1 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
2 ATLANTA DIVISION

3

GEORGIA STATE CONFERENCE OF THE)
4 NAACP, et al.)
) Docket Number
5 Plaintiffs,) 1:21-CV-5338-SCJ-SDG-ELB
)
6 v.)
) Atlanta, Georgia
7 STATE OF GEORGIA, et al.) July 22, 2022
)
8 Defendants.)

9

TRANSCRIPT OF MOTION TO DISMISS
10 BEFORE THE HONORABLE STEVEN C. JONES;
STEVEN D. GRIMBERG; and ELIZABETH L. BRANCH
11 UNITED STATES DISTRICT JUDGES

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1 P R O C E E D I N G S
2 (Atlanta, Fulton County, Georgia; July 22, 2022;
3 all parties present)
4 JUDGE BRANCH: I want to welcome everyone here today.
5 This is a very big deal for me. This is my first time sitting in this
6 courthouse. We've had one hearing before that was virtual, but this
7 is the first time I'm here in person. I clerked for Judge Owen
8 Forster so this feels like coming full circle, it feels like coming
9 home again, so this is a very special day for me.
10 Let me also introduce -- I'm sitting with, as all of
11 you know, Judge Steve Jones and Judge Steve Grimberg, and it's just an
12 honor to sit with this panel and we are pleased, as always, to be in
13 person. I think that has become something that we took for granted a
14 long time ago and we no longer take it for granted.
15 So let me call the case and we'll go ahead and get
16 started. Georgia State Conference of the NAACP vs. The State of
17 Georgia, Case Number 1:21-CV-05338. We are here on a motion to
18 dismiss that's been filed by the defendants. I understand that
19 everybody's going to have 20 minutes per side.
20 Mr. Tyson, are you going to reserve 5 minutes for
21 rebuttal?
22 MR. TYSON: Yes, Your Honor.
23 JUDGE BRANCH: Okay. With that, let's go ahead and get
24 started. Mr. Tyson, whenever you're ready.
25 MR. TYSON: Thank you, Your Honors. Good morning. May

1 it please the Court. Bryan Tyson for the defendants.
2 I wanted to begin -- I know Judge Jones and Judge
3 Grimberg, you all both are working on Section 2 cases right now so
4 from a jurisdictional perspective I wanted to start by clarifying that
5 under Eleventh Circuit precedent in the *Mulhall* case the question of a
6 private right of action is not related to standing and is not
7 jurisdictional and therefore can be waived.
8 Justice Gorsuch's concurrence in the *Brnovich* case came
9 out after we had gotten through kind of the initial jurisdictional
10 pieces in *Fair Fight* and *Rose* so, from our perspective, since we
11 didn't raise that issue in those cases it's waived as to those cases.
12 I think you'll see the State bringing that up pretty regularly in the
13 cases moving forward, but I wanted to make sure that was clear for
14 both of you.
15 I think we can all agree we don't have a private right
16 of action in the text of Section 2 and so that pushes us into the
17 implied private right of action realm to look for the issues, the
18 finding of private right of action. Under *Sandoval* we have to look
19 for both rights-creating language and then look for a private remedy
20 that Congress put in place to address that.
21 As we outlined in our briefing, if you look at the text
22 of Section 2 the primary audience there is focused on the regulated
23 entity, the states and the political subdivisions. Citizens are
24 mentioned, but there's no individual right to bring a Section 2 case.
25 It is a group right that you bring. That's very different than other

1 antidiscrimination statutes where you have a specific individual that
2 can bring that claim.
3 Likewise, in Subsection (b) of Section 2 it's very
4 clear this is a group-focused right so we would argue first that
5 there's not the rights-creating language in the text of Section 2.
6 Recognizing there is a class of citizens that is protected by what's
7 included in Section 2, the real issue, I think, is where is the
8 private remedy that the Court -- that the Congress tried to impose for
9 Section 2, and the plaintiffs have offered you several options for
10 where that might be: Section 3, Section 14 that both talk about
11 aggrieved persons, and then Section 12.
12 As we discussed, I think Section 3 and Section 14,
13 while they mention "aggrieved persons," they don't specifically
14 address the question of a right of action under Section 2.
15 JUDGE BRANCH: Mr. Tyson, do you concede that these
16 provisions imply a private cause of action to sue under some statutory
17 provision?
18 MR. TYSON: Yes, Your Honor, they do. But I think if
19 you look at the language, it's focused on the voting guarantees of the
20 Fourteenth and Fifteenth Amendments so that could include Section 5,
21 that could include the Civil Rights Act, that could include a variety
22 of other statutes. We don't think that just by virtue of there being
23 a general right in Sections 3 and 14 that that moves you to a private
24 right of action in Section 2. We think that's especially the case
25 when you look at the language of Section 12, because Section 12 very

