IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

THE ARKANSAS STATE CONFERENCE NAACP, *et al.*, **PLAINTIFFS,**

v. **Case No. 4:21-cv-01239-LPR**

THE ARKANSAS BOARD OF APPORTIONMENT, *et al.* **DEFENDANTS.**

DEFENDANTS' SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs ask this Court to order the State to draw five additional majority-minority State House districts. To have standing to make that request, the plaintiff organizations need members in the existing districts they seek to redraw. A month after filing this action, Plaintiffs are still unable to identify members in four of the districts they challenge. Because of the centrality of those districts to their claims, that means Plaintiffs lack standing to pursue at least four of the five new majority-minority districts they seek.

Even if Plaintiffs could prove standing, they still lack a cause of action. In this Circuit, whether a plaintiff has a federal cause of action is jurisdictional, and Plaintiffs and the United States, which has entered the fray solely to defend Section 2's ostensibly implied cause of action, concede Section 2 does not contain an express cause of action. Their arguments that Section 2 implies one are confessedly contrary to the Supreme Court's current cause-of-action jurisprudence, and only confirm that the cause of action they read into Section 2 isn't there.

I. Plaintiffs lack standing to challenge at least four of the challenged districts, and therefore, to seek four of the five new majority-minority districts they ask the Court to create.

A. On January 10, this Court ordered the Plaintiffs to file standing declarations informing the Court precisely which districts they challenge, and whether each Plaintiff has black, registered-voter members who live in each of the districts Plaintiffs challenge. (DE 44 at 3.) The Court correctly explained that "to have constitutional standing to bring a vote-dilution claim, an individual plaintiff (or in this case, a member of an organization) must live in a district that is allegedly 'packed' or 'cracked.'" (*Id.* at 2.) And though the Court said standing doctrine might not require Plaintiffs' members to be black, or registered voters (*id.* at 3 n.8), the injury Plaintiffs complain of is the dilution of black voters' votes—an injury that logically could not be suffered by a person who isn't registered to vote, or by a non-black registered voter.

It took Plaintiffs well over a week to identify the members they said they had in their complaint, and when they finally did, they both failed to identify black registered-voter members who lived in all of the districts they challenged. In fact, the Plaintiffs' declarations are both missing members from the same four challenged districts. This is fairly easy to see:

- Plaintiffs' declarations say they're challenging nineteen districts: 34, 37, 61, 64, 65, 74, 75, 76, 77, 79, 80, 90, 93, 94, 95, 96, 97, 98, and 99. (DE 57 at 1 ¶ 2, DE 58 at 2 ¶ 2.)
- The declaration on behalf of the Arkansas State Conference NAACP's says that organization has black registered-voter members in just thirteen districts: 64, 65, 74, 75, 76, 77, 79, 80, 93, 94, 96, 98, and 99. (DE 58 at 2 ¶ 3.)

- The declaration on behalf of the Arkansas Public Policy Panel says that organization has black registered-voter members in the fifteen districts: 64, 65, 74, 75, 76, 77, 79, 80, 90, 93, 94, 95, 96, 98, and 99. (DE 57 at 2 ¶ 3.)

Thus, the Public Policy Panel's declaration covers the same thirteen districts as the NAACP's declaration, plus Districts 90 and 95. And missing from *both* declarations are members in Districts 34, 37, 61, and 97.

B. That membership gap has significant ramifications for Plaintiffs' standing. It means they cannot press their claims for four of the additional five majority-minority districts they seek. First, Plaintiffs' entire claim as to the Upper Delta is that Districts 34 and 37 "crack" black voting populations in that part of the State; they would form a majority-minority district from parts of both. (DE 3 at 5.) Without members from either Plaintiff in those districts, Plaintiffs cannot attack the districting in the Upper Delta. Second, Plaintiffs' sole claim as to Southwest Arkansas is that Districts 97, 98, and 99, in tandem, "crack" black voting populations. (*Id.* at 6.) Their proposed solution is to draw a district with parts of each, including El Dorado, which currently sits in District 97. (*Compare* DE 2-8 at 82 (District 97) *with* DE 2-7 at 43 (illustrative District 5).) Unless Plaintiffs have standing to assert the rights of black voters in El Dorado, this claim cannot get off the ground. Last, in the Lower Delta, Plaintiffs seek to turn three majority-minority districts into five by "uncracking" black voting populations in District 61 (DE 3 at 6) in order to draw their proposed Districts 12 and 48, which would contain portions of Arkansas County (District 12) and Monroe and Woodruff Counties (District 48) that are currently drawn within District 61. (*Compare* DE 2-8 at 46 (District 61) *with* DE 2-7 at 50 (illustrative Districts 12 and 48).) None of these claims can proceed absent organizational members in the districts Plaintiffs seek to "uncrack."

