No. 17-14443

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THE STATE OF ALABAMA, et al.,
Defendants-Appellants,

v.

ALABAMA STATE CONFERENCE OF THE N.A.A.C.P., et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:16-cv-00731-WKW-CSC

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Alabama State Conference of the National Association for the Advancement of Colored People – Appellee;
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4. Blacksher, James Uriah - Counsel for Appellees;
5. Brasher, Andrew L. - Counsel for Appellants;
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15. Marshall, Steve – Appellant, Alabama Attorney General;

16. McGuire, Joseph Mitchell - Counsel for Appellees;

17. Merrill, John H. – Appellant, Secretary of State;

18. Messick, Misty Shawn Fairbanks - Counsel for Appellants;

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22. Rosenberg, Ezra David - Counsel for Appellees;

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24. Spence, Dorian L. - Counsel for Appellees;

25. Still, Wilson Edward - Counsel for Appellees;

26. Stone, Richard - Counsel for Appellees;

27. Travis, Curtis – Appellee;

28. Watkins, Hon. William Keith - Chief Judge for the Middle District of Alabama; and

29. Whatley, Joe Ramon, Jr. - Counsel for Appellees.

Counsel for the Appellant further certify that no additional publicly traded company or corporation has an interest in the outcome of this case or appeal.

Respectfully submitted this 18th day of January 2018.

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The Voting Rights Act ("VRA") does not purport to abrogate the sovereign immunity of the States with respect to claims brought under Section 2 of the statute by private parties. The district court's decision below reached the opposite conclusion only by failing to apply the clear statement rule of *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Under this rule, Congress may "abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242.

The VRA does not contain the required clear statement of Congressional intent to abrogate state sovereign immunity. Indeed, it does not even explicitly establish a right of private litigants to sue to enforce Section 2, as the Supreme Court found in *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996), and this Court held in *Ford v. Strange*, 580 Fed. App'x 701 (11th Cir. 2014). Given that Congress did not authorize private parties to bring Section 2 suits *at all*, it follows that it could not have authorized Section 2 suits against a particular class of defendants, namely the States. In spite of these clear pronouncements, Plaintiffs and their *Amici* argue that Section 3 of the VRA creates an explicit right for private parties to sue under Section 2, even though the remedies provided by Section 3 are

facially limited to constitutional claims and presuppose a private cause of action supplied by *another* federal statute.

The State's arguments are ramified by the fact that interpreting the VRA to abrogate sovereign immunity with respect to Section 2 vote dilution claims would raise potentially serious constitutional questions under *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. Plaintiffs and their *Amici* grossly misinterpret this constitutional avoidance argument, and claim that the State is raising a constitutional challenge to Section 2 for the first time on appeal. But the waiver rule does not preclude parties from making new garden-variety statutory interpretation arguments in support of their position on an issue raised below.

I. The Voting Rights Act Does Not Abrogate State Sovereign Immunity.

A. A Judicially Implied Cause of Action Cannot Abrogate State Sovereign Immunity

Congress could not have intended for the VRA to abrogate state sovereign immunity with respect to Section 2 claims because the text of the statute *does not even create a private cause of action* to enforce the substantive requirements of Section 2. As the Supreme Court determined in *Morse*, "§ 2, like § 5, provides no right to sue on its face." 517 U.S. at 232 (opinion of Stevens, J.); *see also id.* at 240 (opinion of Breyer, J.). This Court has reached the same conclusion. *See Ford*, 580 Fed. App'x at 705, n. 6 (11th Cir. 2014) (private parties are entitled to bring Section 2 claims only through an "implied private right of action"). Given

that Congress did not authorize private parties to bring Section 2 suits *at all*, it follows that it could not have authorized Section 2 suits against a particular class of defendants, namely the States.

Plaintiffs and their *Amici* offer two responses to this argument. First, they argue that a private right of action is explicit in the Voting Rights Act, not implied, because Section 3 of the VRA empowers private parties to seek remedies for violations of Section 2. Plaintiffs' Br. at 10; LDF Br. at 9. Second, Plaintiffs claim the State failed to cite any controlling authority for the rule that an implied cause of action cannot abrogate state sovereign immunity. Plaintiffs' Br. at 10. Both responses fall far short of the mark.

