IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, et al. Plaintiffs, v. KYLE ARDOIN, in his official capacity as the Acting Secretary of State of Louisiana, Defendant	Case No. 18-625-SDD-EWD

PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs respectfully submit this Reply in support of their Notice of Supplemental Authority ("Notice"), ECF No. 40, and in response to several arguments and misrepresentations presented in Defendant's Memorandum In Response to Notice of Additional Authority ("Response"), ECF No. 43. Plaintiffs state as follows:

Defendant's Response to Plaintiffs' Notice purports to challenge the recent decision in *Chestnut v. Merrill*, No. 2:18-CV-00907-KOB (N.D. Al. Jan. 28, 2019), ECF No. 40, holding that standalone claims brought under Section 2 of the Voting Rights Act are not subject to 28 U.S.C. § 2284's three-judge court requirement on several grounds. Nevertheless, Defendant's challenge – which repeatedly mischaracterizes the *Chestnut* court's decision, misstates the governing law, and omits key case law considered by the *Chestnut* court – fails to undermine *Chestnut's* persuasive authority and does not distinguish the questions before the *Chestnut* court from the questions at issue here. Nor could it. Contrary to Defendant's representations, *Chestnut* is indistinguishable from this case, and the *Chestnut* court considered the exact same 28 U.S.C. § 2284 and Section 2

arguments that are before this Court. (Indeed, the defendant in *Chestnut* specifically adopted Defendant Ardoin's arguments in his Motion to Dismiss and attached Defendant Ardoin's memorandum in support of his motion to dismiss as an exhibit.) Moreover, *Chestnut* is based on well-settled principles of statutory interpretation, a thorough evaluation of the legislative history behind 28 U.S.C. § 2284 and Section 2, and a review of relevant Section 2 case law. Thus, *Chestnut* is directly on point, and should be considered persuasive authority by this Court.

First, while Defendant complains that the *Chestnut* court's decision is "literal to a fault," Response at 1, Defendant cannot and does not deny that the plain language of 28 U.S.C. § 2284 excludes standalone Section 2 claims from the jurisdiction of three-judge courts. *See also Chestnut*, slip op. at 3 ("Defendant concedes that this case does not fall within the express language of § 2284's requirements for a three-judge panel."). The *Chestnut* court properly evaluated the plain language of the statute, in accordance with well-settled law governing statutory interpretation. *Id.* at 4-6 (quoting *Caminetti v. United States*, 242 U.S. 470, 490 (1917)). The court found that the "plain meanings" of 28 U.S.C. § 2284 and Section 2 are clear, and that "[a] claim solely alleging a Section 2 violation falls outside a plain reading of § 2284." *Id.* at 5. This finding is in keeping with the governing law, and more than sufficient to support the court's determination in that case. Defendant's suggestion that the court should have ignored the plain language of the statute at issue, on the other hand, is entirely unsupported.[1]

[1] Defendant's request that the Court ignore the plain language of Plaintiffs' claims fares no better. As set out at length in Plaintiffs' Oppositions to Defendant's Motions to Dismiss, ECF Nos. 27, 39, constitutional racial gerrymandering claims are analytically distinct from Section 2 claims. Pls. Opp. to First Mot. to Dismiss at 3-6, ECF No. 27; Pls.' Opp. to Second Mot. to Dismiss at 6-8, ECF. No. 39. Thus, contrary to Defendant's assertion, *see* Response at 2-4, a Section 2 claim is not inherently a constitutional claim and bringing one is not equivalent to bringing the other. And, indeed, a plaintiff is the master of his complaint and at liberty to plead the claim that he chooses. *See, e.g.*, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also* Pls.' Opp. to Second Mot to Dismiss at 5-6. That the defendant may wish a different claim had been pleaded, as

