IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

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

In its order granting in part and denying in part Defendants' motion to dismiss, this Court stated that "Defendants raise a monumental issue sure to find its ultimate conclusion beyond this Court—whether private plaintiffs may sue for violation of the VRA." (Doc. 71, at 5). This Court went on to identify two significant legal issues, stating: "In essence, this issue presents two questions: (1) does Section 2 provide a private right of action and (2) does it create private rights such that a private plaintiff could bring a claim under § 1983." (*Id.* at 5-6).

Defendants' motion to certify addresses these two questions as the reasons why this Court's order should be certified. (Doc. 80, at 3-4). Contrary to the Plaintiffs' assertion that the Defendants' positions are "baseless," (Doc. 86, at 1), the Defendants have identified for appeal the monumental issues identified by the Court that will surely reach an ultimate decision in a higher court. Defendants submit that these issues are threshold issues that ought to be decided by a higher court before the parties spend hundreds of thousands of dollars on additional discovery and trial.

In addition, the Defendants have raised a third reason why interlocutory appeal is warranted: "In a voter-dilution case, can a plaintiff establish an equal protection claim by merely alleging the effects of a challenged practice and the actions taken by non-defendants, or must they

cite actions taken by persons with authority to change the challenged election practice that plausibly suggest race was a motivating factor." (Doc. 80, at 4).

Defendants' proposed questions, individually or collectively, warrant interlocutory appeal. Furthermore, due to the importance of the proposed questions, this case should be stayed if interlocutory appeal is granted. Accordingly, Defendants' motions should be granted.

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

Plaintiffs argue that the Section 2 question should not be certified because "there are no substantial grounds for difference of opinion" on it, as "[t]he weight of long-settled authority supports Plaintiffs' conclusion that Section 2 contains [a private cause of action]." (Doc. 86, at 6-7). At least two sitting Supreme Court justices disagree with Plaintiffs and do so for good reason. Since noting in 1980 that Defendants' Section 2 question was an open one, *see City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980), the Supreme Court has never decided the issue. The closest that Plaintiffs get is *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), a Section 10 case with no single controlling opinion. The Section 2 statements in *Morse*, though, are not well reasoned (rather, they merely recited language in the legislative history that never found its way into the enacted law). Plus, the statements appear at odds with the Supreme Court's current test for determining whether an implied cause of action exists. Thus, Justices Thomas and Gorsuch's observation in *Brnovich* are well grounded and demonstrates that debate on the issue is far from precluded, especially at a time when the Supreme Court has exhibited a greater willingness to review whether actions taken in the name of the VRA are consistent with the statute's text. *See generally, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

Plaintiffs also claim that certification would not materially advance the litigation because, "[e]ven if the Defendants' Section 2 argument were ultimately accepted on appeal, this action

would proceed under Section 1983 and the Fourteenth Amendment." (Doc. 86, at 5). Plaintiffs' argument is based on at least three faulty assumptions. First, as discussed in sections II and III, Defendants' proposed questions for Plaintiffs' Fourteenth Amendment and § 1983 claims should also be certified. Second, even if the Court were not convinced that the Fourteenth Amendment and § 1983 claims should be separately certified, that would not mean that the Section 2 question should not be certified, as a single question need not "be dispositive of [a] lawsuit" to be certifiable. *United States v. Woodbury*, 263 F.2d 785, 787 (9th Cir. 1959). Third, since appellate courts "may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court," *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996), the whole case should be stayed. Due to the similarities and novelty of the Defendants' questions, it "would be a waste of judicial and party resources to proceed with the other claims while the appeal is pending." *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008); *accord NCUAB v. RBS Secs., Inc.*, 2012 WL 4210500, at *3-4 (D. Kan. Sept. 19, 2012). As a result, Plaintiffs' arguments relating to their Fourteenth Amendment and § 1983 claims should not prevent certification of the Section 2 question.