1. The VRA Does Not Explicitly Create a Private Cause of Action to Enforce Section 2

Plaintiffs and their *Amici* claim there is an explicit cause of action to enforce Section 2 present in Section 3 of the VRA. This warrantless assertion flies in the face of the Supreme Court's explicit characterization in *Morse* of the Section 2 private cause of action as judicially implied from a statutory text that is silent on the right of private litigants to sue and this Court's own pronouncement that private plaintiffs are entitled to sue under Section 2 only through an "*implied* private right of action." *Ford*, 580 Fed. App'x at 705, n. 6 (emphasis added). *Amici* suggest that the 1975 amendments to the VRA explicitly created a private cause of action to enforce Section 2. LDF Br. at 9. But *Morse* was decided in 1996 and *Ford* was

decided in 2014, long after the 1975 amendments went into effect. Plaintiffs' response to the State's implied cause of action argument thus flatly ignores these precedents and would require this Court to overstep its authority and correct the interpretation of Section 2 adopted by five members of the Supreme Court.

There is no reason to second-guess the decisions of this Court and the Supreme Court, as Plaintiffs and their *Amici* propose. They concede that Section 2 does not in itself explicitly create a private cause of action for good reason. Section 2 prohibits "any State" from imposing "voting qualification or prerequisite to voting or standard, practice, or procedure" if it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301 (a). This language undoubtedly imposes a duty on the States, but it is utterly silent on whether private parties may bring suit to enforce that duty.

Plaintiffs and their *Amici* suggest that an express private cause of action can be found in Sections 3(a) and 3(b). This argument is a nonstarter. Neither Section 3(a) nor Section 3(b) purports to establish a private cause of action to enforce any provision of the VRA.

Section 3(a) provides that "[w]henever the Attorney General or any aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political

subdivision," the court "shall authorize the appointment of federal observers." 52 U.S.C. § 10302(a). This provision obviously does not create a private cause of action to enforce Section 2. Its function is not to authorize suits by private persons, but rather to empower the district courts to appoint observers in cases that are otherwise properly before the court. This language thus does not *create* a private cause of action for "aggrieved persons," but rather *presupposes* that a private cause of action to vindicate Fourteenth and Fifteenth Amendment claims is provided by "any" federal statute.

It is true that Section 3(a) suggests that some suits that provide the basis for the exercise of this power to appoint federal observers will be brought by "aggrieved persons" rather than the Attorney General, but the text of the statute does not even mention Section 2 or the VRA. By its plain terms, Section 3(a) reaches only suits brought "*under any statute* to *enforce the voting guarantees of the fourteenth or fifteenth amendment*." *Id.* (emphasis added). Thus, taken at face value, Section 3(a) does not even speak to suits brought by "aggrieved persons" to enforce the statutory guarantees of the VRA, but rather addresses *unconstitutional* conduct for which "any" federal statute provides a private cause of action. *Cf.* State's Br. at 20. "Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *United States v.*

Steele, 147 F.3d 1316, 1318 (11th Cir. 1998). If Congress intended for the Section 3(a) federal observer provision to create a cause of action to enforce Section 2 for "aggrieved persons," it would have said that such suits can be brought "under *this statute* to enforce the voting guarantees of *this statute*," not merely "under *any* statute" to enforce *constitutional* voting guarantees.

The same problem undermines Plaintiffs' attempt to find an express cause of action in Section 3(b). Section 3(b) provides that if "in a proceeding instituted by the Attorney General or an aggrieved person *under any statute* to *enforce the voting guarantees of the fourteenth or fifteenth amendment* in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right . . . to vote on account of race or color," the court "shall suspend the use of tests and devices . . . as the court shall determine is appropriate and for such period as it deems necessary." 52 U.S.C. § 10302(b) (emphasis added). Again, this provision does not create a private cause of action to enforce Section 2, but rather empowers the federal district courts to suspend the use of a "test or device" in a case otherwise properly before the court. Section 3(b), like Section 3(a), thus *presupposes* the existence of a federal statute creating a private cause of action to bring Fourteenth and Fifteenth Amendment claims, but does not even create *that* constitutional cause of action, let alone a private cause of action for statutory Section 2 claims.

