LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

THURSDAY, DECEMBER 14, 2023

PERSPECTIVE

8th Circuit's election-year case on race, politics, and voting rights

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Demonstrators in 2019. | The New York Times

On Nov. 20, 2023, a panel of the 8th Circuit issued a bombshell opinion in *AR State Conference NAACP v. AR Bd. of Apportionment*, No. 22-1395, 2023 WL 8011300 (8th Cir. Nov. 20, 2023) ("NAACP"), holding that only the United States Attorney General, and not private parties, can bring claims under Section 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301. The VRA prohibits state and local governments from denying or abridging the right of any citizen to vote based on race or color, and over the last 40 years private individuals have brought 167 voting rights cases under Section 2. In contrast, during this same time period the AG has brought 15.

NAACP's underlying facts involve a challenge to Arkansas's redistricting maps on the grounds that the newly drawn districts violate Section 2 by diluting Black voting strength. The district court, whose decision to dismiss the case the 8th Circuit was reviewing, noted "there is a strong merits case that at least some of the challenged districts" violated Section 2.

The 8th Circuit started its analysis with the general principle that Congress, not the courts, must create private rights of action to enforce federal law. Whereas statutes such as the Civil Rights Act of 1964 expressly include such a right, Section 2 does not. The Court further noted that VRA Section 3 at least provides a nod to a private right of action by its reference to cases by "aggrieved persons," yet there is no similar reference in Section 2. To the textually focused court, this silence spoke volumes.

Plaintiffs confronted the statutory silence by emphasizing the long history of courts accepting Section 2 cases brought by private litigants and statements by legislators that there was a private right of action. *Id.* at *7. Plaintiffs also cited the Supreme Court's assumption of a private right of action in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). However, the 8th Circuit panel examined the record and determined the existence of a private right of action in *Morse* was just an assumption and, at best, *dicta* because the issue in *Morse* was whether Section 10, not Section 2, of the VRA includes a private right of action. *Id.* at *9-*10. Further, *Morse* reached that assumption based on "legislative history" from 1982 the panel deemed to be dubious, as that 1982 legislative history purported to intuit what legislators from 1965 were thinking when they passed the statute. *Id.* at *9.

Ultimately, the 8th Circuit panel reasoned that it is not the courts' "place to fill in the gaps [in a statute], except when the 'text and structure' require it," finding that for there to be an implied private right of action, "Congress must have *both* created an individual right *and* given private plaintiffs the ability to enforce it." *Id.* (quoting *Sandoval*, 532 U.S. at 288).

The dissenting panel judge opined that even if the relevant statement in *Morse* was *dicta*, it should be respected, *id.* at *15. The dissent did not address the majority's point that subsequent Supreme Court rulings have rendered *Morse* "enfeebled," in which case its *dicta* need not be heeded, *id.* at *10. The dissent also suggested that Congress demonstrated an intent for Section 2 to include a private right because Congress has consistently reenacted the VRA without taking action to clarify that

the widely used Section 2 private right actually does not exist. *Id.* at *16. The majority responded that "it is a nonstarter to argue that Congress somehow 'ratified' the existence of a private right of action by reauthorizing the Voting Rights Act in 1982 and 2006," because "[r]atification does not apply when the meaning of a reauthorized statute is 'far from settled.'" *Id.* at *8, n.5.

The Plaintiffs are seeking rehearing en banc by the full 8th Circuit. If the entire 8th Circuit decides not to hear the case or agrees with the decision, then the losing parties will surely seek cert at the Supreme Court. But all parties understand prior skepticism about whether Section 2 includes a private right of action expressed by Justices Brett Kavanaugh and Clarence Thomas may have inspired the 8th Circuit's decision.

If not reversed after en banc review, *NAACP* will make it more difficult – but not impossible – for individuals to protect their constitutional voting rights from racially discriminatory practices in the states within the 8th Circuit: Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Missouri, and Arkansas. And if the case is heard and upheld at the Supreme Court, the landscape of Section 2 cases will radically change nationwide.

While some decry that the decision leaves victims of racially discriminatory election practices with no recourse, there are alternative paths to continue enforcing voting rights. Civil rights cases frequently rely on 42 U.S.C § 1983, which provides a private right of action to allege public officials violated a person's constitutional rights. Indeed, the Plaintiffs from *NAACP* asked to amend their complaint to frame it as a constitutional case under the 14th Amendment rather than a VRA case so they could use § 1983. The Department of Justice could also file more Section 2 lawsuits. Finally, Congress could also amend the VRA to include an express private right of action.

NAACP stands at the combustible crossroads of race, law, and elections, with some lauding it as a well-founded correction and others decrying it as a "travesty for democracy." Beyond the rhetoric, the case indeed illustrates the chasm between liberal and conservative judicial philosophy – a divide that is driving progressive calls to "pack" today's conservative-leaning Supreme Court with additional liberal judges as well as conservative distrust of so-called 'activist' liberal judges allegedly imposing their personal policy choices rather than objectively applying the law as written by Congress. With a presidential election year ahead, it doesn't take much imagination to see this case becoming fodder for political ads and speeches.

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