C. It's also doubtful that Plaintiffs' declarations even establish standing as to the districts they *do* say they have members in. The Public Policy Panel's executive director, Bill Kopsky, admits in his declaration that he relied on the personal knowledge of unidentified "staff organizers" for information about the organization's membership, rather than solely testifying based on his own personal knowledge. (DE 57 at 2 ¶ 4.) He does not specify which members' district residency, voter registration status, and race were identified using his own personal knowledge. Nor does he give any explanation as to how he or these "staff organizers" came to the conclusion that the organization has black members who are registered voters in the listed districts. Neither Kopsky nor his fellow declarant, Barry Jefferson of the Arkansas State Conference NAACP, claim to have actually spoken with any members living in any of the challenged districts to confirm their residency, race, or voter registration status.

As for Jefferson's declaration, he states that he used voter registration files from the Secretary of State to determine residency and voter registration status. (DE 58 at 2 ¶ 4.) But he does not claim to have verified whether any of those members still live at their listed address or have instead moved without updating their voter registration information. Moreover, it is unclear whether the "members" Jefferson identified are members of the Arkansas State Conference NAACP—the Plaintiff in this case—or the national NAACP organization. He specifies that he obtained a list of "NAACP members . . . from counsel at the national NAACP." (*Id.*) In that case, it appears that one of the Plaintiffs in this case is attempting to sue on behalf of the membership of a different organization.

II. Section 2 does not provide a private right of action, and the Court can reach that issue because in this Circuit it is jurisdictional.

A. The Eighth Circuit has held that the existence of a federal cause of action is jurisdictional.

1. As this Court noted in its briefing order, the Eighth Circuit has recently held that the existence of a federal cause of action is jurisdictional. In *Cross v. Fox*, the Eighth Circuit reasoned that federal-question jurisdiction only lies over claims arising under federal law, and that a claim only "arises under federal law 'when federal law creates a private right of action and furnishes the substantive rules of decision.'" *Cross v. Fox*, — F.4th —, No. 20-3424, 2022 WL 127944, at *2 (8th Cir. Jan. 14, 2022) (quoting *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012)). It therefore follows, the Eighth Circuit concluded, that if "the plaintiff brings a claim under a federal statute that does not authorize a private right of action, the statute will not support jurisdiction under [28 U.S.C.] § 1331." *Id.*

This rule is not new in the Eighth Circuit. As *Cross* explained, that court has previously treated the lack of a cause of action as jurisdictional. In *Anthony v. Cattle National Bank & Trust Co.*, the Eighth Circuit affirmed a jurisdictional dismissal under Section 1331 on the ground that the federal statute under which the plaintiff sued did not create a private right of action. 684 F.3d 738, 739-40 (8th Cir. 2012). And in *Lakes & Parks Alliance of Minneapolis v. Federal Transit Administration*, the Eighth Circuit held "the district court lacked jurisdiction" because, in part, the plaintiff had "no cause of action" under federal law. 928 F.3d 759, 761, 763 (8th Cir. 2019).

To be sure, as Plaintiffs observe, the Supreme Court has sometimes said, in cases predating the Eighth Circuit decisions cited above, that so long as a plaintiff has an arguable cause of action, whether he has a valid one is not jurisdictional. (DE 68 at 37 (citing Supreme Court precedent from 1998 and 2002).) But Plaintiffs cite no authority for the proposition that

this Court may disobey Eighth Circuit precedent, even if it disagreed with that court's reading of prior Supreme Court decisions. Rather, this Court is required to apply decisions like *Cross* that interpret Supreme Court precedent on Section 1331 to make the existence of a cause of action jurisdictional. And Plaintiffs don't dispute that the Eighth Circuit has settled on that rule, or point to a case predating *Anthony*, *Lakes & Parks Alliance* or *Cross* that would displace their holdings under the prior-panel rule.

