IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

HAROLD HARRIS; PASTOR ROBERT TIPTON, JR.; DELTA SIGMA THETA SORORITY, INC., DESOTO COUNTY MS NAACP UNIT 5574

Plaintiffs,

v.

No. 24-cv-289-GHD-RP

DESOTO COUNTY, MISSISSIPPI; DESOTO COUNTY BOARD OF SUPERVISORS; DESOTO COUNTY ELECTION COMMISSION; and DALE THOMPSON in her official capacity as DeSoto County Circuit Clerk.

Defendants.

PLAINTIFFS' MEMORANDUM BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs Harold Harris, Pastor Robert Tipton, Jr., Delta Sigma Theta Sorority, Inc., and the DeSoto County NAACP Unit 5574 (together, "Plaintiffs") have pled a straightforward violation of Section 2 of the Voting Rights Act ("VRA"). 52 U.S.C. § 10301. In DeSoto County, despite Black people constituting a third of the population, Defendants DeSoto County, the Board of Supervisors, the Election Commission, and the Circuit Clerk (together, "Defendants") have adopted or administered a districting plan that cracks the Black community across multiple districts. ECF No. 1 ("Compl.") ¶¶ 1, 81. That plan cracks Black population centers in a way that routinely allows the County's white majority to outvote Black voters in each of the County's five districts. *Id.* ¶¶ 96–104. As a result, none of the twenty-five officials elected under this plan is either Black or the Black-preferred candidate. *Id.* ¶ 5. No Black person has been elected to the Board of Supervisors, Board of Education, Election Commission, Justice Court, or as Constable in decades. *Id.* ¶ 2.

Defendants raise three bases for dismissal in their Motion to Dismiss Plaintiffs' Complaint. *See generally* Defs.' Br. in Support of Mot. to Dismiss, ECF No. 37 ("Mot."). Each is meritless. First, the Circuit Clerk is a proper Defendant. State law charges her with administering County elections under the challenged 2022 redistricting plan (the "2022 Plan"). Plaintiffs' injury is therefore traceable to and redressable by the Circuit Clerk who is sued in her official capacity. Second, Plaintiffs have sufficiently pled their claims. Defendants wrongly either ignore or misread key factual allegations in the Complaint. Finally, binding precedent forecloses Defendants' argument that Section 2 lacks a private right of action. *Robinson v. Ardoin*, 86 F.4th 574, 588 (5th Cir. 2023).

Accordingly, Plaintiffs respectfully request that the Court deny Defendants' motion.

RELEVANT BACKGROUND

Plaintiffs, two individual voters in DeSoto County and two membership organizations, Compl. ¶¶ 33–50, filed suit to vindicate their rights to a non-dilutive districting plan. They allege that the 2022 Plan violates Section 2 of the VRA. *See generally* Compl. Plaintiffs plead the three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986): that (1) the Black population in the County is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) DeSoto County's Black voters are politically cohesive; and (3) the majority usually votes as a bloc to defeat Black-preferred candidates. *See, e.g.*, Compl. ¶¶ 81–104. Plaintiffs also allege facts to show that, under the totality of the circumstances, Black voters in DeSoto County have less opportunity than white voters to participate in the political process. *See, e.g.*, *id.* ¶¶ 105–230. The Complaint seeks, among other relief, an injunction preventing Defendants' use of the 2022 Plan in future elections and an order setting special elections. *See id.* at 35–36. It names as Defendants the County and the entities and officials responsible for drawing and enforcing the 2022 Plan. *Id.* ¶¶ 51–54.

Defendants move to dismiss the Complaint on three grounds. *See* ECF Nos. 36–37. First, pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Dale Thompson challenges Plaintiffs' standing to sue her in her official capacity. *See* Mot. at 4–5. Second, all Defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that Plaintiffs have failed to allege sufficient facts to state a claim. *See* Mot. at 5–12. Finally, pursuant to Rule 12(b)(6), all Defendants insist that Section 2 does not provide a private right of action. *See* Mot. at 12–15.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), courts "accept all well-pleaded facts as true and draw all reasonable inferences in favor of the nonmoving party." *Molzan v. Bellagreen*

Holdings, L.L.C., 112 F.4th 323, 331 (5th Cir. 2024) (citation omitted). A court assessing a Rule 12(b)(6) motion "generally confine[s] [its] analysis to the complaint and its proper attachments." *Id*. (citation omitted). Courts "construe facts in the light most favorable to the nonmoving party, as a motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted." *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011), *as revised* (Dec. 16, 2011) (citation omitted). "Dismissal is appropriate only if the complaint fails to plead enough facts to state a claim to relief that is plausible on its face." *Id*. (citation omitted).

