IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MIGUEL COCA and ALEJANDRO RANGEL-LOPEZ,	)	
Plaintiffs,	)	Case No. 6:22-cv-01274-EFM-RES
vs.	)	
CITY OF DODGE CITY, *et al.,*	)	
Defendants.	)	

DEFENDANTS' MOTION TO AMEND AND CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND MOTION TO STAY PROCEEDINGS PENDING APPEAL

Defendants hereby move the Court for an order amending and certifying for interlocutory appeal this Court's April 18, 2023 Memorandum and Order (Doc. 71) pursuant to 28 U.S.C. § 1292(b). Defendants further move to stay this proceeding through appeal if their motion is granted. For the reasons stated in their contemporaneously filed memorandum in support, Defendants' requests should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 2nd of May 2023, the foregoing was electronically filed with the Clerk of the Court by using the Court's e-Filing system which will send notification of electronic filing to counsel for all parties of record, and a true and correct copy was served by electronic mail upon:

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO AMEND AND CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND MOTION TO STAY PROCEEDINGS PENDING APPEAL

Defendants move for an order granting their motion to amend and certify for interlocutory appeal this Court's April 18, 2023 Memorandum and Order (Doc. 71) pursuant to 28 U.S.C. § 1292(b). Defendants further move to stay this proceeding through appeal if their motion is granted.

BACKGROUND

The Court recognized that "Defendants raise a monumental issue sure to find its ultimate conclusion beyond this Court—whether private plaintiffs may sue for violation of section 2 of the VRA." (Doc. 71, at 5). Plaintiffs allege that Dodge City's at-large process for electing its city commissioners violates section 2 of the Voting Rights Act ("VRA") and is unconstitutional on the ground that the process dilutes the Latino vote. (*See generally* Doc. 30). In total, Plaintiffs asserted three counts against Defendants: (1) a section 2 claim, (2) a Fourteenth Amendment equal protection claim, and (3) a Fifteenth Amendment intentional racial discrimination claim.

Boiled down, Plaintiffs contend that Latino voters have been adversely impacted by Dodge City's maintenance of its longstanding at-large election process. Plaintiffs do not allege, though,

that the citizens of Dodge City or their elected city commissioners are motived by racial considerations.

Defendants moved to dismiss. Defendants argued, among other things, that section 2 did not create a private cause of action and that § 1983 could not be used to enforce any right that section 2 arguably bestowed upon Plaintiffs. For Counts 2 and 3, Defendants argued, among other things, that there was no evidence that plausibly indicated that the "relevant decisionmakers," as set forth in the applicable statutes, were motivated by racial considerations.

The Court denied Defendants' motion as it related to Counts 1 and 2 but granted it with respect to Count 3. Beginning with Count 1, the Court concluded that the "Supreme Court [had] explicitly recognized a private right of action under section 2 in *Morse*," and, absent the Supreme Court overturning *Morse* or the Tenth Circuit providing further guidance on the issue, the Court was bound to find that section 2 "contains an implied private right of action." (Doc. 71, at 10). The Court found that, even if section 2 did not have an implied private right of action, a section 2-esque claim existed in § 1983 because section 2 bestows individual rights on Plaintiffs and section 2 does not preclude private enforcement of the VRA. Turning to Count 2, the Court was not persuaded that the fact Dodge City utilizes the commission-manager form of government had any bearing on the issue of whether racial considerations were afoot in this case.

STANDARDS OF REVIEW

A district court may certify an order as immediately appealable under § 1292(b) if the court finds that (1) the order in question involves a controlling question of law; (2) there is substantial ground for difference of opinion as to that question; and (3) an immediate appeal to determine the issue may materially advance the ultimate termination of the litigation. While interlocutory appeals are to be "limited to extraordinary cases," they are proper in instances "in which extended and

expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action." *KPH Healthcare Servs. v. Mylan N.V.*, 2022 WL 16551340, at *1 (D. Kan. Oct. 31, 2022). "The proponent of an interlocutory appeal bears the burden of establishing that all three of [§ 1292(b)'s] substantive criteria are met." *Id.*

Regarding stays, § 1292(b) does not mandate that they be issued during the interlocutory appeal process. Rather, that decision is committed to the district court's sound discretion. *See, e.g.*, *McHenry v. City of Ottawa, Kan.*, 2017 WL 4758947, at *3 (D. Kan. Oct. 20, 2017).