II. The Fourteenth Amendment question should be certified.

Plaintiffs suggest that Defendants' Fourteenth Amendment question merely relates to "the application of settled to fact." (Doc. 86, at 5). Plaintiffs ignore what Defendants' proposed question actually asks, though, which is: Who's intent matters for Fourteenth Amendment purposes? Is it sufficient for a plaintiff to merely point to any local government official's allegedly discriminatory actions, as Plaintiffs have done here, or must they make allegations related to the specific person(s) who are responsible for the action they are challenging? Due to the dearth of cases in this context, and recent developments in the pleading standard, the answer

is not clearly established in this Circuit. However, based on a very recent decision out of the Eleventh Circuit (a decision to which Plaintiffs offered no response), it appears that the latter is required. *See League of Women Voters v. Fla.*, --- F.4th ----, 2023 WL 3108161, at *5 (11th Cir. Apr. 27, 2023) (finding that voter roll purges were not evidence of legislative discriminatory intent because the purge was "not conducted by the Legislature").

Plaintiffs attempt to recast Defendants' argument and claim that it is "new." (Doc. 86, n.4). However, Defendants have continuously argued that Plaintiffs have not "'show[n] that the relevant decisionmakers' were motivated by discriminatory purpose." (Doc. 56, at 5 (citation omitted)). Under Kansas law, the relevant decisionmaker is determined based on the form of government that has been adopted for a city. While the Court disagreed with Defendants that the Dodge City electorate were the only relevant decisionmakers, the fact remains that county officials, which are the only government actors that Plaintiffs make non-conclusory allegations against, have no statutory role in determining whether city officials are elected in at-large elections. Thus, any discriminatory purpose that county officials may allegedly have should be of no assistance to Plaintiffs in their discriminatory intent claim against the City of Dodge City and its commissioners.

III. There is no established precedent that Section 2 is enforceable through § 1983.

Plaintiffs contend that Defendants' proposed question regarding § 1983 should not be certified because there are "*no* cases holding that Plaintiffs cannot alternatively bring their claim under 42 U.S.C. § 1983." (Doc. 86, at 2). Until roughly ten months ago, the same could have been said about Plaintiffs' position. The fact of the matter is that it appears that there is currently only one district court in the entire country that has ever addressed how, if at all, Section 2 intersects with § 1983. Thus, contrary to Plaintiffs' intimation otherwise, this issue is not "substantially guided by prior decisions." (Doc. 86, at 9). In fact, it is quite the opposite.

What's more, *Turtle Mountain*'s analysis of the § 1983 question was, at best, abbreviated, relying primarily on the court's naked assertion that "[i]t is difficult to imagine more explicit or clear rights creating language." (Doc. 86, at 8). Actually, subjecting the language of Section 2 to the Supreme Court's standard for determining individual rights does not appear to support such a conclusion, though, for reasons previously stated by Defendants—namely, Section 2 is not concerned with the needs of any one particular person and does not focus on the parties to be protected by it, but, rather, the parties that are to be regulated. (Doc. 80, at 7).

IV. A stay in this case should be ordered.

This case presents an opportunity for the Tenth Circuit to provide much needed guidance and to do so before local communities like Dodge City are forced to spend hundreds of thousands of dollars on a lawsuit that may ultimately be found meritless under the applicable legal standard. *See, e.g.*, *NCUAB*, 2012 WL 4210500, at *3 (granting a certification motion where it "could significantly streamline the litigation and conserve the valuable resources of the parties, the Court, and the public"). Accordingly, regardless of whether the Court believes all three of Defendants' proposed questions are certifiable or just one, Defendants respectfully request that a stay of the entire case be entered if the Court certifies its April 18, 2023, Order (Doc. 71) for interlocutory appeal.

Regarding Plaintiffs' charge that Defendants' motive for filing the pending motions was something other than to receive guidance on the questions they have proposed, it should be ignored. (Doc. 86, at 2-3 & 10-11). The "real driver[s]" behind Defendants' filing of their motion were this Court's April 18 Order and the requirement that a § 1292(b) motion "be filed in the district court within a *reasonable time* after the order sought to be appealed." *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). Discovery had nothing to do with it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 16th day 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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