In addition, the term "test or device" is defined in the VRA to refer to "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 52 U.S.C. § 10303(c). This definition does not encompass a "voting qualification or prerequisite to voting or standard, practice, or procedure" in general, which is the subject of Section 2's prohibition.

Accordingly, there is no reason to second-guess the determination of the Supreme Court and this Court that the Section 2 cause of action is the product of judicial implication. But in spite of the fact that these decisions are clear on this question, *Amici* claim that *United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547 (5th Cir. 1980) ("*Uvalde*"), held "that Section 3 'sets forth judicial remedies to be utilized by a court whenever the Attorney General or an aggrieved person institutes a proceeding' under Section 2 or other provisions of the VRA" and thus recognizes an explicit cause of action in the text of the VRA. LDF Br. at 8 (quoting *Uvalde*, 625 F.2d at 550, n.4). What the opinion actually says is that Section 3 "sets forth judicial remedies to be utilized by a court whenever the Attorney General or an aggrieved person institutes a proceeding *under any statute*

to *enforce the guarantees of the fourteenth or fifteenth amendments*." *Uvalde*, 625 F.2d at 550, n.4. Far from holding that Section 3 establishes a private cause of action to enforce the VRA, *Uvalde* merely parrots the statutory language of Section 3, which says nothing about the rights of private parties to sue under Section 2.

In sum, nothing in Section 3 expressly creates a private cause of action to enforce Section 2. This fatally undermines the district court's decision below. If a cause of action is *implicit* in the text of a statute, that statute cannot *explicitly* abrogate sovereign immunity, because the statute is silent on the rights of private litigants to sue *at all*.

2. The Rule That an Implied Cause of Action Cannot Abrogate Sovereign Immunity Is Mandated by Established Precedent

Plaintiffs' second response to the State's implied cause of action argument claims that "the State points to no controlling authority" for the rule that sovereign immunity cannot be abrogated by judicial implication of a private cause of action. Plaintiffs' Br. at 10. This argument fails for three reasons.

First, the State's rule is a necessary implication of *Atascadero*'s clear statement rule. *Atascadero* holds that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 473 U.S. at 243. Congress cannot have stated its intent to abrogate state sovereign immunity with unmistakable clarity if the language of the statute does not clearly

speak to the question of whether private parties are entitled to sue under a statute *at all*. The rule that an implied cause of action cannot abrogate state sovereign immunity is thus an inescapable corollary of *Atascadero*'s clear statement rule, which is obviously binding on this Court.

Second, the judiciary has no power to abrogate state sovereign immunity *sua sponte*, as it would be required to do if it were to eliminate the sovereign immunity defense to a cause of action created by the federal courts. State's Br. at 11-13. Neither Plaintiffs nor their *Amici* contest this argument. In recognizing a private cause of action to enforce Section 2, *Morse* self-consciously perpetuated the "*ancien regime*" of private cause of action jurisprudence, *Alexander v. Sandoval*, 532 U.S. 245, 287 (2001), typified by *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). In this era, courts assumed they had the power to "provide such remedies as are necessary to make effective the congressional purpose" embodied in a statute. *Id.* at 433. Such a "private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008).

An implied cause of action generated through this policy-driven form of reasoning is not the product of Congressional action, but judicial common lawmaking. But the judiciary has no power to abrogate the sovereign immunity defense to common law causes of action, as though it were a federal common law

defense rather than a constitutional immunity "inherent in the nature of sovereignty." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (citation omitted).

Third, Plaintiffs and *Amici* completely ignore the State's argument that because the Section 2 cause of action was judicially implied, this Court has the power to shape the scope of that cause of action and should exercise that power to limit the federalism costs of the VRA. This requires an interpretation of the VRA that leaves the sovereign immunity of the States undiminished, even on the dubious assumption that federal courts can abrogate sovereign immunity *sua sponte*. State's Br. at 23-26. Under *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), federal courts "have a measure of latitude to shape a sensible remedial scheme that best comports with the statute" when dealing with an implied cause of action. *Id.* 284. Expanding the scope of the Section 2 cause of action to obviate sovereign immunity would compromise the "preeminent purpose of state sovereign immunity," which is "to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). These costs would not be offset by any countervailing benefits because suits to enforce Section 2 could still be brought by the Attorney General pursuant to the VRA's enforcement provision, 52 U.S.C.

