UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MIGUEL COCA, et. al., Plaintiffs, v. CITY OF DODGE CITY, et. al., Defendants.	Case No. 6:22-cv-01274-EFM-RES

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

Defendants' motions to amend and certify for interlocutory appeal this Court's April 18, 2023 Memorandum and Order (Doc. 71, the "Order") and to stay all proceedings in this Court pending appeal (Doc. 79, the "Motions") should be denied.[1]

PRELIMINARY STATEMENT

Defendants' Motions should be denied because they are baseless. Their argument for certification under 28 U.S.C. § 1292(b) as to Plaintiffs' Fourteenth Amendment Equal Protection claim does not raise *any* unsettled legal issue, but only questions the adequacy of Plaintiffs' allegations of discriminatory intent, which both sides agree is required to establish an Equal Protection claim. Defendants' position on this point is particularly incongruous because the Court ruled that Defendants had not addressed, and therefore waived, any argument on this issue. *See* Order at 19–20. With respect to Section 2 of the Voting Rights Act of 1965 ("VRA"),

[1] Terms defined in the Amended Complaint, Doc. 30, retain their meanings. Internal citations and quotations are omitted throughout this brief, except where otherwise indicated. Citations to the Motions refer to Defendants' memorandum of law filed in support of the Motions (Doc. 80).

Defendants identify *one* district court case that flies in the face of decades of precedent establishing a private right of action under Section 2, and *no* cases holding that Plaintiffs cannot alternatively bring their claim under 42 U.S.C. § 1983. Defendants' arguments thus do not remotely approach substantial grounds for a difference of opinion, or constitute the sort of "extraordinary case[]" that would merit an interlocutory appeal. *Lynn v. Cline*, 2020 WL 1847744, at 3 (D. Kan. Apr. 13, 2020) (internal quotation marks omitted) (Melgren, C.J.).

Defendants' companion request for a stay, blocking any further discovery, is equally meritless. Their opening assertion that there is "no evidence" that discriminatory intent has "motivated" the use of the at-large method of election in Dodge City, Mots. at 2, ignores significant evidence recently produced by Ford County in response to Plaintiffs' subpoena. In 2011, the United States Department of Justice ("DOJ") investigated whether Dodge City's at-large method of election violated Section 2 of the VRA by diluting the effect of Latine residents' votes. Ex. A, Letter from Ford County Clerk Sharon Seibel to County Commissioners (July 13, 2011).[2] In response to DOJ's inquiries, Ford County conducted its own investigation into whether Dodge City's at-large method of election violates Section 2 and received advice from an outside consultant that the practice raised "red flags" and substantial risk of liability. Ex. B, Letter from Bruce L. Adelson to Ford County Clerk Sharon Seibel (August 26, 2011), at 2, 4. This evidence flatly contradicts Defendants' repeated representations, including to the Court, that concerns about the at-large method of election's dilutive impact on Latine voters "[have] not been raised by the plaintiffs *or others in the past*." Ex. C, Rule 16 Conf. Tr. 24:6–11 (emphasis added). It is hard to escape the conclusion that the real driver of Defendants' Motions—filed less

[2] Plaintiffs received documents from Ford County on a rolling basis, which they in turn then produced to Defendants in a series of rolling productions on April 4, 2023, April 27, 2023, April 28, 2023, and May 5, 2023.

than three weeks before Plaintiffs' expert disclosure deadline—is the strong evidence of intent that recently came to light supporting Plaintiffs' claims. Blocking discovery at this stage, based on grounds for Section 1292(b) certification that can be charitably described as thin, clearly would be unwarranted.