Second, even though it could have, the *Chestnut* court did not stop with an evaluation of the statute's plain language. Indeed, although Defendant erroneously asserts that the *Chestnut* court discounted the purpose behind 28 U.S.C. § 2284 and Section 2, *see* Response at 1, *Chestnut* engages in an extensive analysis of the legislative history behind both statutes. *Chestnut*, slip op. at 6-9. The court found that Congress had amended both 28 U.S.C. § 2284 and Section 2 after 1976 and had not made any amendments indicating that standalone Section 2 claims should be heard before a three-judge court. *Id*. at 7-8. Thus, the *Chestnut* court found that Congress certainly *could* have amended one or both statutes to take into account Defendant's policy arguments if it so desired. *Id.* at 8. The court properly held that it "cannot do Congress's job" by amending either law to bring the Section 2 challenge before it under the jurisdiction of a three-judge court. *Id.* at 9. Defendant, meanwhile, requests that this Court disregard Congress's express instructions, impute an intent that Congress has never itself expressed, and do what Congress has had every opportunity to do—but elected *not* to do—in over 40 years. This Court should reject that request, just as the *Chestnut* court did.

Third, Defendant implies that *Chestnut* is unpersuasive because Section 2 cases "are ordinarily plead with [constitutional] claims." Response at 3. But not only does this argument ignore the host of cases bringing standalone Section 2 claims or standalone constitutional claims, *see, e.g.*, Pls. Opp. to First Mot. to Dismiss, ECF No. 27 at 6 n.2, it ignores that the *Chestnut* court pointed to multiple cases in which standalone Section 2 challenges to congressional or statewide legislative plans have been heard by a single judge. *See, e.g.*, *Rural W. Tenn. African American Affairs Council v. Sundquist*, 290 F.3d 835, 838 (6th Cir. 2000) (noting that the underlying case initially alleged

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Defendant essentially argues here, *see* Response at 1-2, is of no consequence. Defendant cannot foist onto Plaintiffs a claim they are not making.

both Section 2 and constitutional violations, but "[b]ecause the amended complaint contained no constitutional claims, the three-judge court disbanded"); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004); *Old Person v. Brown*, 182 F. Supp. 2d 1002 (D. Mont. 2002); *see also Dwight v. Kemp*, No. 1:18-cv-02869-RWS (N.D. Ga.), ECF Nos. 25, 27 (issuing scheduling order after inquiring whether the Section 2 challenge should be heard by a three-judge court and both parties "agree[d] that this case is properly before a single district judge"). Meanwhile, "[n]either the court nor Defendant could find any purely Section 2 cases heard by a three-judge panel." *Chestnut*, slip op. at 9. Defendant Ardoin has similarly failed to point this Court to even one case supporting Defendant's argument for a three-judge court. Like the *Chestnut* court, this Court should reject Defendant's invitation to be the first court ever to find that, contrary to the plain language of 28 U.S.C. § 2284, standalone Section 2 challenges should be heard by a three-judge court.

Finally, Defendant again relies on a misunderstanding of *Page v. Bartels*, 248 F.3d 175 (3rd Cir. 2001), to support his jurisdictional arguments in an attempt to undermine *Chestnut*. Response at 3, 4. Plaintiffs have explained at length that *Page* is distinguishable. *See* Pls. Opp. to First Mot. to Dismiss at 6-7; Pls.' Opp. to Second Mot. to Dismiss at 8-9. Indeed, to the extent it has any bearing on this case, *Page* only lends further support to Plaintiffs' argument.

In *Page*, the plaintiffs alleged both constitutional and Section 2 claims. 246 F.3d at 180. Notably, the plaintiffs in that case agreed that a three-judge court should be convened to hear the case, *id.* at 185 n.4, and it was "beyond dispute" that the three-judge court would have jurisdiction over the entire action, including the Section 2 claim, *id.* at 188 n.9. The question before the *Page* court was "whether the single judge, sitting alone," had jurisdiction to rule on the Section 2 claim on his own, notwithstanding the convening of a three-judge court to hear the constitutional claim. *Id.* at 188 n.9. The court explained that the analysis of this question is not "so simple" in light of

U.S. Supreme Court case law suggesting that "when a case was presented that included some issues requiring the convening of a three-judge district court and *some issues that could be ruled upon by a single judge*, there existed no jurisdictional bar to a single judge disposing of *those issues properly within his or her province*." *Id.* at 188 (emphasis added). *Page* thus recognized that Section 2 claims would be "properly within [the] province" of a single district judge but for the addition of constitutional claims.