1 clearly says the Attorney General can bring an action under Section 2
2 of the Voting Rights Act and while Congress has amended Sections 3 and
3 14 to add "aggrieved persons," it never amended Section 12 to address
4 specifically that an aggrieved person could bring an action about
5 Section 2 specifically.
6 JUDGE JONES: Are you saying all the cases for the last
7 45 years that have been brought by a private right of actions is what,
8 it's wrong, illegal?
9 MR. TYSON: And, Your Honor, that's a significant issue,
10 I know you addressed that in *Alpha Phi Alpha*, and I think it's an
11 example of where everybody, like Justice Gorsuch said, assumed this
12 existed. But given the language in the Supreme Court's decision,
13 especially since *Sandoval*, I think that that's correct. The private
14 right of action was assumed to exist. Since it wasn't jurisdictional,
15 it's not like those are undone, but they were waived as to those
16 particular issues.
17 JUDGE JONES: Were they waived or was it just
18 acknowledgment that you could bring a private right of action? You
19 know, somehow most major cases, *Gingles*, private right of actions;
20 *Greater Birmingham*, private right of actions. I have a list of them
21 here. *Roemer*, *Houston Lawyers Association*, all private right of
22 actions. Case law has changed in America based on some of these
23 cases. Just lately, *Wisconsin Legislature vs. Wisconsin Election*
24 *Commission*.
25 MR. TYSON: Yes, Your Honor. Definitely there has been

1 a long line of cases that have assumed that this private right of
2 action existed and I think we had, especially in the voting rights
3 context, a lot of other issues like this so you'll see in a lot of the
4 redistricting cases that I know we'll be dealing with later, in a
5 racial gerrymandering case there's a lot of language from the Supreme
6 Court assuming, for example, that compliance with the Voting Rights
7 Act is a compelling government interest. That issue has never really
8 been clearly squarely decided. So the mere fact that everybody
9 assumed this right existed, I think if we go back and take a look at
10 the text, as the justices did in *Brnovich*, we don't find that private
11 right of action there.
12 JUDGE BRANCH: What about the fact that in *Brnovich* we
13 do have Justice Gorsuch's concurrence raising the issue that you've
14 mentioned and Justice Thomas has joined in, but it's a very quick
15 concurrence, it's a pretty simple proposition, but we only have two
16 justices who signed onto it. What are we supposed to make of that
17 other than the fact that it looks like a majority of the Supreme Court
18 isn't walking down that path with you?
19 MR. TYSON: And, Your Honor, I think the key point is
20 this also wasn't raised in *Brnovich* either and so there was nothing
21 for the majority of the Supreme Court in *Brnovich* to decide on this
22 front, and I think Justice Gorsuch and Justice Thomas flagging this is
23 the opportunity for this Court to go back and look at the text and say
24 is there an implied right of action here and under the line of cases
25 from *Sandoval* and other cases we don't think that right exists in the

1 text.

2 JUDGE GRIMBERG: Let me ask you this, Mr. Tyson. I'm
3 glad you started out with the explanation about the waiver of -- that
4 this is a waivable argument, that addresses one of the issues that I
5 had coming in, that explains the waiver. It does not explain the why;
6 right? Why, if this is a position that your clients take, including
7 the Secretary of State, why did we just have a one-week bench trial
8 two weeks ago on a Voting Rights Act case with five private
9 plaintiffs?

10 MR. TYSON: And, Your Honor, that's a great question.
11 I think the key thing is for the Secretary and the Attorney General's
12 Office, we had also like the Supreme Court and other courts, assumed
13 that this private right of action existed and we actually looked at
14 this issue specifically before the *Rose* trial and concluded that as a
15 matter of binding precedent it had been waived in that case;
16 therefore, it was too late for us to raise it since it wasn't
17 jurisdictional. I think what you're going to find now, though, is the
18 Secretary and the State Election Board consistently raising this as a
19 defense at the earliest opportunity, as we've done here, to try to
20 address this issue and solve the problem of can a private party bring
21 one of these claims.

22 JUDGE GRIMBERG: When did that begin? When did that
23 position begin to take hold from your clients' perspective?

24 MR. TYSON: Your Honor, I think it was brought to our
25 clients' attention when the *Arkansas NAACP* case was ruled the way it

1 was by the District Court there. We had obviously seen Justice
2 Gorsuch and Justice Thomas's concurrence, but when the *Arkansas NAACP*
3 case came down we had a District Court judge taking the invitation
4 from those justices looking at that question and, from our
5 perspective, we looked at that and found the reasoning persuasive and
6 began to assert that as a defense.
7 So I think the other element that we have to talk about
8 here is the *Morse* case and the impact of the *Morse* case and I think
9 there's a couple of issues with that. The plaintiffs say this
10 forecloses the question completely, that there's at least five
11 justices who said there is --
12 JUDGE JONES: You say it's *dicta*?
13 MR. TYSON: We say it's *dicta*, yes, Your Honor.
14 JUDGE JONES: Why?
15 MR. TYSON: We say it's *dicta* because Justice Breyer's
16 concurrence doesn't reason from Section 2 to Section 10. It reasons
17 from *Allen*, which is the case that found a private right of action
18 under Section 5 to Sections 2 and 10, and so the fact that only
19 Section 10 was before the Court in that case for Justice Breyer's
20 concurrence we don't think it becomes binding as to Section 2. I'll
21 freely admit I believe the two justices' concurrence does reason from
22 Section 2 to Section 10, but Justice Breyer's reasons from *Allen* to
23 Section 2 and Section 10 which is why we don't believe that's
24 controlling. We also think it's significant that at least Justice
25 Thomas and Justice Gorsuch didn't view *Morse* as a controlling outcome

