IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Marjorie Taylor Greene,

Plaintiff,

vs.

Brad Raffensperger, in his official capacity as Secretary of State of the State of Georgia, *et al.,*

Defendants,

and

David Rowan, *et al.,*

Intervenor Defendants.

Case No. 1:22-cv-1294-AT

Rowan Intervenors' Response to the Defendants' Motion to Dismiss

Intervenor defendants David Rowan, Donald Guyatt, Robert Rasbury, Ruth Demeter, and Daniel Cooper (collectively, the "Rowan Intervenors"), respectfully submit this response to the defendants' motion to dismiss. (ECF 73.) The Court should grant the defendants' motion.

The Rowan intervenors join the defendants' motion in full. They write separately here to add to the defendants' argument that the Court

should dismiss Count IV of Representative Greene's complaint because she has no private right of action.

There is no private right of action to enforce the Amnesty Act of 1872. Whether a statute contains a private right of action is a question of statutory interpretation. For no less than "substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. 275, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.*; *see also Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1294-95 (11th Cir. 2015).

That task is made easier by the requirement that Congress's intent be unambiguous. Under current doctrine, "a private right of action under federal law is not created by mere implication, but must be unambiguously conferred." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 US. 320, 332 (2015) (cleaned up). In the Amnesty Act of 1872, Congress neither "unambiguously confer[red] a private right," nor "display[ed] an intent to provide a private remedy." *Id.*

The first question in deciding whether a statute contains an implied right of action is whether it unambiguously confers a private right. That right must be individual, not aggregate. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (holding that both the test for whether a right is enforceable under Section 1983 and whether a statute contains a right of action turns on whether "Congress intended to confer individual rights upon a class of beneficiaries").

Here, Representative Greene has yet to identify where in the Amnesty Act's eighty-seven words the unambiguous individual right appears. Nor has she identified clearly what the alleged right is. Is it the right to run for office? Representative Greene's argument falters on the first step: the Amnesty Act does not unambiguously confer an individual right on anyone to do anything.

But even if it did, the next question under *Sandoval* is whether it displays an intent to provide a private remedy. It does not. Again, Representative Greene has not identified a single phrase in the Amnesty Act of 1872 that seems intended to provide a private remedy.

Representative Greene simply cannot establish under current law that the Amnesty Act of 1872 contains an implied right of action. Count

IV of her complaint should be dismissed for that reason. She brought that count directly under the Amnesty Act of 1872. That is apparent from the face of the complaint, which identifies the statute giving rise to the cause of action directly under the heading for each count. Counts I though III identify "42 U.S.C. § 1983" as the cause of action, while Count IV identifies "42 Cong. Ch. 194, May 22, 1872, 17 Stat. 142" as the cause of action. (*Compare* ECF 3 at 16, 19, 20 *with id.* at 22.)

Representative Greene argued at the hearing on her motion for a preliminary injunction that, because her complaint mentions Section 1983 in paragraphs 1, 4, 11, and 12, she did not need to identify Section 1983 as the cause of action for Count IV. (ECF 52.) But that assertion is not persuasive. There is nothing in any of those paragraphs suggesting that she was asserting Section 1983 as the cause of action for Count IV. This Court correctly found that "Count IV, as alleged, is brought directly under the 1872 Amnesty Act, not Section 1983." (*Id.*)

But even if Representative Greene had properly alleged a cause of action under Section 1983, dismissal would still be proper because the Amnesty Act of 1872 is not enforceable through that statute. To determine whether a private plaintiff can enforce a federal statute

though Section 1983, a court must first "determine whether Congress *intended to create a federal right*" in the statute that a plaintiff seeks to enforce. *Gonzaga*, 536 U.S. at 283 (emphasis in original). Once a court determines that a federal right exists, that "right is presumptively enforceable by § 1983," and a plaintiff "do[es] not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Id.* at 284. Defendants can rebut the presumption that a federal right is enforceable through § 1983 only by "demonstrat[ing] that Congress shut the door to private enforcement either [1] expressly, through specific evidence from the statute itself" or "[2] impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 284 n.4 (cleaned up).

Here, Representative Greene's attempt to enforce the Act through Section 1983 falters on the first step. For the reasons already discussed above, Representative Greene cannot establish the Congress intended to create a federal right in the Act's eighty-seven words. She has not identified what, exactly, that right is or where it appears in the Act. The

Court should therefore hold that the Act cannot be enforced through Section 1983 even when properly alleged.

Accordingly, the Court should grant the defendants' motion to dismiss.

Respectfully submitted this 1st day of September, 2022.

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Certificate of Compliance

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing document has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Bryan L. Sells

Bryan L. Sells