10308(d), and by private parties against state officials under *Ex parte Young*, 209 U.S. 123 (1908).

B. Section 3 Of The VRA Does Not Abrogate Sovereign Immunity

Plaintiffs and *Amici* argue that because Section 2 imposes a duty on the States and Section 3 purportedly creates an express cause of action for "aggrieved persons" to enforce the substantive requirements of the VRA, these provisions jointly abrogate state sovereign immunity. Plaintiffs' Br. at 7-8; LDF Br. at 8. This argument fails for at least three reasons.

First, as established above, nothing in Section 3 creates a private cause of action to enforce Section 2. *See supra* 2-10. Section 3(a) empowers federal courts to appoint election observers. Section 3(b) authorizes federal courts to suspend the use of "tests or devices." Both provisions *presuppose*, but do not *create* a private cause of action that would give the court jurisdiction to impose either remedy in an appropriate case. And once again, Section 3(a) and Section 3(b) license the appointment of federal election observers and the suspension of tests or devices when "the Attorney General or any aggrieved person institutes a proceeding *under any statute* to *enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision*." 52 U.S.C. § 10301(a); *id.* § 10301(b) (emphasis added). Thus, the plain text of Section 3 makes these remedies are available when (1) "any" federal statute provides a cause of action

and (2) the suit in question is brought to enforce the *constitutional* rights secured by the Fourteenth and Fifteenth Amendments.

Second, even if a statute creates a private cause of action, it does not follow that Congress has abolished all defenses to it. "The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 n. 4 (1996). While *Atascadero*'s plain statement rule does not require an "abrogation clause" or the use of "magic words," it requires *unmistakably clear* textual evidence that Congress intended to eliminate the sovereign immunity defense, not merely evidence that Congress intended to empower the federal courts to hear a particular class of claims brought by a particular class of plaintiffs.

Plaintiffs and their *Amici* ignore this step in the abrogation analysis and simply assume that if Section 2 imposes a duty on the States and Section 3 explicitly supplies a private cause of action, it follows that the VRA abrogates sovereign immunity. But the existence of a private cause of action does not imply that no defenses are available against it.

Third, the provisions of Section 3 cited by Plaintiffs and their *Amici* are "susceptible of at least two interpretations that *do not* authorize" private litigants to assert Section 2 claims against State defendants. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

For one, both Section 3(a) and Section 3(b) apply only in circumstances in which "the Attorney General or any aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision." 52 U.S.C. § 10301(a); *id.* § 10301(b). This language can be read to anticipate (1) suits brought by an "aggrieved person" against a political subdivision, and (2) suits brought by the Attorney General against a political subdivision *or a State*. This construction is reasonable because it tracks the usual division of enforcement responsibility between federal and private litigants created by the Constitution's system of dual sovereignty. "[I]n ratifying the Constitution, the States consented to suits brought by other States or by the federal government." *Alden v. Maine*, 527 U.S. 706, 755 (1999). But "immunity does not extend to suits prosecuted against a . . . governmental entity which is not an arm of the State." *Id.* at 756. Nothing in Section 3 rules out a reading of the VRA that preserves this allocation of responsibilities *and* sovereign immunity by licensing suits by the Attorney General against the States and suits by private parties against political subdivisions.

Alternatively, Sections 2 and 3 could be read to create a private cause of action against state officials under *Ex parte Young*. State's Br. at 21. Unlike Section 2 itself, the language of Section 3 is squarely focused on the *territory* where a violation of the VRA occurred, not the *agent* who committed the violation.

