons 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). "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 (2001). "The judicial task is to 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." *Id.*

While the Supreme Court of the United States has considered numerous Section 2 claims brought by private plaintiffs, two Justices of the Supreme Court have recognized that its "cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, joined by Thomas, JJ., concurring). Moreover, while the Fifth Circuit itself recently stated that the

purpose of Section 2 of the VRA is to "surely allow the States to be sued by someone," that Court did not thoroughly analyze the issue and instead relied on an earlier opinion that, in a sentence, declared that the VRA "validly abrogated state sovereign immunity." *Robinson*, 2023 WL 7711063, at *5 (citing *OCA-Greater Houston* , 876 F.3d at 614). As such, the issue of whether Section 2 of the VRA confers a private right of action is currently not settled.

In determining whether there is an implied private right of action, a court's analysis must begin with "Congress's intent with the text and structure." *Alexander*, 532 U.S. at 286. "'[A]ffirmative' evidence of congressional intent must be provided for an implied remedy, not against it, for without such intent 'the essential predicate for implication of a private remedy simply does not exist.'" *Id.* at 293 n. 8 (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981)). "A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute. In other words, he must overcome the familiar presumption that Congress did not intend to create a private right of action." *Casas v. American Airlines, Inc.*, 304 F.3d 517, 521-22 (5th Cir. 2002) (citing *Louisiana Landmarks Soc'y, Inc. v. City of New Orleans*, 85 F.3d 1119, 1123 (5th Cir. 1996)).

i. Section 2 of the Voting Rights Act Does Not Create a New Individual Right.

"[T]he question [of] whether Congress . . . intended to create a private right of action [is] definitively answered in the negative' where a 'statute by its terms grants no private rights to any identifiable class.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (*quoting Touche Ross & Co. v. Redington*, 442 U.S. 560, 576, 99 S. Ct. 2479 (1979)). "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" provide "far less reasons to infer a private remedy in favor of individual persons."

Cannon, 441 U.S. at 691; *see also Alexander*, 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, 101 S. Ct. 1775 (1981)).

Here, Section 2 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 State to vote on account or race or color." 52 U.S.C. § 10301(a). Thus, by its terms, the prohibition on state governments does not expressly create any new individual rights. Nor can a reference to "any citizen of the United States" in Section 2 demonstrate "an unmistakable focus on the benefited class," *Gonzaga*, 536 U.S. at 284, because the statute was "enacted for the protection of the general public," and therefore does not create an individual right, *Cannon*, 441 U.S. at 691.[4]

ii. Section 2 of the Voting Rights Act Does Not Contain a Private Remedy.

As stated above, whether Congress created an implied private right of action is determined by "Congress's intent with the text and structure." *Alexander*, 532 U.S. at 286. "The judicial task is to 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." *Id.* Here, as explained above, the language of Section 2 does not create a cause of action. Thus, the question remaining is whether Section 2 creates a private remedy.

"The Voting Rights Act lists only one plaintiff who can enforce § 2: the Attorney General." *Ark. State Conf. NAACP*, 2023 WL 8011330, at *3 (citing 52 U.S.C. § 10308(d)). Specifically,

[4] The lack of an individual right also goes to Plaintiffs' standing because no individual can show a particularized injury with respect to a claim under Section 2.

VRA Section 12 authorizes "the Attorney General [to] 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" to enforce VRA §2 (among other provisions). 52 U.S.C. § 10308(d). Congress's express provision of a government-enforcement mechanism is overriding evidence against a private remedy for the same relief. *See Alexander*, 532 U.S. at 289–90 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Ark. State Conf. NAACP*, 2023 WL 8011330, at *3 ("If the text and structure of § 2 and § 12 show anything, it is that 'Congress intended to place enforcement in the hands of the [Attorney General], rather than private parties.'") (quoting *Freeman v. Fahey*, 374 F.3d 663, 665 (8th Cir. 2004)).[5]