ARGUMENT

I. Certification for interlocutory appeal should be denied.

The party moving for certification under 28 U.S.C. § 1292(b) bears the heavy burden of showing that "(1) [the underlying] order involves a controlling question of law; (2) a substantial ground for difference of opinion exists with respect to the question of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Freedom Transportation, Inc. v. Navistar Int'l Corp.*, 2020 WL 108670, at *2 (D. Kan. Jan. 9, 2020). "These criteria are conjunctive, not disjunctive," meaning that Defendants must satisfy each prong. *Id.* The courts of appeals generally have jurisdiction over "final decisions" of district courts, and the "long-established policy preference in the federal courts disfavor[s] piecemeal appeals." *Freedom Transportation*, 2020 WL 108670, at *2. For these reasons, "[i]nterlocutory appeals are the exception and not the rule." *Lynn*, 2020 WL 1847744, at *3; *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1189 (10th Cir. 2006) ("Interlocutory appeals have long been disfavored in the law, and properly so."); *Freedom Transportation*, 2020 WL 108670, at *2 (certification is "limited to extraordinary cases"). Defendants have not satisfied any of the Section 1292(b) factors and cannot argue, nor do they even try to do so, that this case presents extraordinary circumstances justifying certification for interlocutory review.

A. Defendants do not present a controlling question of law.

Defendants' Motions do not present legal questions that would control the outcome of this case. Defendants seek to appeal this Court's ruling that, for purposes of a Rule 12(b)(6)

motion to dismiss, Plaintiffs' allegations of Defendants' racially discriminatory intent in *operating* the at-large election scheme "plausibly alleged a claim for violation of the Equal Protection Clause." Order at 18–20. There is no dispute that discriminatory intent is required to state an Equal Protection claim. And the Court found that Defendants had "waived any argument" that Plaintiffs insufficiently alleged an inference of discriminatory intent, *id.* at 19, by not addressing it in their motion to dismiss ("Motion to Dismiss," Doc. 38), where Defendants argued only that there were no factual allegations of Dodge City's *citizens'* discriminatory intent at the time the at-large election scheme was *adopted*.

Defendants now assert that, at least until 2015, Kansas law "mandated" at-large voting in cities with the Commissioner-Manager system of government, such as Dodge City; that since 2015, this could only be undone by the citizens of Dodge City or the Commissioners, Mots. at 9; and that there are no plausible allegations of discriminatory intent by the "citizens as a whole" or the Commissioners in maintaining at-large voting, *id.* at 10. The first part of this argument—that the Commissioner-Manager form of government legally "mandated" at-large voting—was not even discussed in Defendants' briefing on the Motion to Dismiss.[3] The second part is no more than an attempt belatedly to argue that Plaintiffs did not adequately plead discriminatory intent by the Defendants in operating the at-large voting system, which the Court deemed to have been waived.[4]

[3] Indeed, the Court properly found that Defendants failed "to explain how the City's at-large election system is inseparable from its chosen form of government." Order at 18.

[4] Defendants' new argument itself shows that their previous assertion that "it is the citizens of Dodge City, not the Commission (or any other elected official for that matter), who get to determine whether to abandon the Commissioner-Manager form of government," Defendants' Motion to Dismiss, Doc. 38 at 14, was incorrect. Indeed, the fact that Defendants, notwithstanding the concerns raised in 2011, apparently made no effort to change from at-large voting after 2015 is itself potentially probative of discriminatory intent. In any event, Plaintiffs allege additional facts, besides the polling location changes in 2018, which Defendants attribute solely to Ford County, that raise an inference of discriminatory intent. Pls.' Resp. to Defs.' Mot. to Dismiss, Doc. 48 at 9.

At best, Defendants argue that the Fourteenth Amendment claim "fail[ed] to provide any basis to conclude that the relevant decision makers in a voter-dilution case were motivated by racial considerations." Mots. at 12. But this is a fact-specific question that raises no legal issues warranting immediate appeal: "The term 'question of law' does not mean the application of settled law to fact." *Raymond v. Spirit Aerosystems Holdings, Inc.*, 2019 WL 1922170, *3 (D. Kan. Apr. 30, 2019) (citing *McFarlin v. Conseco Svcs., LLC*, 381 F.3d 1251, 1258 (11th Cir. 2004)). Defendants' quarrel with the adequacy of Plaintiffs' intent allegations is thus hardly grounds for interlocutory appeal. Were it otherwise, denials of Rule 12(b)(6) motions would be routinely appealable, which is the exact opposite of what the law requires.[5]