ARGUMENT

Plaintiffs' claims are based on the alleged disparate effect that at-large voting has had on Latinos. There is no indication that the people who have the statutory authority to change how city commissioner elections are conducted in Dodge City—either the citizens of Dodge City or the City's commissioners—are motivated by race. Thus, this case turns on whether section 2 creates a private cause of action, which this Court recognizes is an open question. If it does not, much time, money, and effort will be wasted over the next two years as the parties litigate Plaintiffs' outstanding claims. As noted by the Tenth Circuit, "cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action" are prime candidates for a § 1292(b) interlocutory appeal. *Utah State Dep't of Health v. Kennecott*, 14 F.3d 1489, 1495 (10th Cir. 1994). That is the case here. The motion to dismiss ruling should be certified for immediate appeal to avoid costly extended litigation about controlling questions of law."

I. Interlocutory appeal of the Order is warranted.

At least three controlling questions of law justify certifying the Order. They are:

(1) Does section 2 create a private right of action;

(2) If section 2 does not create a private right of action, can a plaintiff sue under § 1983 for an alleged violation of section 2; and

(3) In a voter-dilution case, can a plaintiff establish an equal protection claim by merely alleging the effects of a challenged election practice and the actions taken by non-defendants, or must they cite actions taken by persons with the authority to change the challenged election practice that plausibly suggest race was a motivating factor.

As these questions meet each of § 1292(b)'s requirements, interlocutory appeal is proper.

A. The Order presents controlling questions of law.

The phrase "question of law" as used in 28 U.S.C. § 1292(b) typically refers "to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine.'" *Pub. Serv. Co. of N.M. v. Approx. 15.49 Acres of Land*, 167 F. Supp. 3d 1248, 1270 (D.N.M. 2016) (citation omitted). What the proper legal standard is for deciding a specific issue can also be a "question of law within the meaning of section 1292(b)." *In re Text Antitrust Litig.*, 630 F.3d 622, 626 (7th Cir. 2010) (collecting cases); *Steering Comm. v. United States*, 6 F.3d 572, 575 (9th Cir. 1993). "An issue is controlling if interlocutory reversal would terminate the action or substantially affect the course of litigation." *Fox v. Transam Leasing*, 2015 WL 4243464, at *3 (D. Kan. July 13, 2015).

Here, the first two certifiable questions that the Order raises require interpretation of the Voting Rights Act ("VRA") to determine if (1) a private cause of action was created and (2) an individual right was bestowed, and a comprehensive enforcement scheme established. *See, e.g.*, *Love v. Delta Air Lines*, 310 F.3d 1347, 1351 (11th Cir.2002) ("[W]hether a statute creates by implication a private right of action is a question of statutory construction . . . ."); *Anderson v. Jackson*, 556 F.3d 351, 356 (5th Cir. 2009) ("Whether [] rights [enforceable pursuant to § 1983] have been conferred depends on Congressional intent, as indicated by the text and structure of the statute."). The third question asks what the proper standard is for determining whether an equal protection claim has been plausibly alleged in the voter-dilution context. *See, e.g.*, *United States*

v. Triumph Group., 2016 WL 3546244, at *2 (D. Utah June 23, 2016) (finding that there is a question of law "when there is a genuine doubt or conflicting precedent as to the correct legal standard"). As such, § 1292(b)'s question of law requirement is met.

The requirement that the questions of law be controlling is also readily satisfied here. If section 2 does not create an implied cause of action and does not bestow individual rights upon Plaintiffs or create a comprehensive enforcement scheme, Plaintiffs' section 2 and § 1983 claims should be dismissed. Likewise, if an equal protection claim cannot be based only on the disparate results that a minority group has purportedly faced, but instead, a plaintiff must allege that persons with authority to change the challenged election practice have engaged in discriminatory behavior, then Plaintiffs' lone remaining claim (their Fourteenth Amendment claim) would also go away. This is all that is needed for the control prong to be found to be satisfied. *See, e.g.*, *Martinez v. Back Bone Bullies*, 2022 WL 1027148, at *2 (D. Colo. Apr. 6, 2022) ("[A] 'controlling question of law' is one that, if resolved differently, would entitle a party to judgment [and] obviate the need for further proceedings in the case.").

B. There is substantial ground for difference of opinion regarding the identified issues.

The substantial-ground requirement asks if the identified question of law "is difficult, novel, and either a question which there is little precedent or one whose correct resolution is not substantially guided by previous decisions." *KPH*, 2022 WL 16551340, at *2. A party can satisfy this requirement "by presenting 'colorable arguments' supporting its position on the question of law—grounds, though they failed to persuade the district court in its ruling, still presented a 'colorable' basis for an alternative decision on the question of law." *Id.* (citation omitted).