Page does not stop there. The Third Circuit went on to note that "a single district judge before whom both [Section 2] and constitutional challenges to a statewide reapportionment scheme are raised could decline to convene a three-judge court and could reach the merits of the statutory claims if he or she were to conclude that the plaintiffs' constitutional challenge was legally frivolous and insubstantial." *Id.* at 191; *see also id.* at 194 ("When presented with an action involving both statutory Voting Rights Act and constitutional challenges to the apportionment of a statewide legislative body, a single district judge cannot reach the merits of the statutory claims unless he or she concludes that the constitutional claims are legally frivolous and insubstantial."). In other words, far from conflating Section 2 claims with statutory claims, *Page* recognizes a clear jurisdictional difference between the two. *Page* further instructs district courts to determine whether an alleged constitutional claim is even viable before convening a three-judge court; if it is not, the single district judge should "reach the merits of the statutory claim[]." *Id.* at 194. This is the exact opposite of what Defendant advances here—that this Court should affirmatively *create* a constitutional claim Plaintiffs have never made to trigger jurisdiction before a three-judge court. Contrary to Defendant's misplaced reliance on *Page*, *Page* instructs that cases such as this one proceed before a single district judge.[2]

[2] Defendant wholly misrepresents that Plaintiffs amended their Complaint "to purge any mention

Accordingly, this Court should look to *Chestnut* as powerful persuasive case law when making its determination on jurisdiction under 28 U.S.C. § 2284 and Section 2 here, as it is both directly on point and well-reasoned.[3]

Dated: February 8, 2019

Respectfully submitted,

s/Darrel J. Papillion
Darrel J. Papillion (Bar Roll No. 23243)
Renee C. Crasto (Bar Roll No. 31657)
Jennifer Wise Moroux (Bar Roll No. 31368)
WALTERS, PAPILLION,
THOMAS, CULLENS, LLC
12345 Perkins Road, Building One
Baton Rouge, LA 70810
Phone: (225) 236-3636
Fax: (225) 236-3650
Email: Papillion@lawbr.net
Email: crasto@lawbr.net
Email: jmoroux@lawbr.net

Marc Erik Elias (admitted pro hac vice)
Bruce V. Spiva (admitted pro hac vice)
Amanda R. Callais (admitted pro hac vice)
Perkins Coie, LLP
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6338
Fax: (202) 654-9106
Email: MElias@perkinscoie.com
Email: BSpiva@perkinscoie.com
Email: ACallais@perkinscoie.com

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of the constitution once the prospect of a three judge [sic] panel was raised." Response at 4-5. This is plainly false. The Amended Complaint made four points of clarification, *see* Pls.' Reply in Support of Mot. for Leave to Exceed Page Limits and to Strike and Substitute Incorrect Pleading at 1-2, ECF Nos. 24-2, 24-3, 26, none of which pertained to the constitution. Indeed, the word "constitution" appears the same number of times in both the original and Amended Complaint.

[3] The *Chestnut* court chose to dispose of the three-judge court issue before proceeding to the remaining issues raised in the defendant's motion for judgment on the pleadings. *See Chestnut*, slip op. at 10. Plaintiffs note that, to the extent the Court requires more time to consider some of the other issues raised in Defendant's motion to dismiss, it may similarly choose to resolve this aspect of Defendant's argument so that the case may proceed pursuant to a scheduling order while a full decision on the motion to dismiss is pending.

Abha Khanna (admitted pro hac vice)
Perkins Coie, LLP
1201 Third Avenue, Ste. 4900
Seattle, WA 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000
Email: AKhanna@perkinscoie.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, the foregoing Reply In Support of Plaintiffs' Notice of Supplemental Authority was filed electronically with the Clerk of Court using the CM/ECF system.

s/ Jennifer Wise Moroux
Jennifer Wise Moroux