Under these circumstances, Defendants present no controlling issue of law within the meaning of Section 1292(b) because appeal would not "materially affect the outcome of litigation in the district court or . . . require reversal of a final judgment." *Freedom Transportation*, 2020 WL 108670, at *3 (internal quotations omitted). Even if the Defendants' Section 2 arguments were ultimately accepted on appeal, this action would proceed under Section 1983 and the Fourteenth Amendment. *See* Order at 12 ("Accordingly, the Court finds that Plaintiffs may alternatively assert a Section 2 claim under § 1983."). Defendants' Motions therefore should be denied for failing to meet the first Section 1292(b) factor.

B. There are no substantial grounds for difference of opinion.

Defendants devote the bulk of their Motions to the argument, which this Court analyzed at length and rejected in accordance with overwhelming precedent, that there is no private right of action under Section 2 of the VRA. As discussed below, this is not an open issue of the kind

[5] After the conclusion of discovery, which has already begun uncovering evidence of discriminatory intent in line with Plaintiffs' allegations on the subject in the Amended Complaint, Doc. 30, Defendants will be free to seek summary judgment on the full record, which the Court would then consider.

for which Section 1292(b) certification is designed. And even if it were, Plaintiffs can bring their Section 2 claims under 42 U.S.C. § 1983, and Defendants provide no authority to the contrary. Defendants' request for extraordinary relief on this latter ground is particularly confounding, given that Defendants did not even raise this argument in their opening brief on their Motion to Dismiss.[6]

Even if this case only involved Section 2, Defendants fail to satisfy requirements for certification under the second prong of Section 1292(b). To merit certification, Defendants must make at least a "colorable argument" on an issue that is "difficult, novel, and involve[s] a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions." *Freedom Transportation,* 2020 WL 108670 at *3–4 (internal quotations omitted). "[I]t is not enough that the issue is one of first impression, or that the only other case on point reached the opposite conclusion." *Id.* at *3. Defendants' first and second issues are neither difficult nor novel; indeed, decades of precedent, including from the Supreme Court, contradict them.[7]

Defendants' first question asks whether Section 2 provides a private right of action. Mots. at 6. The weight of long-settled authority supports Plaintiffs' conclusion that Section 2 contains such a right. As this Court has recognized, there is a "vast sea of cases recognizing and affirming the private right of action within Section 2, usually without question." Order at 9; Pls.' Resp. to Defs.' Mot. to Dismiss, Doc. 48, at 14–15 (collecting cases); DOJ Statement of Interest, Doc. 54, at 4 n.2 (collecting cases). Critically, in *Morse v. Republican Party of Virginia*, 517 U.S. 186,

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[6] It is also undisputed that Plaintiffs can bring their Fourteenth Amendment claims under Section 1983. *See Hafer v. Melo*, 502 U.S. 21, 21 (1991) (observing that the Supreme Court has held that "Congress enacted § 1983 'to enforce provisions of the Fourteenth Amendment'") (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974)).

[7] As discussed above, the third question, regarding the adequacy of Plaintiffs' pleading of discriminatory intent for their Fourteenth Amendment claim, is not a question of law at all; there is no dispute that a Fourteenth Amendment claim requires intent, and Defendants' only quarrel is with the adequacy of the pleading on this issue.

232 (1996), the Supreme Court stated that "the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965." "The simple fact is that the Supreme Court explicitly recognized a private right of action under Section 2 in *Morse*." Order at 10. It is immaterial whether this statement was dicta because courts in the Tenth Circuit are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings." Order at 9 n.32 (quoting *United States v. Nixon*, 919 F.3d 1265, 1273 (10th Cir. 2019)).

The inspiration for Defendants' novel theory to the contrary is a single Arkansas district court opinion, in which that court became the first—and only—federal court in the country to hold that Section 2 does not provide a private right of action. *State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893 (E.D. Ark. 2022); *see also* Mots. at 6. The Arkansas district court based its ruling on a concurring opinion by Justice Gorsuch, joined by one other justice, which remarked that the Supreme Court has only ever assumed, without deciding, that there is a private right of action to enforce Section 2. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring). This is a far cry from the situation in *McHenry v. City of Ottawa, Kansas*, 2017 WL 4758947 (D. Kan. Oct. 20, 2017), in which a Kansas district court found substantial grounds for difference of opinion where an issue had been flagged in a *majority* opinion of the U.S. Supreme Court and was also the subject of a circuit split. *Id.* at 2.