2. That said, the jurisdictional status of the cause-of-action question in this Circuit *doesn't* mean that if this Court concludes Plaintiffs lack a cause of action—and thus that it lacks jurisdiction—it must refrain from addressing the merits. That is because in this Circuit, as in most, the rule against hypothetical jurisdiction—assuming jurisdiction to reach the merits—only applies to Article III jurisdiction, not statutory jurisdiction under Section 1331 or other jurisdictional grants. *See Lukowski v. Immig. & Naturalization Serv.*, 279 F.3d 644, 647 & n.1 (8th Cir. 2002) (assuming without deciding statutory jurisdiction to reach the merits); *see also* Joshua Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 Ala. L. Rev. 493, 510-11 (2016) (listing eight Circuits, including the Eighth, that have adopted this view). Therefore, while the Court *may* reach the cause-of-action question, it also may (1) assume Plaintiffs have a cause of action and reach the merits, or (2) conclude Plaintiffs lack a cause of action but assume a cause of action in the alternative and reach the merits. Defendants would encourage the Court to, preferably by the second path, reach the merits, so that in the event of an appeal the Eighth Circuit has a ruling on all potentially dispositive issues to review, and to avoid the need for a remand in the event the Eighth Circuit concluded there was a cause of action—or changes course and holds a missing cause of action is non-jurisidictional.

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

Section 2 of the Voting Rights Act does not contain an express cause of action. It prohibits a "State or political subdivision" from imposing certain voting qualifications, practices and procedures, 52 U.S.C. 10301(a), and specifies the circumstances in which a "violation of [that prohibition] is established[.]" 52 U.S.C. 10301(b). But it says not a word about how or by whom that prohibition is to be enforced. The Act's enforcement section, Section 12, only provides the Attorney General with a cause of action to enforce Section 2. *See* 52 U.S.C. 10308(d) ("Whenever any person has engaged . . . in any act or practice prohibited by section 10301 . . . the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief . . . ."). That strongly implies that only the United States has enforcement power, for "[c]ourts should presume that Congress intended that the enforcement mechanism provided in the statute be exclusive." *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999) (en banc).

Given the silence of Section 2, and the statute as a whole, on a private right of action, the Supreme Court has acknowledged that "[Section] 2 . . . provides no right to sue on its face" and "lack[s] . . . express authorizing language" for private suits. *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (Stevens, J., plurality opinion); *id.* at 240 (Breyer, J., concurring in the judgment) (describing any "right of action to enforce [Section] 2" as an "implied private right of action").

Because Section 2 "provides no right to sue on its face," *id.* at 232, it follows that it does not create a private right of action. For "[l]ike 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.* Absent statutory language that displays that intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

Plaintiffs' and the United States' various arguments that Section 2 implies—though they both admit "does not expressly provide" (DE 68 at 40; DE 71 at 5)—a cause of action only confirm that Section 2 lacks one. Plaintiffs' first argument on the statute itself, echoed by the United States, is that "Congressional intent clearly points to a private right of action" (DE 68 at 38; *see also* DE 71 at 7), because two committee reports said the authoring committees intended for there to be one. It is true, as Plaintiffs note, that the Supreme Court has often turned to the 1982 Senate Report to fill gaps and resolve ambiguities in Section 2's cryptic language. But it would be something else altogether to say a statute that's entirely silent on a cause of action contains one solely because a committee report says so. If committee reports could create causes of action, that would largely nullify the Supreme Court's private-right-of-action jurisprudence—which requires the *statute* to display an intent to create one—and allow a committee to manufacture a cause of action where members who wanted a cause of action were unable to obtain bicameral support for one.

Plaintiffs next argue that at the time Section 2 was enacted, the Supreme Court had a more liberal approach to implying causes of action, embodied by *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), and that Congress legislated against the background of that approach. (DE 68 at 39.) The premise is correct, but the conclusion doesn't follow. The Supreme Court's current approach to recognizing rights of action applies to *all* statutes; the Court doesn't toggle between its current approach and *Borak* depending on when a statute was enacted. To the contrary, "even

when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak*" itself, the Court has "[n]ot . . . applied *Borak*'s method for discerning and defining causes of action" since it "abandoned" *Borak*'s method. *Sandoval*, 532 U.S. at 287. The same rule applies *a fortiori* to the much later-enacted Voting Rights Act. Indeed, *Sandoval* itself concerned the Civil Rights Act of 1964, enacted the year before the VRA, and declined to apply 1960s cause-of-action jurisprudence. As Justice Scalia colorfully put it in *Sandoval*, "[h]aving sworn off the habit of venturing beyond Congress's intent, we will not accept [plaintiffs'] invitation to have one last drink." *Id.*