See Villareal v. R.J. Reynolds Tobacco Company, 839 F.3d 958, 932 (11th Cir. 2016) ("a material variation in terms suggests a variation in meaning"). By its plain terms, Section 3 applies if proceedings to enforce the Fourteenth or Fifteenth Amendment are instituted "*in* any State or political subdivision." 52 U.S.C. § 10301(a); *id.* § 10301(b) (emphasis added). This suggests that Section 3 remedies are available in suits brought by "aggrieved persons" for violations that occur *within the territory* of a State, but it does not indicate that such suits may be instituted *against* a State.

Relying on *Seminole Tribe*, Plaintiffs and their *Amici* counsel that the abrogation inquiry requires a holistic reading of the statute. Plaintiff's Br. at 10; LDF Br. at 7. This principle has obvious limits. "[I]nferences from general statutory language are insufficient" for abrogation. *Florida Paraplegic Association, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131 (11th Cir. 1999). *Seminole Tribe* did not merely rely on references to "States" in the text of the statute at issue. Its holding was premised on the fact that the statute's remedial scheme explicitly empowered the district courts to issue orders to the States for violations of statutory duties owed to Indian tribes. *Seminole Tribe*, 517 U.S. at 56-57. In contrast, the remedial provisions of Section 3 are *territorial* in character, and do not specifically authorize the courts to impose remedial obligations on the States for the breach of statutory duties owed to private parties.

"[T]he existence of two reasonable, competing interpretations is the very definition of ambiguity." *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004). "To be effective the expression of Congressional intent must be a clarion call of clarity. Ambiguity is the enemy of abrogation." *Freemanville Water Systems v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1206 (11th Cir. 2009). The provisions of Section 3 that speak to suits by "aggrieved persons" are uniformly susceptible to plausible alternative constructions that do not abrogate sovereign immunity. As the Supreme Court held in *Dellmuth v. Muth*, 491 U.S. 223 (1989), generic "aggrieved person" language is the textbook example of the kind of "general authorization for suit in federal court" that is not "the kind of unequivocal statutory language sufficient to abrogate" sovereign immunity. *Id.* at 231 (citation omitted). The requisite "clarion call of clarity" is nowhere to be found in the text of the VRA.

II. Interpreting Section 2 to Abrogate Sovereign Immunity Would Jeopardize Its Constitutional Validity

The State argues that this Court should interpret the VRA to leave the sovereign immunity of the States untouched to avoid potential constitutional questions regarding the validity of Section 2. State's Br. at 26-41. "[I]n 1982, Congress amended Section 2 of the Voting Rights Act so that a plaintiff could establish a violation without proving discriminatory intent," *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 (11th Cir. 2005), which was required under the test

for unconstitutional vote dilution under *City of Mobile v. Bolden*, 446 U.S. 55 (1980). As applied to at-large electoral systems, the "results test" created by the 1982 amendments raises two potential constitutional problems.

First, because Congress made no factual findings justifying a departure from *Bolden*'s intent standard, the 1982 amendments were arguably "unsupported by a relevant history and pattern of constitutional violations." *Tennessee v. Lane*, 541 U.S. 509, 521 (2004). Second, with respect to an abrogation of sovereign immunity, Section 2 may not exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" because there is little reason to believe that most voting schemes prohibited by the results test are unconstitutional. *City of Boerne*, 521 U.S. at 520. The responses to these arguments made by Plaintiffs and their *Amici* uniformly fail.

A. The State Did Not Waive Its Constitutional Avoidance Argument

Plaintiffs and their *Amici* accuse the State of attempting to challenge the constitutionality of Section 2 for the first time on appeal. Plaintiffs' Br. at 11-13; LDF Br. at 11. This is a gross misreading of the State's argument. The State does not argue that Section 2 is unconstitutional, but rather that *as a matter of statutory interpretation*, the VRA should be interpreted to not abrogate sovereign immunity to avoid potential constitutional questions. *See* State's Br. at 26-29.

"Although new claims or issues may not be raised, new arguments relating to preserved claims may be reviewed on appeal." *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299, 1304 n. 3 (11th Cir. 2008) (citation omitted). There is only one issue presented in this appeal: Whether the VRA abrogates state sovereign immunity. The State's avoidance argument is a garden-variety statutory interpretation argument presented in support of its position on this issue, not a new federal claim or defense. *Cf. Pugliese*, 550 F.3d at 1304, n. 3 (statutory interpretation arguments "not presented below are more accurately characterized as new arguments, rather than new issues").

