



ATTORNEY GENERAL
LESLIE RUTLEDGE

ARKANSASAG.GOV

Asher L. Steinberg
Senior Assistant Solicitor General

Direct Dial: (501) 682-1051
asher.steinberg@arkansasag.gov

October 10, 2022

Michael Gans
Clerk, United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
St. Louis, MO 63102

Re: *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, No. 22-1395

Dear Mr. Gans:

In their letter, Plaintiffs note that a Georgia district court recently held Section 2 provides an implied cause of action. That decision is certainly the most careful opinion to reach that result. *See* Appellants' Letter, Ex. at 20 (conceding the question "is a close one" and commending the decision below as "thorough and well-articulated"). Ultimately, however, its carefulness only lays bare the fallacy of Plaintiffs' core argument.

The Georgia court began with the precisely cabined premise that Sections 3's and 14's "mention of actions" to enforce constitutional voting rights "imply that private parties have the right to sue to enforce *some* provision or provisions" of relevant "federal laws." *Id.* at 14. True; the "mention of actions" of some kind assumes that "*some*" actions of that kind exist. But the court then leapt to the conclusion that what this "mention" implies is "a private right to sue under *whatever* statute or statutes" enforce constitutional voting rights. *Id.* at 15 (emphasis added). That doesn't follow. Just as Section 1331's mentioning suits arising under federal law doesn't imply a cause of action under every federal law, mentioning private suits to enforce constitutional voting rights doesn't imply that every statute enforcing constitutional voting rights affords a cause of action—only that some do, which no one disputes.

323 Center Street, Suite 200, Little Rock, Arkansas 72201
Office: (501) 682-1051 | Fax: (501) 682-8084

But even if the court’s first step held water, the next fails entirely. There, the court reasoned that because Section 2 prohibits unconstitutional conduct “in part,” every Section 2 suit “enforce[s] the voting guarantees of the fourteenth or fifteenth amendment”—even if the plaintiff only makes an effects claim. Ex. at 17. That is like saying that every criminal case enforces the prohibition of murder because criminal law prohibits murder. A Section 2 suit that asserts constitutional violations enforces constitutional voting rights, but a Section 2 suit that doesn’t assert one does not. Instead, it only enforces a prophylactic rule. And as the Supreme Court recently held in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022) (rejecting Section 1983 suits for *Miranda* violations), suits that enforce prophylactic rules—even if constitutionally grounded—don’t enforce the Constitution.

Respectfully submitted,

/s/ Asher L. Steinberg _____

Asher L. Steinberg
Senior Assistant Solicitor General

Counsel for Appellees

CERTIFICATE OF SERVICE

I certify that on October 10, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Asher L. Steinberg

Asher L. Steinberg