Under Rule 12(b)(1), courts may go beyond the complaint and "find a plausible set of facts by considering any of the following: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citation omitted).

ARGUMENT

I. THE CIRCUIT CLERK IS A PROPER DEFENDANT, AND PLAINTIFFS HAVE STANDING TO SUE HER IN HER OFFICIAL CAPACITY TO SEEK RELIEF.

To have standing, a plaintiff must establish (1) an injury in fact that is (2) fairly traceable to the challenged action of the defendant and (3) redressable by a favorable ruling. *See OCA-Greater Houston v. Texas*, 867 F. 3d 604, 609–10 (5th Cir. 2017). In a VRA case, the proper defendant is an election official who state law charges with enforcing a challenged plan. *Id*. at 613–14; *see also Fusilier v. Landry*, 963 F. 3d 447, 454–55 (5th Cir. 2020) (explaining that Section 2 plaintiffs have standing to sue officials charged with either enacting or administering plans). Defendants' insistence that the Circuit Clerk "has no role" in either causing or redressing the Section 2 violation misapprehends both the harm alleged in the Complaint, and the Circuit Clerk's role in redressing that harm. Mot. at 4.

First, the injury is traceable to the Defendant Circuit Clerk because she is responsible for implementing and administering elections under the 2022 Plan. Under Mississippi law,[1] once the Board of Supervisors adopts a redistricting plan, it "shall immediately forward all changed boundary lines to the appropriate circuit clerk, who shall . . . implement the boundary line changes in the Statewide Elections Management System [("SEMS")]." Miss. Code Ann. § 23-15-283(3) (West 2019); *see also Harreld v. Banks*, 319 So. 3d 1094, 1106 (Miss. 2021) (discussing these responsibilities). Once the Circuit Clerk implements new district boundaries in SEMS, she is also responsible for administering elections under the 2022 Plan. For example, the Circuit Clerk is DeSoto County's registrar, who bears primary responsibility for registering voters and assigning them to districts under the 2022 Plan. Miss. Code Ann. §§ 23-15-223, 23-15-33 (West). She administers the in-person early voting and mail-in absentee ballot processes. *Id.* §§ 23-15-625, 23-15-627, 23-15-629, 23-15-631, 23-15-637, 23-15-639, 23-15-641, 23-15-645, 23-15-647, 23-15-657; 23-15-685, 23-15-687, 23-15-691, 23-15-699, 23-15-715, 23-15-719, 23-15-721, 23-15-751. She is the county official responsible for curing affidavit ballots, *id.* §§ 23-15-563, 23-15-573; ballot custody, *id.* § 23-15-595; and supporting the Election Commissioners in all aspects of their responsibilities, *id.* § 23-15-161. Indeed, DeSoto County's own elections website acknowledges that the Circuit Clerk's responsibilities include "[p]reparing and holding elections." *Elections*,

[1] Defendants note that the Complaint only mentions Defendant Thompson once, describing her responsibilities as DeSoto County's Circuit Clerk, Mot. at 4–5, but Plaintiffs need not list in a Complaint every statutory duty. *See La. State Conf. of the NAACP v. Louisiana*, 490 F. Supp. 3d 982, 1031 (M.D. La. 2020) ("Plaintiffs have not alleged [Secretary of State's] specific statutory duties, but the Court agrees with Plaintiffs that these duties operate as a matter of law and need not be set forth in the *Complaint*."), *aff'd sub nom. Allen v. Louisiana*, 14 F.4th 366 (5th Cir. 2021).