B. Past Decisions Upholding Section 2 Do Not Preclude the State's Avoidance Argument

The second response to the State's avoidance argument contends that the precedent of the Supreme Court and this Court establish that Section 2 is constitutional in all its applications. Plaintiffs' Br. at 13-17; LDF Br. at 12. Lower federal courts are bound by summary decisions of the Supreme Court "except when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 442 U.S. 332, 344 (1975) (citation omitted). But myriad changes in the Supreme Court's Section 2 and enforcement powers doctrine have occurred since the Court summarily affirmed a decision upholding Section 2 in *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984).

First, when *Brooks* was decided, the Court had not yet adopted *City of Boerne*'s "congruence and proportionality" test. Thus, Section 2 was presumably upheld only under the rational basis standard of *McCulloch v. Maryland*, 17 U.S. 316 (1819), which was applied to a challenge to Section 5 in *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966). The fact that a means is "plainly adapted" to a constitutionally permissible end, *McCulloch*, 17 U.S. at 39, does not entail that it exhibits congruence and proportionality. Accordingly, *Brooks* does not speak to the constitutionality of Section 2 under *City of Boerne*.[1]

Second, decisions upholding a statute against facial constitutional attack will not bar as-applied challenges, much less avoidance arguments. "[W]hen a plaintiff mounts a facial challenge to a statute or regulation, the plaintiff bears the burden of proving that the law could never be applied in a constitutional manner." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007). That a law could be applied constitutionally in some circumstances does not entail that it is constitutional as-applied in any given case. The State's argument is that Section 2, if construed to abrogate sovereign immunity, would raise serious constitutional

[1] Plaintiffs briefly argue that a challenge to Section 2 would be evaluated under the *McCulloch* test or *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612 (2013). But this Court has already held that *City of Boerne*'s "congruence and proportionality" test applies to Section 2. *See Johnson*, 403 F.3d at 1230. *Shelby County* followed the logic of *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009), which reserved the question whether the Fifteenth Amendment enforcement power is governed by *City of Boerne* or *McCulloch*. *See id.*, 557 U.S. at 205.

questions about its constitutionality as applied to at-large voting systems. *See* State's Br. at 33; 40. Thus, the decisions cited by Plaintiffs and their *Amici* upholding Section 2 against facial attack have no bearing on the State's argument.

Third, members of the Supreme Court have repeatedly signaled that Section 2's constitutionality remains an open question. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (Kennedy, J., concurring); *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); *Johnson v. De Grandy*, 512 U.S. 997, 1028-29 (1994) (Kennedy, J., concurring); *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., concurring in the judgment); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting). The Supreme Court has repeatedly rejected broad interpretations of the VRA based on constitutional concerns. *See, e.g.*, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 202 (2009) (applying the avoidance canon in interpreting Section 5); *Bartlett v. Strickland*, 556 U.S. 1, 21 (2006) (applying avoidance canon to Section 2); *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 445-46 (2006); *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000); *Vera*, 517 U.S. at 979-81.

For analogous reasons, this Court's decisions upholding Section 2 against facial challenges do not bar the State's as-applied avoidance argument. Like *Brooks*, *United States v. Marengo County*, 731 F.2d 1546 (11th Cir. 1984), was decided 13 years before *City of Boerne* and explicitly relied on *McCulloch*'s

rational basis standard. And while *Johnson v. Hamrick*, 196 F.3d 1216, 1219 n. 3 (11th Cir. 1999), reaffirmed *Marengo County*'s broad holding, this Court has joined the chorus of Supreme Court opinions suggesting that constitutional questions remain regarding Section 2. *See Johnson*, 405 F.3d at 1227-34; *Nipper v. Smith*, 39 F.3d 1494, 1515-15 (11th Cir. 1994). These concerns have been echoed by members of other Circuit Courts. *See, e.g.*, *Veasley v. Abbott*, 830 F.3d 216, 316-317 (5th Cir. 2016) (Jones, J., dissenting); *Hayden v. Pataki*, 449 F.3d 305, 329-36 (2d Cir. 2006) (Walker, J., concurring); *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc); *Goosby v. Town of Hempstead*, 180 F.3d 476, 502 n. 4 (2d Cir. 1999) (Leval, J., concurring) ("Requiring discriminatory intent to prove vote dilution reduces the otherwise serious tension between section 2 and constitutional principles").