1. There is a colorable argument that section 2 has no implied cause of action.

The first question, whether section 2 creates an implied cause of action, turns largely upon whether the Supreme Court found, instead of assumed, that an implied cause of action before the *Sandoval* test was adopted by the Supreme Court. If it did not, which at least two justices believe is the case, *see Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (Gorsuch, J., concurring), then section 2 likely does not establish a private cause of action because, as the Supreme Court has made quite clear, judicially implied private rights of action are now extremely disfavored. This alone is enough to satisfy the § 1292(b)'s second requirement. *See, e.g.*, *McHenry*, 2017 WL 4758947, at *2 (D. Kan. Oct. 20, 2017) (finding that the substantial-ground-for difference requirement was met when the Supreme Court "appears to have some doubts" about the legal proposition in question).

Likewise, as noted in Defendants' motion to dismiss briefing, a well-reasoned opinion out of the District Court for the Eastern District of Arkansas has set forth why an implied cause of action does not exist under section 2. *See generally State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893 (E.D. Ark. 2022). No circuit court has weighed in on the issue, though it is currently pending before the Eighth Circuit. While some district courts have reached a conclusion opposite of the Arkansas court, they have done so relying on cases that Justices Thomas and Gorsuch have described as "assum[ing]—without deciding—" that an implied cause of action exists under section 2. Thus, these cases, and the ones they rely upon, seem ill-prepared to defuse the disagreement that exists on this issue. *See, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

2. There is a colorable argument that section 2 is not enforceable under § 1983.

As far as counsel is aware, only one federal court has decided whether section 2 is enforceable through a § 1983 action. In *Turtle Mountain Band of Chippewa Indians v. Jaeger*, 2022 WL 2528256 (D.N.D. July 7, 2022), the court concluded that it was. To reach this conclusion, though, the district court short-armed the analysis. In its single paragraph of analysis about whether section 2 bestows an individual right, the district court did not address subsection (b) of section 2 or discuss how its conclusion could be squared with existing Supreme Court precedent. Significantly, the Supreme Court has admonished that an individual right should not be found in statutes that are "not concerned with 'whether the needs of any particular person have been satisfied," *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002), or "that focus on the person regulated rather than the individuals protected," *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).

Starting with subsection (b) of section 2, it is actually the subsection that defines what right section 2 creates. Specifically, subsection (b) states that a civil rights violation occurs only if a "political process . . . [is] not equally open to participate on by *members of a class of citizens* protected by subsection (a) in that its members have less opportunity than *other members* of the electorate to participate in the political process." 52 U.S.C. § 10301 (emphasis added). Understanding section 2(b) as creating something other than an individual right, the Supreme Court has required in a voter-dilution case evidence that "minority group members constitute a politically cohesive" group and that the group has a "preferred candidate[]." *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986). Without this type of "group" evidence, there is no violation of whatever section 2 provides. Thus, section 2 is not concerned with the needs of any one person.

Moving to the person-regulated-versus-individual-protected distinction created by the Supreme Court, it too militates against finding an individual right under section 2. As noted in *Thornberg*:

> [s]ubsection 2(a)[, which was the sole basis for the *Turtle Mountain* court's conclusion that section 2 bestowed an individual right,] prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class or racial and language minorities.

478 U.S. 43 (emphasis in original). In other words, it has long been viewed that section 2 was focused on prohibiting government actors from taking certain actions versus providing individuals with rights that they can offensively wield. *See, e.g.*, *New Phone v. N.Y.C. Dep't of Info. Tech. & Tele.*, 2006 WL 6908254, at *15 (E.D.N.Y. Aug. 25, 2006), *subsequently aff'd sub nom. New Phone v. N.Y.C. Dep't of Info. Tech. & Tele.*, 355 F. App'x 503 (2d Cir. 2009) (finding that an individual right was not bestowed under the Telecommunication Act ("TCA") because the TCA focused on what state and local governments can do, not the rights that the plaintiffs had).

In short, despite the *Turtle Mountain* court's proclamation that "[i]t is difficult to imagine more explicit or clear rights creating language" than that found in section 2, there is very little precedent on the issue, and the conclusion that section 2 creates individual rights appears to be in tension with the Supreme Court's guidance on how suspected rights-bestowing language should be interpreted. Accordingly, this issue also warrants certification.