DeSoto County, MS, https://www.desotocountyms.gov/120/Elections (last visited Nov. 30, 2024) [https://perma.cc/5TDN-5YRV].[2]

Accordingly, Plaintiffs' injury is traceable to the Circuit Clerk's conduct implementing the 2022 Plan and administering elections pursuant to it, along with the other Defendants' conduct in enacting and enforcing the 2022 Plan.[3] The injury at issue here—vote dilution—stems from *both* the existence of the 2022 Plan and from its ongoing *use in elections*. *See, e.g.*, *Robinson*, 86 F.4th at 600 (explaining harm in "forcing black voters *to vote* under a map that likely violates Section 2" (emphasis added)). It is the Circuit Clerk's administration of the 2022 Plan—*e.g.*, implementing that plan in the SEMS, assigning voters pursuant to that plan's districts, printing ballots and administering voting according to that plan—that creates the harm. *See, e.g.*, *La. State Conf. of the NAACP*, 490 F. Supp. 3d at 1030–32 (holding that Section 2 plaintiffs injury was traceable to the state election official responsible for administering elections under the challenged plan); *Johnson v. Ardoin*, No. 18-625, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019) (same), *Terrebonne Parish NAACP v. Jindal*, No. 14-069-JJB, 2014 WL 3586549, at *4 (M.D. La. July 21, 2014) (same); *Hall v. Louisiana*, 974 F. Supp. 2d 978, 933 (M.D. La. 2013) (same); *cf. Wright v. North Carolina*, 787 F.3d 256, 262 (4th Cir. 2015) ("[T]he county Board of Elections, in cooperation

[2] In fact, according to the minutes of the meeting at which the Board of Supervisors formally adopted the 2022 Plan's districts, Thompson "came to the meeting to get information to be sure they get their work done after the redistricting is approved." DeSoto County Board of Supervisors, *Board Meeting Minutes* 7, (June 20, 2022) https://www.desotocountyms.gov/AgendaCenter/ViewFile/Minutes/_06202022-1655; *see also Redistricting Flyers*, DeSoto County, MS, https://www.desotocountyms.gov/817/Redistricting-Flyers (last visited Nov. 30, 2024) [https://perma.cc/F57X-SSUQ] (flyers sent following redistricting stating Circuit Clerk mailed voter registration cards reflecting polling locations). Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of these government websites. *Cf. Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015) (taking judicial notice of content on government website). *See also Lane*, 529 F.3d at 557 (explaining that courts may go beyond complaint in assessing Rule 12(b)(1) motion)

[3] Plaintiffs have also named the Board of Supervisors as a Defendant, given its role in drawing district lines, and the Election Commission, because it shares responsibilities with Thompson for administering elections. Defendants have not disputed that these two entities, as well as the County itself, are properly named. *See generally* ECF Nos. 36, 37.

with the State Board of Elections, has the specific duty to enforce the challenged redistricting plan."); *Bowman v. Chambers*, 586 F. Supp. 3d 926, 933 (E.D. Mo. 2022) ("Defendants are properly named in this matter in that the Board of Election Commissioners is responsible for conducting elections in St. Louis County, and its actions will violate voters' constitutional rights if it administers elections in districts that are found to be unconstitutional.").

It is standard in Section 2 lawsuits to name as defendants the officials who run elections, even when they played no role in enacting the challenged redistricting plan. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1 (2023) (Alabama Secretary of State named defendant in challenge to plan drawn by legislature); *Robinson*, 86 F.4th 574 (same in Louisiana); *Miss. State Conf. of the NAACP v. State Bd. of Election Comm'rs* ("*Miss. NAACP*"), No. 3:22-cv-734-DPJ-HSO-LHS, 2024 WL 3275965 (S.D. Miss. July 2, 2024) (three-judge court) (state election commissioners named defendants in challenge to plan drawn by legislature).

Second, Plaintiffs' injury is also redressable by the Circuit Clerk because an injunction against the 2022 plan will bar her (alongside the other Defendants) from administering any future elections using the 2022 Plan. *See, e.g.*, *Scott v. Taylor*, 405 F.3d 1251, 1256–57 (11th Cir. 2005) (holding that election officials were the proper defendants in a voting case involving "prospective relief seeking to enjoin the enforcement of the challenged voting district and a declaration as to its legality"); *Nairne v. Ardoin*, 715 F. Supp. 3d 808, 878 (M.D. La. 2024) (enjoining election official from enforcing a plan); *La. State Conf. of the NAACP*, 490 F. Supp. 3d at 1030–31 (holding that Section 2 plaintiffs' injury was redressable through an injunction barring an official from administering elections under the challenged plan); *Terrebonne Parish NAACP*, 2014 WL 3586549, at *4 (M.D. La. July 21, 2014) (same); *see also* Compl. at 36 (Plaintiffs seek to "enjoin Defendants and their agents from holding any election . . . under the existing district boundaries").