Next, Plaintiffs and the United States both claim that since courts assumed Section 2 contained a private right of action pre-1982, Congress must have ratified that assumption when it amended Section 2 without expressly foreclosing a right of action. (DE 68 at 39-40; DE 71 at 7.) Whatever the force of inferences from congressional silence generally, this is an especially weak one. The Supreme Court and lower courts did not hold pre-1982 that Section 2 contained a private right of action; they merely assumed it. *See City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion) ("[a]ssuming, for present purposes, that there exists a private right of action to enforce this statutory provision"); *see also Washington v. Finlay*, 664 F.2d 913, 926 (4th Cir. 1981) ("[a]ssuming without deciding . . . that there is a private right of action"). Indeed, the earliest decision the United States can find *holding* Section 2 contains a cause of action dates to 1999. (DE 71 at 4 n.1.) Contrary to Plaintiffs' and the United States' suggestion, an assumption is not a "judicial interpretation of a statute" that reenactment without change ratifies. (DE 68 at 39 (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); DE 71 at 7 (quoting same).) Rather, it merely flags an open question. So the prior-construction canon does not apply here. *See Liu v. SEC*, 140 S. Ct. 1936, 1947 (2020) ("[T]he prior-construction principle . . . has no

application where . . . [the question in dispute] was far from settled.") (internal quotation marks omitted). The far better inference, if any is to be drawn, from Congress's silence is that if Congress supported a cause of action in 1982, it would have expressly created one after the Court suggested Section 2 might not contain one two years prior in *City of Mobile*.

Finally and reluctantly turning to the text of the statute, Plaintiffs observe that Section 14(c) of the Voting Rights Act, enacted in 1975, provides for attorney's fees in favor of prevailing parties in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. 10310(e). Likewise, they note that Section 3 of the Act, also enacted in 1975, similarly provides for certain procedures when "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." 52 U.S.C. 10302(a). The United States relies on the same provisions. (DE 71 at 5-6.) But those provisions do not create a cause of action, for several reasons.

First, at most, the 1975 amendments only assume that a cause of action exists and set forth procedures and fee-shifting rules that would govern that cause of action in the event courts imply one, as the Supreme Court already had under Section 5 of the Act in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Second, though they may contemplate actions under the Voting Rights Act, they do not assume a cause of action under any particular section of that statute, and can easily be given effect without inferring an implied cause of action under *each* of that statute's sections—for example, by applying them to Section 5 suits. Third, and perhaps most critically, both provisions only apply to actions to "enforce the voting guarantees of the fourteenth or fifteenth amendment" themselves—that is, constitutional claims, for which there obviously are causes of action, such as Section 1983. While the Voting Rights Act may

indirectly enforce the Fourteenth or Fifteenth Amendment, an *action* brought under Section 2 of the Voting Rights Act, which does not require proof of intentional discrimination, isn't brought to enforce the Fourteenth or Fifteenth Amendments' guarantees; it enforces the Voting Rights Act's guarantees. And tellingly, these provisions do not reference the Voting Rights Act itself. Rather, they regulate procedures in proceedings brought "under any statute" to enforce the Reconstruction Amendments, or in the case of the fees provision reference no statute at all. Were Congress talking about VRA proceedings, it likely would have mentioned proceedings under "this statute," not just unspecified others.

Last, Plaintiffs and the United States take solace in dicta. Though they concede the Supreme Court has never held that Section 2 contains a private right of action, they note that in *Morse*, a fragmented opinion, the Court held that Section 10 of the Act did, and that the Justices in the majority reasoned "in part" that Section 2 provides a private right of action and that it would be anomalous if Section 10 did not. (DE 68 at 38; DE 71 at 5.) The problem with this argument is that the various Justices' discussions of Section 2 in *Morse* were dicta, and unreasoned dicta at that, which merely cited the Senate Report's support for a private right of action. *See Morse*, 517 U.S. at 232 (Stevens, J., plurality opinion); *id.* at 240 (Breyer, J., concurring in the judgment). The majority's spare and uncompelling reasoning on this point, compared with its extended discussions of Section 10, aptly illustrates why dicta don't bind; absent the weight of judgment brought to bear by actually deciding an issue, dicta are likely to be less than "completely investigated." *Cohens v. Virginia*, 19 U.S. 264, 400 (Marshall, C.J.) (1821) (explaining why dicta in his own opinion in *Marbury* ought not bind the Court). The Court may, of course, give the statements in *Morse* persuasive weight. But as their sole basis for

finding a private right of action in Section 2 is that a committee report said Congress intended one, their power to persuade is minimal.

CONCLUSION

The Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: January 31, 2022

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

Nicholas J. Bronni (2016097)
Solicitor General
Asher L. Steinberg (2019058)
Dylan L. Jacobs (2016167)
Assistant Solicitors General
Jennifer L. Merritt (2002148)
Senior Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Tel: (501) 682-1051
Fax: (501) 682-2591
Counsel for Defendants