Additionally, no appellate court has addressed whether section 2 creates a sufficiently comprehensive enforcement scheme to preclude a plaintiff from resorting to using § 1983 to vindicate any section 2 right they may have. As noted in *Arkansas State Conference NAACP*, the "text and structure [of section 2] strongly suggests that exclusive enforcement authority resides in

the Attorney General of the United States." 586 F. Supp. 3d at 911. This apparent exclusivity seems to leave little room for § 1983 to be utilized to vindicate any right created by section 2.

3. There is a colorable argument that race must motivate the relevant actors for an equal protection claim to exist.

As Defendants have maintained throughout, Plaintiffs' allegations support, at most, an unintentional vote-dilution claim, which should not fall within the Fourteenth Amendment. *See, e.g.*, *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1328 (11th Cir. 2021) (stating that a plaintiff must show that the actor in question's "decision or act had a discriminatory purpose"). This is so because the only non-conclusory allegations in Plaintiffs' Amended Complaint that relate to local government actors reference the Ford County's Election Officer.[1] However, the Ford County's Election Officer has no statutory authority to change the challenged election practice.

Contrary to the Court's and opposing counsel's conclusions otherwise, the fact that only the citizens, and not elected officials, of Dodge City have the ability to change the City's form of government is relevant to the analysis at hand. The reason for this is that the type of government that a city has dictates which set of Kansas statutes apply to their elections. For instance, Article 10 of Chapter 12 in the Code applies to cities with the commission-manager form of government. Since before the commission-manager form of government was adopted in Dodge City in 1970 and up through 2015, Article 10 of Chapter 12, specifically K.S.A. 12-1005a through -1005l, mandated that a city's commissioners be chosen through at-large voting. In 2015, K.S.A. 12-1005

[1] The Amended Complaint makes multiple assertions regarding the fact that polling locations were changed in ways that Plaintiffs believe were more prejudicial to Latinos than other races. (*See* Doc. ¶¶ 94-95, 98-99, 103-04). However, pursuant to K.S.A. 25-2701, only county election officers have the authority to set polling locations. Therefore, even assuming that Plaintiffs' allegations regarding polling locations could be probative on the question of discriminatory intent, they would not demonstrate purposefulness on Defendants' behalf here because Defendants had no hand in designating polling locations in Dodge City.

and all of its subsections were repealed, and the Legislature replaced those sections with others that specifically empower two groups of people, and only two groups, to make changes to how candidates are elected in a city—a city's residents and its commissioners. *See* K.S.A. 12-1039 & 12-1040. Therefore, only decisions or actions that can be attributed to Dodge City's citizens as a whole or the Dodge City Commissioners should be considered when deciding whether a Fourteenth Amendment violation has transpired. *See, e.g.*, *League of Women Voters of Fla. v. Fla. Sec'y of State*, --- F.4th ----, 2023 WL 3108161, at *5 (11th Cir. Apr. 27, 2023) (refusing to consider alleged evidence of intent because the act in question was not taken by the actor in question and thus could not be attributed to them).

However, there is little case law regarding what is required at the motion-to-dismiss stage in a voter-dilution case like this, especially in a post-*Iqbal* and *Twombley* plausibility world. This is largely due to the fact that courts have dodged questions relating to the Fourteenth Amendment's purposefulness, *see, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442, (2006) ("Because we hold Plan 1374C violates section 2 in its redrawing of District 23, we do not address appellants' claims that the use of race and politics in drawing that district violates the First Amendment and equal protection."), opting instead to address, through the uncritical application of section 2, what they no doubt perceived as being easier, lower threshold issues presented by section 2 claims, *see, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 942-43 (N.D. Ga. 2017) (describing "results-only claims [as] usually [being] easier to prove [than] vote dilution claims"). As a result, there is currently a dearth of case law regarding whether an equal protection claim can be maintained by a plaintiff that has, at most, alleged an unintentional voter-dilution case.