If Plaintiffs succeed, then the Court can order the Circuit Clerk to administer elections under a new remedial plan. *See, e.g.*, *Singleton v. Allen*, No. 2:21-cv-1291-AMM, 2023 WL 6567895, at *19 (N.D. Ala. Oct. 5, 2023) (three-judge court) (ordering a state election official to hold elections under a remedial plan).

Defendants miss the point when they emphasize that the Circuit Clerk is not responsible for adopting a remedial plan. Mot. at 5. The necessary first step here is to prohibit use of the 2022 Plan through an injunction directed to the Circuit Clerk. After that, no matter who draws the remedial plan, the Circuit Clerk will be the one to implement it and administer elections under it. *See supra* at 4–5 (explaining the Circuit Clerk's role in process). The elections she will administer include any special elections the Court orders. *See* Compl. at 36 (prayer for relief seeking special elections). Enjoining her use of the 2022 Plan will redress Plaintiffs' harms, and the Circuit Clerk is a proper Defendant, regardless of her role in passing the challenged or remedial plans. *See supra* at 6 (citing Section 2 cases against named defendant election administrators with no role in passing remedial plan).

Defendants' reliance on *Simon v. DeWine*, No. 4:22-cv-612, 2024 WL 3253267 (N.D. Ohio July 1, 2024), is woefully misplaced. *See* Mot. at 5. The plaintiffs in *Simon* asked the court to order a reapportionment of Ohio's congressional representation so that Ohio would lose congressional seats pursuant to the Fourteenth Amendment. *Simon*, 2024 WL 3253267, at *5. The defendants in the case were state officials responsible for congressional *districting*, but with no power over congressional *apportionment*.[4] *See id*. Under these circumstances, the court made the

[4] Congressional apportionment refers to the number of seats in the U.S. House of Representatives each state receives following the decennial census. *See Simon*, 2024 WL 3253267, at *4; U.S. Const. amend. XIV § 2. It is distinct from congressional districting, which refers to how the state draws districts used to elect representatives to those seats.

unremarkable observation that "[t]he relief plaintiffs seek is beyond the defendants' ability to provide." *Id.*

Here, by contrast, Plaintiffs seek to enjoin actions that are squarely within the Circuit Clerk's authority—implementing a redistricting plan and administering elections under it. The Circuit Clerk is a proper defendant in this case.

II. PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS TO STATE A CLAIM.

Defendants are also incorrect in insisting that Plaintiffs haven't alleged sufficient facts to state a claim. To prove a Section 2 violation, Plaintiffs must satisfy three "preconditions." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). First, the "minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district." *Milligan*, 599 U.S. at 18 (internal alterations omitted). "Second, the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51. Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* "Finally, a plaintiff who demonstrates the three preconditions must also show, under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." *Milligan*, 599 U.S. at 18 (citation omitted).

Defendants misread some paragraphs of the Complaint and wholly ignore others in their efforts to argue that Plaintiffs do not allege sufficient facts to meet the *Gingles* threshold preconditions for a Section 2 claim. Plaintiffs have alleged the facts necessary to state a claim.

A. The Complaint satisfies *Gingles* I.

Plaintiffs have adequately alleged the facts necessary to satisfy the first *Gingles* precondition: that DeSoto County's Black community "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Plaintiffs explicitly allege that DeSoto County's Black population can "constitute a majority of the *voting-*

age population in one of the five DeSoto County election districts." Compl. ¶ 90 (emphasis added). Defendants are therefore plainly wrong in claiming that Plaintiffs have alleged only that it is possible to draw a single-member district with a majority-Black *total* population, rather than a majority-Black *voting-age* population ("BVAP") district.

Defendants attempt to discount this paragraph as a "bald, conclusory allegation[]," Mot. at 7, when in fact it is one of several relevant paragraphs alleging the ability to draw a district that satisfies *Gingles* I. Immediately after alleging that it is possible to draw a majority-BVAP district, Plaintiffs spend several paragraphs describing that district. The Complaint alleges that the district would include large portions of Horn Lake, Walls, and Nesbit, Compl. ¶ 91, which share a community of interest, *id.* ¶ 83.[5] It alleges that the district would be contiguous. *Id.* ¶ 92. It alleges details about the number of municipalities that the district would split. *Id.* It alleges that the district would have compactness scores akin to the 2022 Plan. *Id.* And it alleges that the district would have a permissible population deviation. *Id.* ¶ 93. In these paragraphs, Plaintiffs use the term "majority-Black district" rather than reciting "majority-Black voting-age population district" every time. That doesn't matter. The term "majority-Black district" can refer to either a majority as measured by BVAP or as measured by total population (or both). In fact, courts often use the term "majority-Black" as shorthand for *Gingles* I districts. *See, e.g.*, *Milligan*, 599 U.S. at 20; *Robinson*, 86 F.4th at 593. The context makes clear that Plaintiffs were describing the majority-BVAP district they had *just* introduced in the preceding paragraph. They were under no obligation to repeatedly incant "majority-BVAP" in every paragraph. "[P]leading standards don't demand such precision in terminology or any magic words." *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748, 756 (5th Cir. 2021). At bare minimum, these allegations should be reasonably construed in