While some courts and litigants have seized on the term "aggrieved person" in Section 3 of the VRA, this provision addresses a suit "to enforce the voting guarantees of the fourteenth or fifteenth amendment" and concerns "the appointment of Federal observers of elections." 52 U.S.C. § 10302(a). Thus, Section 3 does not create a private right of action, but instead allows an "aggrieved person" to pursue a claim pursuant to "an already existing procedure, in other words, not a new one created by § 3." *Ark. State Conf. NAACP*, 2023 WL 8011330, at *5. Nor does Section 10 of the VRA create a private remedy to enforce Section 2. *See id.* at *9-10. In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), the Court held that Section 10 contains a private right of action. However, although the Court assumed Section 2 contains a private right of action, *id.* at 232, it undertook no analysis of the question beyond that mere assumption, which cannot even arise to the level of dicta. Supreme Court decisions do not stand for propositions they do not reach. *See, e.g.*, *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1282–83 (11th Cir.

[5] Furthermore, without a private remedy, there can be no standing as nothing can be redressed as to an individual without a right of action in the first instance.

2020). The Supreme Court has consistently "remind[ed] counsel" and lower courts "that words of our opinions are to be read in the light of the facts of the case under discussion." *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944); *accord Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012).

Because Section 2 does not confer a private cause of action—either expressly or implicitly—Plaintiffs' Amended Complaint must be dismissed with prejudice under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

II. In the Alternative, If the Court Denies the Motion to Dismiss, the Court Should Certify its Order for Immediate Appeal.

In the event this Court denies Defendants' motion to dismiss Plaintiffs' amended complaint (including on the basis that the Court deems itself bound by *Robinson* or *OCA-Houston*), Defendants respectfully request that that the Court certify its order denying the motion to dismiss for immediate appeal pursuant to 28 U.S.C. § 1292(b). An interlocutory appeal is necessary and appropriate in this case in order to prevent prejudice and preserve judicial resources while the Fifth Circuit or the Supreme Court determines whether Section 2 confers a private right of action, and thus, whether Plaintiffs have standing to pursue their VRA claim. Legislative elections will not be held in Louisiana until the fall of 2027. Therefore, there is no urgency for any ruling on the merits of Plaintiffs' Section 2 claim. The resolution of the Court's jurisdiction will materially advance the ultimate termination of the litigation before the merits of the case are fully litigated. *See Clark-Dietz and Associates-Engineers, Inc. v. Basic Const. Co.*, 702 F.2d 67, 69 (5th Cir. 1983). It is in no one's interest that the parties be forced to continue litigating these issues, at great expense to the state, when whether Plaintiffs have authority to bring and litigate their claim in front of a court is in question.

Certification under Section 1292(b) of an interlocutory appeal may be granted when: "(1) the order from which the appeal is taken involves a 'controlling question of law;' (2) there is 'substantial ground for difference of opinion' concerning the issue; and (3) 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Johnson v. Ardoin*, No. 3:18-cv-625-SDD-EWD, 2019 WL 4318487, *2 (M.D. La. Sept. 12, 2019) (citing 28 U.S.C. § 1292(b)); *see Clark-Dietz and Associates-Engineers, Inc,* 702 F.2d at 69 (providing that Section 1292(b) appeals are "permitted only when there is a substantial difference of opinion about a controlling question of law and that the resolution of that question will materially advance, not retard, ultimate termination of the litigation").

The purpose of 28 U.S.C. § 1292 is to give the judiciary "considerable flexibility" in order to avoid the "disadvantages of . . . final judgment appeals." *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 703 (5th Cir. 1961). "Under § 1292(b), it is the order, not the question, that is appealable." *Castellanos-Contreras v. Decatur Hotels LLC*, 622 F.3d 393, 398 (5th Cir. 2010) (citing *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996)).