The lack of guidance in the Fourteenth Amendment context manifested itself just this past week when the Eleventh Circuit ended up reversing a district court's finding that the State of

Florida had violated the Equal Protection Clause through various voting related laws that it had recently enacted. *See League of Women Voters of Fla.*, 2023 WL 3108161, at *4-22. There, "even in the light of the deferential standard or review," the Eleventh Circuit still found that the district court had committed at least ten errors in its analysis. *Id.* at *22. Notably, the Eleventh Circuit reiterated that "a finding of disparate impact alone cannot support a finding that [an action] violates the Constitution." *Id.* at *21. Discriminatory purpose must also be shown. *Id.*

In this case, unlike in *League of Women Voters of Florida*, there is no indication that the two possible relevant decisionmakers—Dodge City's citizens and its commissioners—have ever been motivated by race. In *League of Women*, the plaintiffs pointed to past legislative action they believed showed discriminatory intent, the arguably "conflicting or nonsensical rationales" for the challenged laws, and the "deeply troubling" positions of the laws' sponsor. *Id.* at *4-6 & 12. Here, in contrast, there is no cited history intimating that the citizens of Dodge City or the Dodge City Commissioners (*i.e.*, the only ones who could have the authority to change the at-large voting process) have a pattern of discriminating against Latinos. *Id.* at *18 ("[A]bsent a clear pattern, 'unexplainable on grounds other than race,' a finding of 'discriminatory impact alone is not determinative' of whether a provision violates the Fourteenth or Fifteenth Amendment." (citation omitted)). Likewise, there is no conflicting or nonsensical justification for Dodge City's at-large city elections or basis to question why the election practice was adopted. The reason is simple: it is what the law required when the City's citizens adopted the commission-manager form of government in 1970.

In short, other than Plaintiffs alleged disparate impact evidence, there is nothing suggesting, plausibly or otherwise, that at-large elections are occurring in Dodge City for any racially-motivated reason. Under the law generally applicable to motions to dismiss, the failure to

allege an essential element of a claim, such as discriminatory purpose, should warrant dismissal. *See, e.g.*, *Ellis ex rel. Estate v. Ogden City*, 589 F.3d 1099, 1102 (10th Cir. 2009) ("If the plaintiff fails to allege an essential element of his claim, the complaint is appropriately dismissed pursuant to Rule 12(b)(6)."). However, in light of the Supreme Court's statement that discrimination cases typically entail "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 266 (1977), and due to the lack of case law in the voter-dilution context regarding dismissal of an equal protection claim, it is unclear what specific types of facts must be alleged by a plaintiff to survive a motion to dismiss. Based on the fact that the Tenth Circuit, *see Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1179 (10th Cir. 2003), like other circuits, *see Rollerson v. Brazos Harbor Navigation Dist. of Brazoria Cnty. Texas*, 6 F.4th 633, 639-41 (5th Cir. 2021), have not hesitated to dismiss equal-protection claims that do not adequately allege discriminatory purpose, it would seem that the failure to provide any basis to conclude that the relevant decisionmakers in a voter-dilution case were motivated by racial considerations would be fatal. Since it appears that that section 2 cases are destined for increased scrutiny going forward, thus likely forcing consideration of equal protection issues that have longed been ignored, confirmation of this fact by the Tenth Circuit should be made, and made sooner rather than later, to spare state and local governments from the lengthy, time-consuming, and expensive proceedings associated with equal protection claims on which a plaintiff cannot prevail.

C. Immediate appeal will materially advance the ultimate termination of the litigation.

"'The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law.'" *Martinez*, 2022 WL 1027148, at *2 (citation omitted). As discussed in the context of § 1292(b)'s first requirement, resolution of the three identified questions will likely resolve this case and avoid

the time and expense associated with a case that appears Plaintiffs cannot prevail on. As a result, the third requirement is met.

II. If an interlocutory appeal is permitted, this proceeding should be stayed.

When certifying an order for interlocutory appeal, the court generally stays the proceeding before it in order to "prevent potentially costly [and unnecessary] proceedings." *Farmer v. Kan. Stat. Univ.*, 2017 WL 3674964, at *6 (D. Kan. Aug. 24, 2017). Here, there is substantial justification for granting Defendants' request. Not only would the failure to stay force Defendants to fight on essentially two fronts (assuming its underlying motion is granted), but, given the expert-heavy nature of VRA cases, it would force Defendants to incur exorbitant costs and fees to defend against claims that the Tenth Circuit may ultimately find meritless on interlocutory appeal. Accordingly, the need for a stay is higher here than other cases in which such relief is requested.

CONCLUSION

For the reasons stated herein, Defendants respectfully request that this Court grant their request to amend and certify the Order and stay this proceeding through the resolution of Defendants' appeal.

Respectfully submitted,

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I certify that on the 2nd of May 2023, the foregoing was electronically filed with the Clerk of the Court by using the Court's e-Filing system which will send notification of electronic filing to counsel for all parties of record, and a true and correct copy was served by electronic mail upon:

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