In sum, subsequent doctrinal developments raise significant doubts about the vitality of *Brooks* and *Marengo County*. And, in any event, these decisions do not foreclose a constitutional avoidance argument based on potential as-applied problems.

C. The Avoidance Canon Requires an Interpretation of The VRA That Does Not Abrogate State Sovereign Immunity

Under the avoidance canon, "federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress

endorsing this understanding." *Johnson*, 405 F.3d at 1229. The text of the VRA is "genuinely susceptible to two constructions," *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998), so this Court should construe the statute to leave the sovereign immunity of the States undiminished to avoid potential constitutional problems. The arguments raised by Plaintiffs and their *Amici* do nothing to disturb this conclusion.

1. The 1982 Amendments to Section 2 Were Not Clearly Based on a Pattern of Unconstitutional Conduct that Supports Abrogating Immunity.

The first potential constitutional problem with Section 2 is that Congress made no factual findings justifying a departure from *Bolden*'s intent standard in the 1982 amendments to the VRA. State's Br. at 29-33. At minimum, prophylactic legislation must be supported by "evidence of a pattern of constitutional violations by the States." *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003). But the 1982 amendments to Section 2 were not predicated on evidence that States adopted or maintained at-large electoral schemes for racially discriminatory purposes.

In response, Plaintiffs cite an array of generalized "findings" contained in the Senate and House Committee Reports accompanying the amendments to Section 2, but none of the underlying evidence supporting these "findings." Plaintiffs' Br. at 19-20. This is unsurprising, because there is little to be found.

See State's Br. at 29-30. These "findings" were contradicted by the only systematic evidence considered in the Reports, a 1978 study by the Justice Department that "analyzed more than 200 cities in northern and western states" and concluded that for "most of these cities," there was an "insufficient basis for proceeding further." S. Rep. No. 97-417, at 35. Of the few cities "selected for more detailed investigations," all "were ultimately found by the department not to warrant litigation." *Id.* A "general finding" will not support prophylactic legislation when the "committee reports . . . flatly contradict [its] assertion." *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 369-70 (2001).

The only evidence of unconstitutional conduct cited by Plaintiffs and their *Amici* consists of a few cases mentioned in the Committee Reports. Plaintiff's Br. at 21; LDF Br. at 17. But a handful of "incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination" on which prophylactic legislation must be based, particularly given that the *only systematic evidence* considered by Congress contradicted the assertion that these cases were evidence of a trend. *Garrett*, 531 U.S. at 370. In these cases, the courts largely misinterpreted *Bolden* to require "smoking gun" evidence of intent or of unresponsiveness to minority needs, resulting in a pattern of vacaturs and reversals. *See Cross v. Baxter*, 639 F.2d 1383 (5th Cir. 1981), *vacated*, 460 U.S. 1065

(1983); *Jordan v. City of Greenwood*, No. GC 7-51-WK-P (N.D. Miss. 1982), *vacated*, 711 F.2d 667 (5th Cir. 1983). *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981), and *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1068 (S.D. Ala. 1982), are the *only* cases cited by Plaintiffs and *Amici* in which plaintiffs made meritorious constitutional claims. A paltry *two cases* hardly constitute a pattern.

Plaintiffs also note that the Senate heard testimony indicating that the *Bolden* intent standard is divisive because it requires courts to accuse state and local officials of racism. Plaintiff's Br. at 21. But this evidence is simply irrelevant to the *City of Boerne* inquiry, which requires evidence of "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999) ("*College Savings*").