[5] The Complaint also notes that another district court had recently found that the Horn Lake-Walls-Nesbit area constitutes a community of interest. Compl. ¶ 88; *see also, Miss. NAACP*, 2024 WL 3275965, at *19.

favor of Plaintiffs to refer to "a majority-Black [voting-age population] district" rather than "a majority-Black [total population] district." *See Turner*, 663 F.3d at 775 (courts must "construe facts in the light most favorable to the nonmoving party" when deciding Rule 12(b)(6) motion).

While the allegations described above suffice to defeat Defendants' arguments, the Complaint includes other allegations that further support an inference in Plaintiffs' favor. The Complaint alleges that both individual Plaintiffs "reside[] in an area which could form part of a reasonably configured majority-Black district." Compl. ¶¶ 35, 39. It also alleges that both organizational Plaintiffs have members who live in Horn Lake, Walls, Nesbit, and the surrounding areas "where a reasonably configured majority-Black district can be drawn consistent with traditional redistricting principles." *Id*. ¶¶ 44, 49. In each instance, the term "majority-Black district" supports a reading of majority as measured by BVAP rather than by total population alone. At this stage of the case, that inference must be drawn in Plaintiffs' favor. *See Turner*, 663 F.3d at 775.

B. The Complaint satisfies *Gingles* II and III.

Defendants would also have this Court ignore key Complaint allegations that satisfy the second and third *Gingles* preconditions: that DeSoto County's Black voters are politically cohesive, and that the white majority votes as a bloc to usually defeat Black voters' preferred candidate. *Gingles*, 478 U.S. at 51.

Plaintiffs plead that "[s]ince 2018, at least twelve Black candidates have run against white candidates" in endogenous elections (*i.e.*, elections for the offices governed by the 2022 Plan), Compl. ¶ 100, and that the Black voters' preferred candidate was defeated by white bloc voting in each of those elections, *id*. ¶ 101. Contrary to Defendants' arguments, Mot. at 10–11, the Complaint allege concrete demonstrating racially polarized voting in *twelve* endogenous elections in the past six years. See, e.g., *Stone v. Allen*, 717 F. Supp. 3d 1161, 1169 (N.D. Ala. 2024)

(denying a motion to dismiss based on similar allegations of racially polarized voting); *Ala. State Conf. of the NAACP v. Pleasant Grove*, 372 F. Supp. 3d 1333, 1340 (N.D. Ala. 2019) (same). Immediately before discussing these elections, Plaintiffs explain the pattern where, "[i]n recent elections on the local [and] countywide . . . levels, large majorities of Black voters supported the same candidates, who were defeated by candidates preferred by large majorities of white voters." *Id.* ¶ 99; *see also id.* ¶ 8 (describing the "pattern," including in "the County's election results in elections at the local [and] countywide . . . levels," in which (1) "large majorities of Black voters in DeSoto County have supported one candidate, while [(2)] large majorities of the County's white voters supported the opposing candidate," and (3) "White voters' preferred candidates regularly defeat Black-preferred candidates"). No pleading standard requires Plaintiffs to recite for each election the pattern that is true for all of them. It is perfectly appropriate to do what Plaintiffs do here: discuss together twelve recent endogenous elections that fit the pattern described in the preceding paragraph. *See Colony Ins. Co. v. Peachtree Const., Ltd.*, 647 F.3d 248, 252 (5th Cir. 2011) (explaining that "a complaint need not contain detailed factual allegations" but must "raise a non-speculative right to relief").