Because Defendants' first question is not one on which there is "little precedent" or that "is not substantially guided by previous decisions," *Freedom Transportation,* 2020 WL 108670, at *3, there are no substantial grounds for difference of opinion. In its decision denying Defendants' Motion to Dismiss Plaintiffs' Section 2 claim, this Court decided to "adhere to the extensive history, binding precedent, and implied Congressional approval of Section 2's private right of action." Order at 10. Those same considerations counsel against certification.

Defendants' second question asks whether private plaintiffs may enforce Section 2 through the private right of action provided in 42 U.S.C. § 1983. Mots. at 7–9. Defendants failed to address this point at all in their Motion to Dismiss, *see* Doc. 38, and only cursorily addressed it in their response to the United States' Statement of Interest, Doc. 62 at 4–5. In that response, and in their Motions here, Defendants did not—because they cannot—point to *any* court that has ever found that Section 1983 does not permit private plaintiffs to bring suit under Section 2 of the VRA. Instead, Defendants offer their own textual analysis of Section 2 and reason that, because Section 2 protects minority groups and requires plaintiffs to show political cohesion among such groups, "section 2 is not concerned with the needs of any one person." Mots. at 7. Defendants make no substantive response to the reasoning in *Turtle Mountain Band of Chippewa Indians v. Jaeger*, 2022 WL 2528256 (D.N.D. July 7, 2022)—which this Court adopted—that "[i]t is difficult to imagine more explicit or clear rights creating language," *id.* at *5, than the "right of any citizen . . . to vote," 52 U.S.C. § 10301(a). That "Section 2 contain[s] clear rights-creating language [is] a legal position thus far unquestioned by any members of the Supreme Court," Order at 12, or any other court for that matter. Indeed, the language of Section 601 of Title VI of the Civil Rights Act of 1964—which the Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001), held out as "paradigmatic rights-creating language"—"seems to mirror" that of Section 2. *League of United Latin Am. Citizens v. Abbott*, 2021 WL 5762035, at *1 & n.1 (W.D. Tex. Dec. 3, 2021). And Defendants' assertion that "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," Mots. at 8, ignores the "extensive history of Section 2 enforcement by individuals," Order at 12.

Because Defendants' second question is therefore not a "difficult" one lacking "guid[ance] by previous decisions," there are no substantial grounds for difference of opinion. *Freedom Transportation*, 2020 WL 108670, at *3; *see also Moore v. Kobach*, 2019 WL 4228415, at *2 (D. Kan. Sept. 5, 2019) (denying 1292(b) certification because no substantial grounds of difference of opinion where decision substantially guided by prior decisions). The second prong of Section 1292(b) is therefore not satisfied.

C. Interlocutory review would not materially advance the ultimate termination of the litigation.

Defendants fail to satisfy the exacting standard required under the third prong of Section 1292(b) for largely the same reasons they fail to present a controlling question of law. *See Martinez v. Back Bone Bullies Ltd*, 2022 WL 1027148, at *2 (D. Colo. Apr. 6, 2022) (third prong of Section 1292(b) is "closely tied" to the first prong regarding controlling question of law). Additionally, the third prong "turns on pragmatic considerations" such as "the procedural and substantive status of the case, the extent of the parties' preparation for trial, and the nature and scope of the requested relief." *Freedom Transportation,* 2020 WL 108670 at *5. "If the litigation will be conducted in substantially the same manner regardless of the decision, an immediate appeal will not advance the termination of the litigation." *Id*. By contrast, the third prong is "met where an immediate appeal would eliminate the need for a trial, eliminate complex issues so as to simplify the trial, or make discovery easier and less costly." *Id.* (citing *Raymond v. Spirit Aerosystems Holdings, Inc.*, 2019 WL 1922170, at *2 (D. Kan. Apr. 30, 2019)).