A. The Order Involves a Controlling Question of Law to Which There Are Substantial Grounds for Difference of Opinion.

The Court's disposition of Defendants' joint motion to dismiss rests on a controlling legal question that is potentially dispositive of the action in this Court. "Whether an issue of law is controlling usually 'hinges upon its potential to have some impact on the course of the litigation.'" *United States v. La. Generating LLC*, No. 09-100-JJB, 2012 WL 4588437, *5 (M.D. La. Oct. 2, 2012) (quoting *Tesco v. Weatherford Intern., Inc.*, 722 F. Supp. 2d 755, 766 (S.D. Tex. 2010)); *cf. id.* ("[I]t is clear that a question of law is controlling if reversal of the order would terminate the action." (internal quotations omitted)).

Here, there is a circuit split on whether Section 2 confers a private right of action. Nor has the Supreme Court weighed in on this issue of unsettled law. "A substantial ground for difference of opinion may exist 'if novel and difficult questions of first impression are presented.'" *June Med. Servs., LLC. v. Gee*, No. 17-00404-BAJ-RLB, 2018 WL 2224064, *3-4 (M.D. La. May 11, 2018) (quoting *Mitchell v. Hood*, No. 13–5875, 2014 WL 1764779 (E.D. La. May 2, 2014)), *order rescinded on other grounds*, 2018 WL 2656552 (M.D. La. June 4, 2018); *see also La. Generating LLC*, 2012 WL 4588437 at *5 ("[A] genuine doubt as to the correct applicable legal standard relied on in the order" is a substantial ground). Thus, whether Plaintiffs' have authority to bring a Section 2 suit is a controlling issue of law in this action, and allowing Plaintiffs to proceed when they may not have jurisdiction has the "potential to have some impact on the course of the litigation." *See La. Generating LLC*, 2012 WL 4588437 at *5. The impact goes to the Court's jurisdiction. *See Stratton v. St. Louis S. R. Co.*, 282 U.S. 10, 16 (1930). Indeed, if Plaintiffs do not have authority to bring and litigate a Section 2 claim, then any litigation in this Court is a waste of judicial and party resources.

B. An Immediate Appeal Will Materially Advance the Ultimate Termination of the Litigation.

Resolution of the jurisdictional question will materially advance the litigation. "There is no requirement that permitting an interlocutory appeal [will] be certain to materially advance the termination of the litigation; rather, 28 U.S.C. § 1292(b) only requires that permitting such an appeal *may* materially advance the ultimate termination of the litigation." *Scott v. Ruston La. Hosp. Co.*, No. 16-0376, 2017 WL 1364219, *15 (W.D. La. Apr. 12, 2017) (internal quotation omitted) (emphasis in original). Avoiding post-trial appeals on a topic is sufficient to satisfy the "materially advance the ultimate termination" threshold. *See Cazorla v. Koch Foods of Miss., LLC.*, 838 F.3d 540, 548 (5th Cir. 2016).

Here, if this matter continues with proceedings, including trial, and thereafter it is determined that Section 2 does not confer a private right of action, there will have been an enormous waste of party and judicial resources that could have been prevented by this timely request for interlocutory appeal. Indeed, interlocutory review of this Court's denial of Defendants' joint motion to dismiss Plaintiffs' amended complaint may make further action in this matter unnecessary or futile. *See Mitchell v. Hood*, 2014 WL 1764779 at *18 (avoiding costly and burden of litigation by potential dismissal martially advances the litigation). Therefore, resolution of this Court's jurisdiction will materially advance the ultimate termination of this litigation, and the movants represent to this Court that they would move to seek expedited review of this matter before the Court of Appeals if this motion were granted.

CONCLUSION

For the reasons discussed herein, this Court should grant Defendants' Motion to Dismiss Plaintiffs' Amended Complaint under Rule 12(b)(1) or, alternatively, Rule 12(b)(6). In the alternative, if the Court denies the joint motion to dismiss, the Court should grant Defendants' Motion for Certification of Interlocutory Appeal under 28 U.S.C. § 1292(b) to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted, this the 29th day of November, 2023.

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**Admitted pro hac vice*