Nor are Plaintiffs required to drill down into specific percentage point estimates at the pleading stage to allege *Gingles* II and III. To the contrary, even at the *merits* stage, "statistical evidence of racial polarization is not necessary to establish that minority voters vote cohesively." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 n.12 (5th Cir. 1991). Although Plaintiffs will prove racial polarization at trial through statistical evidence, the fact that such evidence is not necessary at trial underscores that Plaintiffs need not allege it at the pleading stage. Instead, "plaintiffs [are] required to plead demographic facts that satisfy the *Gingles*

preconditions, which they have done." *Petteway v. Galveston Cnty.*, 667 F. Supp. 3d 447, 469 (S.D. Tex. 2023).

The facts Plaintiffs plead regarding endogenous elections are only bolstered by other allegations about exogenous elections (*i.e.*, elections in DeSoto County for elected offices other than those governed by the 2022 Plan). Defendants take issue with Plaintiffs' allegations regarding the 2020 U.S. Senate election and the 2019 statewide elections, insisting they "are not representative of the County's local elections governed by the 2022 Plan that Plaintiffs challenge." Mot. at 10. But that claim is at odds with Plaintiffs' well-pled factual allegations about local elections since at least 2018, which the Court must accept as true. *See, e.g.*, *Molzan*, 112 F.4th at 331. Indeed, after pleading facts about endogenous elections, Plaintiffs introduce exogenous elections as follows: "*Similarly*, Black congressional and statewide candidates have received the lion's share of Black voter support, but very little white voter support, in DeSoto County." Compl. ¶ 102 (emphasis added). In other words, Plaintiffs allege that the pattern of racially polarized voting among DeSoto County voters exists throughout elections at every level of government, including local elections.

Moreover, Defendants' argument is self-defeating. They acknowledge (as they must), that exogenous elections are probative of minority cohesion and white bloc voting. Mot. at 10–11. Even if exogenous elections may be less probative than endogenous elections, they are still useful data points from which the Court can infer that Plaintiffs have stated a claim—especially when paired with the factual allegations about *endogenous elections* that Defendants ignore. *See Westwego*, 872 F.2d at 1207–09 & nn.7, 8 (rejecting the argument that evidence from exogenous elections is irrelevant to a vote dilution claim). Likewise, Plaintiffs' allegations regarding the Southern District of Mississippi's recent finding that "racial polarization among voters in Mississippi is quite high,"

support an inference that *Gingles* II and III are satisfied. Compl. ¶ 104; *see also id*. ¶ 133 (noting the *Mississippi NAACP* decision involved districts in DeSoto County).

It bears noting that two Black candidates' recent victories in exogenous elections do not undermine Plaintiffs' claims of racially polarized voting. *Contra* Mot. at 11. The key inquiry under Section 2 is not whether candidates are Black, but whether they are preferred by Black voters. *See Gingles*, 478 U.S. at 67–68; *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987). Especially because these two candidates ran unopposed in the general election, it is not clear that either Sheriff Tuggle or Representative Hall was Black voters' candidate-of-choice. *See Gingles*, 578 U.S. at 60–61 (holding that a minority candidate's unopposed election is a "special circumstance" that does not defeat a Section 2 claim); *Meek v. Metropolitan Dade Cnty.*, 985 F.2d 1471, 1483–84 (11th Cir. 1993) (same). Even assuming either candidate was the Black-preferred candidate, the law is clear that a small number of elections in which the minority-preferred candidate prevails does not defeat a Section 2 claim. *See, e.g.*, *Gingles*, 478 U.S. at 57. That is especially true when the candidate was unopposed.[6] *See id.* And, as Defendants themselves explain, exogenous elections are less probative than endogenous ones. Whether or not Black voters supported Sheriff Tuggle or Representative Hall, they have been repeatedly deprived of the opportunity to elect their preferred candidates to DeSoto County's districted offices at issue in this case. As the Complaint explains, Black voters are politically cohesive in those elections, yet white bloc voting has prevented them from prevailing. That satisfies *Gingles* II and III and federal pleading standards.

[6] Both Sheriff Tuggle and Representative Hall were elected with no opposition in the general election. *See Summary Results Report, General Election* 3, 5, DeSoto County, MS (Nov. 7, 2023), https://www.desotocountyms.gov/DocumentCenter/View/7844/Election-Summary-Unofficial-Final-Results; *see also* Fed. R. of Evidence 201; *Perez v. Perry*, No. 11-cv-360, 2017 WL 962686, at *1 (W.D. Tex. Mar. 10, 2017) (taking "judicial notice of election returns available on the Texas Secretary of State's website").