Amici note that Congress heard testimony that the *Bolden* intent standard was too difficult for plaintiffs to meet. LDF Br. at 16. But again, this is not evidence of a pattern of unconstitutional conduct, as *City of Boerne* requires. The "primary point made by these witnesses" was not that available remedies were "constitutionally inadequate, but rather that they were less convenient than federal remedies" proposed in the 1982 amendments. *College Savings*, 527 U.S. at 644. Indeed, the same evidence might be understood to demonstrate that the plaintiffs in those cases *did not have meritorious constitutional claims.*

2. As Applied to Vote Dilution Claims, Abrogating Sovereign Immunity under Section 2 Is Likely Not a Congruent and Proportional Measure

The second potential constitutional problem is that abrogating sovereign immunity under Section 2 likely does not qualify as a "congruent and proportional" response to a pattern of unconstitutional conduct in its amended form.

The State argues that abrogating sovereign immunity under Section 2 is likely not a congruent response to unconstitutional vote dilution because the elements of a statutory vote dilution claim under *Thornburn v. Gingles*, 478 U.S. 30 (1986), are not calibrated to detect unconstitutional discrimination under *Bolden*'s intent standard. State's Br. at 34-38. Plaintiffs and *Amici* concede the *Gingles* "threshold factors" are not probative of official intent to discriminate, but argue that the factors considered at the "totality of the circumstances" stage of the *Gingles* inquiry closely mirror the factors considered when analyzing a constitutional vote dilution claim under *Rodgers v. Lodge*, 458 U.S. 613, 616 (1982). Plaintiff's Br. at 23; LDF Br. at 20.

This argument, of course, contradicts the assertion of Plaintiffs and their *Amici* that the results test was necessary because it is too difficult to prove a constitutional vote dilution claim. But setting that issue aside, it is clear that to the extent that *Gingles* considers the same factors as *Rodgers*, the analysis of those

factors is geared toward an entirely different end, which makes it prohibitively unlikely that the results test is calibrated to "identify and counteract state laws likely to be unconstitutional." *City of Boerne*, 521 U.S. at 534. The question at the totality of the circumstances stage is whether the challenged electoral system "impede[s] the ability of minority voters to elect representatives of their choice." *De Grandy*, 512 U.S. at 1011. This question deals with the deprivation of a *positive right* created *by statute* to elect one's candidate of choice, not the *negative constitutional right* to be free from the operation of an electoral scheme that was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination." *Bolden*, 446 U.S. at 66 (citation omitted).

While superficially retaining the *Rodgers* factors, the results test alters the meaning of those factors to conform to the analytically distinct inquiry prescribed by *Gingles*. For example, under *Gingles*, "the history of voting-related discrimination" in a State will be relevant to determining whether an electoral system operates in conjunction with historical discrimination to deprive members of minority groups of the positive right to elect their preferred candidates. Under *Rodgers*, the same factor is relevant to determine whether the history of a State suggests that an electoral system was chosen or maintained to suppress minority voting power. As a result of this shift in meaning worked by the results test's focus on deprivations of the statutory positive right of minorities to elect their

preferred candidates, it is unlikely that the results test can be "understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532.

The State also argues that the results test is likely a disproportionate means of counteracting unconstitutional vote dilution. State's Br. at 38-41. A prophylactic measure is proportional only if Congress has taken steps "to limit the coverage of the Act to cases involving arguable constitutional violations." *College Savings*, 527 U.S. at 639. Unlike other civil rights statutes such as Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, Section 2 does not permit defendants to rebut a *Gingles* prima facie case by proving as an affirmative defense that the challenged electoral system was not adopted or maintained for a discriminatory purpose. Thus, Section 2 will necessarily invalidate electoral schemes that are not even arguably unconstitutional. See State's Br. at 39-40.

Plaintiffs respond that under Circuit precedent "[t]he State's interest in maintaining an electoral system . . . is a legitimate factor to be considered by courts" at the totality of the circumstances stage of *Gingles*. Plaintiff's Br. at 25 (quoting *Nipper*, 39 F.3d at 1541). But the State's point is not that *Gingles* precludes consideration of its interest in preserving its electoral systems, but rather that Section 2's results test is not restricted "to cases involving arguable constitutional violations," *College Savings*, 527 U.S. at 639, because there is no

way for a defendant to escape liability by proving that a challenged electoral system is constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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