On this point, the lack of any even colorable basis for certification of the Court's decision on the Fourteenth Amendment Equal Protection claim is dispositive. Even if the Court were to certify appeal of the Section 2 private right of action issues, the parties would continue with discovery and proceed to trial, which is scheduled for February 2024, on the Fourteenth

Amendment claim. In *Freedom Transportation*, the court found that because certain defendants would "likely continue[]" to be involved "in discovery for this matter" regardless of whether they were dismissed, "an immediate appeal will not advance the ultimate termination of this litigation or result in substantial time savings for the Court or the other litigants." *Freedom Transportation,* 2020 WL 108670 at *6. The same reasoning applies here. Even if Plaintiffs' Section 2 claim were dismissed, the case would proceed on the Equal Protection claim. Although the legal standard for Section 2 results claims is distinct from the legal standard for Fourteenth Amendment intent claims, they each require discovery of evidence probative of discriminatory intent. *See Rogers v. Lodge*, 458 U.S. 613, 616–22 (1982); *compare id.* at 619 n.8 (listing the factors laid out in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), as probative of discriminatory intent under the Fourteenth and Fifteenth Amendments) *with Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986) (listing the factors relevant to the Section 2 totality of circumstances inquiry, which can also involve issues of intent). Therefore, interlocutory appeal would not materially advance the termination of this case.

II. The Court should not stay the proceedings.

It is clear that a request for interlocutory review "shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 U.S.C. § 1292(b). Discovery stays generally are discouraged because they interfere with the plaintiff's interest "in bringing the case to trial." *Clinton v. Jones*, 520 U.S. 681, 707 (1997).

After receiving input from both Parties, the Court set the schedule for this case with the "hope . . . that we can, as expeditiously as possible, proceed in this litigation." Ex. C, Rule 16 Conf. Tr. 54:25–55:1; Doc. 42. Trial has been set for the end of February 2024, and Defendants' Motions notably ignore that discovery has been ongoing since January 10, 2023, with the

deadline for substantial completion of document productions for fact discovery having passed on May 1, 2023. Plaintiffs' expert reports are due on May 19, 2023. Defendants have already taken Plaintiffs' depositions, and Plaintiffs' counsel have begun noticing depositions of Defendants and certain third parties for the months of May and June. Defendants' request to stay discovery is nothing more than a delay tactic that would impede Plaintiffs' ability to timely obtain the discovery necessary to prove their case. Staying discovery at this juncture would severely prejudice Plaintiffs and disrupt the schedule that the Court carefully set for the litigation.

Indeed, the entry of a stay at this juncture would be particularly unfair to Plaintiffs. Defendants are apparently continuing to collect, and have not yet produced any, documents from the personal emails of the Commissioners responsive to Plaintiffs' requests, despite the Court's May 1 substantial completion deadline. In addition, Plaintiffs are still awaiting productions in response to certain of their requests, including Plaintiffs' request prompted by the recent disclosure by Ford County of the DOJ investigation, in which Ford County documents indicate that the County coordinated its response with the City. *See* Ex. D, Email from Bruce L. Adelson to Ford County Clerk Sharon Seibel (July 15, 2011). It would be highly prejudicial under these circumstances to stay discovery, when evidence of Defendants' intent, which relates to the Fourteenth Amendment claim as well as supporting the Section 2 claim, is now in the process of emerging. Defendants' request to delay discovery should be denied.

CONCLUSION

For the foregoing reasons, Defendants' Motions to certify the Court's order for interlocutory appeal and stay the proceeding pending such appeal should be denied in their entirety.

Dated: May 9, 2023

Respectfully submitted,

By: */s/ Sharon Brett*

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CERTIFICATE OF SERVICE

Pursuant to D. Kans. Loc. R. 5.1(f), I hereby certify that on this 9th day of May 2023, a true and correct copy of the foregoing was served via the United State District Court's CM/ECF system on all parties or persons requiring notice, including upon attorneys for defendants:

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