Finally, Defendants' motion (with good reason) does not dispute that the myriad facts Plaintiffs allege demonstrate that, under the totality of circumstances, they can make out a Section 2 violation. *See* Compl. ¶¶ 105–230. Plaintiffs allege, among other factors, that Mississippi generally and DeSoto County specifically have a sordid history of racial discrimination, including in voting, *see id.* ¶¶ 115–150; that elections in the County use problematic practices with disparate impact on Black residents, *see id.* ¶¶ 151–160; that there are severe socioeconomic disparities along racial lines in the County, *see id.* ¶¶ 161–205; and that Black and Black-preferred candidates are rarely successful in County elections, leading to non-responsiveness to the Black community, *see id.* ¶¶ 107–14, 206–21.

III. PLAINTIFFS CAN BRING THIS SUIT UNDER SECTION 2 (AND 42 U.S.C. § 1983).

The Fifth Circuit has explicitly foreclosed Defendants' final argument for dismissal. Defendants contend that Section 2 does not provide a private right of action that permits private parties (like Plaintiffs here) to sue. They acknowledge that Fifth Circuit precedent binds this Court to reject that argument but bring it to preserve it for appeal and to highlight purported "shortcomings" in the Fifth Circuit's reasoning. Mot. at 12. Below, Plaintiffs explain that Section 2 provides a private right of action and that, even if it didn't, Plaintiffs could bring their claim through 42 U.S.C. § 1983.

A. Binding precedent holds that private parties may sue to enforce Section 2.

In *Robinson v. Ardoin*, the Fifth Circuit held that Section 2 is privately enforceable: "there is a right for these [private] Plaintiffs to bring these claims." 86 F.4th 574, 588 (5th Cir. 2023). That precedent binds this Court. *Miss. NAACP*, 2024 WL 3275965, at *10. What's more, the *en banc* Fifth Circuit has twice declined to take the question of whether Section 2 provides a private right of action. Order on Pet. for Reh'g En Banc, *Robinson v. Ardoin*, No. 22-30333 (5th Cir. Dec.

15, 2023), ECF No. 363-2; Order on Pet. for Reh'g En Banc, *Nairne v. Landry*, No. 24-30115 (5th Cir. June 24, 2024), ECF No. 95. Both instances post-dated the Eighth Circuit's decision in *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionment* ("*Arkansas NAACP*"), 86 F.4th 1204 (8th Cir. 2023), and in both cases the defendants explicitly asked the Fifth Circuit to adopt the Eighth Circuit's reasoning. *Robinson* ends the inquiry.

Supreme Court precedent supports the conclusion that Section 2 includes a private right of action. Although *Morse v. Republican Party of Virginia* did not produce a majority opinion, five Justices noted that Section 2 is privately enforceable. *See* 517 U.S. 186, 232 (1996) (opinion of Stevens, J., joined by Ginsburg, J.) ("'[T]he existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965.'" (quoting S. Rep. No. 97-417 at 30)); *id.* at 240 (opinion of Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.) ("I believe Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5."). The Eighth Circuit rejected this part of *Morse* as "mere dicta at most." *Arkansas NAACP*, 86 F.4th at 1215. But, as the Southern District of Mississippi explained, even if this discussion were dicta, "the Fifth Circuit has held that it is generally bound by Supreme Court *dicta*." *Miss. NAACP*, 2024 WL 3275965, at *10. "[T]he Supreme Court has told inferior courts to remain faithful to its on-point precedent . . . 'leaving to [the Supreme Court] the prerogative of overruling its own decisions.'" *Miss. NAACP*, 2024 WL 3275965, at *10 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)) (alteration in original). In other words, even if *Robinson* didn't exist, *Morse* would still bind this Court.

Defendants nevertheless ask this Court to adopt the reasoning of the Eighth Circuit's *Arkansas NAACP* decision—which stands alone on the short end of a circuit split. In addition to the Fifth Circuit, the Sixth and Eleventh Circuits have held that Section 2 provides a private right

of action. *Ala. State Conf. of the NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021); *Mixon v. Ohio*, 193 F.3d 389, 398–99 (6th Cir. 1999). Even after *Arkansas NAACP*, courts have declined to follow the Eight Circuit's reasoning. *See Miss. NAACP*, 2024 WL 3275965, at *9–11.

B. In the alternative, Plaintiffs may enforce Section 2 through 42 U.S.C. § 1983.

Even if Section 2 lacked a private right of action, Plaintiffs have properly pled a cause of action under 42 U.S.C. § 1983. *See* Compl. at 34. Section 1983 provides an enforceable remedy for the deprivation of any right "secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002). A statute confers an individual right if it "is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga*, 536 U.S. at 284, 287).

Section 2 by its terms provides an individual right that is presumptively enforceable. Section 2 uses quintessential rights-creating language that easily meets the *Gonzaga* test. The text protects "the *right* of any citizen to vote" free from "denial or abridgment . . . on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). That is the type of individual-centric rights-creating language that is presumptively enforceable in a Section 1983 action. *See, e.g.*, *Gonzaga*, 536 U.S. at 284 & n.4. As the District Court for North Dakota observed in a recent Section 2 case: "The plain language of Section 2 mandates that no government may restrict a citizen's right to vote based on an individual's race or color. It is difficult to imagine more explicit or clear rights creating language." *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-cv-22, 2022

WL 2528256, at *5 (D.N.D. July 7, 2022); *see also Coca v. City of Dodge City*, 669 F. Supp. 3d 1131, 1141–42 (D. Kan. 2023) ("Section 2 contain[s] clear rights-creating language—a legal position thus far unquestioned by any members of the Supreme Court"). "There certainly is an emphasis on rights" in prohibiting states or political subdivisions from denying or abridging the right to vote. *Miss. NAACP*, 2024 WL 3275965, at *10. Section 2 also includes an explicit reference to "a class of citizens protected" by the provision, 52 U.S.C. § 10301(b), providing an "'unmistakable focus on the benefited class.'" *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 284, 287). Not even the Eighth Circuit in *Arkansas NAACP*, whose reasoning Defendants embrace, *see* Mot. at 12, went so far as to deny that Section 2 may include rights-creating language. *Arkansas NAACP*, 86 F.4th at 1210 (acknowledging that at least a portion of Section 2 "unmistakably focuses on the benefited class: those subject to discrimination in voting" (cleaned up)).

The Fifth Circuit's ruling in *Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023), is instructive. The court there held that the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), is enforceable through Section 1983. *Id*. at 478. The language of that provision has key similarities to Section 2: "No person acting under color of law shall . . . *deny the right of any individual* to vote in any election because of an error or omission." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Both provisions discuss the right to vote. Both have "neither . . . an 'aggregate focus' nor . . . 'speak only in terms of institutional policy and practice.'" *Callanen*, 89 F.4th at 474 (citation omitted). And while both address themselves to a regulating entity, the Fifth Circuit explained in *Callanen* that is no barrier to concluding they are rights-creating: "[I]t would be strange to hold that a statutory provision fails to secure rights simply because it considers,

alongside the rights bearers, the actors that might threaten those rights (and we have never so held)." *Id*. at 474–75 (quoting *Talevski*, 599 U.S. at 185).

Because Section 2 has rights-creating language, it is presumptively enforceable, and the presumption of enforceability is rarely overcome. *See Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994). Here, Defendants have made no attempt to "defeat the presumption by demonstrating that Congress did not intend that § 1983 be available to enforce those rights." *Talevski*, 599 U.S. at 186. Even as it held that Section 2 lacks a private right of action, the Eighth Circuit in *Arkansas NAACP* acknowledged it might be enforceable via Section 1983. As Judge Stras, who authored that decision, explained when concurring in the denial of *en banc* review: "It may well turn out that private plaintiffs can sue to enforce § 2 of the Voting Rights Act under § 1983." *Ark. State Conf. of the NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967, 968 (8th Cir. 2024) (Mem.) (Stras, J., concurring in the denial of rehearing en banc). Moreover, post-*Arkansas NAACP*, the Eighth Circuit recently declined to stay pending appeal a decision enforcing Section 2 via Section 1983. *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, 2023 WL 9116675, at *1 (8th Cir. Dec. 15, 2023).

Viewing its plain language, Section 2 unequivocally focuses on the rights of individual "citizens" and "members" of a benefitted class to enjoy an equal opportunity to vote and elect representatives of their choice. 52 U.S.C. § 10301. That rights-creating language is enforceable via Section 1983 whether or not Section 2 provides a private right of action—which, of course, the Fifth Circuit has said it does. *Robinson*, 86 F.4th at 588.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

Dated: December 6, 2024

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CERTIFICATE OF SERVICE

I, Daniel J. Hessel, do certify that on this day I filed the foregoing with the ECF System which sent notification to all counsel of record.

This the 6th day of December, 2024.

/s/ Daniel J. Hessel
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