1 there in terms of the private right of action on these cases.
2 JUDGE BRANCH: Mr. Tyson, surely you would concede
3 there's *dicta* and then there's Supreme Court *dicta?*
4 MR. TYSON: Certainly, Your Honor, we definitely
5 recognize that. I think that what we also have to look at, though, is
6 we have a series of binding opinions from that point in the implied
7 private right of action sphere and so we also have two justices in
8 *Brnovich* saying this is an open question, we have a long line now of
9 20 years of implied private right of action jurisprudence that says
10 you have to go back to the text and look and then, we would submit,
11 it's not in the text as to Section 2.
12 So the other argument plaintiffs raise is a
13 ratification argument, that there was an argument that Congress had
14 somehow ratified this. We'd submit that because there was no clear
15 ruling on this point there was no ability to make a ratification by
16 Congress. If Congress, as we said earlier, wished to make clear there
17 was a private right of action under Section 12 it could add "aggrieved
18 person" to that language. Its failure to add that probably speaks
19 more volumes about what its actual position was in trying to ratify
20 something that was not clear from the courts about whether there was a
21 private right of action under Section 2 and the legislative history
22 issues that are involved there we don't believe provide a sufficient
23 support when there's not something in the text regarding the implied
24 right.
25 The last point I'll address - and I'm happy to answer

1 any other questions you have -- Yes, Your Honor.
2 JUDGE BRANCH: Mr. Tyson, before you move on to that
3 final point, I wanted to ask you a question about the supplemental
4 authority that was filed by plaintiffs in this case, the *Turtle*
5 *Mountain* case. So let's just assume, for the sake of argument, that
6 we were to agree with you and find there's no private cause of action
7 for Section 2 challenges, could the plaintiffs just turn around and
8 replead their Section 2 claims under Section 1983 and so, therefore,
9 what practical effect would our ruling have if that's the case?
10 MR. TYSON: Certainly. And we would submit that they
11 could not turn around and get that in through 1983 and I'll explain
12 why.
13 So first I think *Turtle Mountain* does demonstrate that
14 at least another District Court has agreed that the *Arkansas NAACP*
15 District Court is persuasive as far as the reasoning of no private
16 right of action. But if you look at the *Gonzaga University* case,
17 which involved a FERPA issue with student privacy that addressed what
18 is the scope of 1983 if there's not kind of a clear right of action in
19 the statute, there does still have to be a similar rights -- searching
20 for some rights-creating language even under 1983. There's also a
21 requirement in that *Gonzaga* case that you look at the enforcement
22 mechanism that Congress has put together so I think of it in terms of
23 the Help America Vote Act under HAVA. The Eleventh Circuit's been
24 very clear in *Bellitto vs. Snipes* there is no private right of action
25 under HAVA and it's very clear enforcement regime, I think it's 52 USC

1 21111, that says this is the Attorney General that does this and so we
2 don't then get to get a private right of action under HAVA by moving
3 through 1983, you still have to look at the enforcement regime that's
4 set up. So we'll be happy to brief that if and when the plaintiffs go
5 down that road, but our submission would be if you look at the statute
6 in *Gonzaga*, the FERPA statute, it's very similar to Section 2, it has
7 duties for colleges and universities related to student privacy, it
8 mentions students, but the U.S. Supreme Court found that that was not
9 sufficient rights-creating kind of language to get you into 1983 for a
10 private right of action there.
11 JUDGE JONES: Let me ask this question. We talked
12 about this a lot in the *Fair Fight* case. It was made quite clear that
13 HAVA, no private right of action; okay?
14 MR. TYSON: Yes.
15 JUDGE JONES: If they wanted the same thing for Section
16 2, would that have been just as clear?
17 MR. TYSON: Well, Your Honor, we'd submit Section 12 is
18 because Section 12 matches up very well with the enforcement regime in
19 HAVA of saying this is the kind of case the Attorney General can bring
20 and in that scenario it was very specific in the Voting Rights Act
21 that this is who can bring a case under Section 2. Sections 3 and 14
22 just say if somebody brings a case here's kind of the relief you can
23 get if you're trying to enforce the voting guarantees of the
24 Fourteenth and Fifteenth Amendments, which is very different than
25 saying an aggrieved person can bring this case. So we think it's more

1 like the *Gonzaga* case in that scenario or the HAVA statutory setup
2 than it is anything else.
3 JUDGE BRANCH: I know you had a final -- I'm sorry.
4 You had a final point.
5 MR. TYSON: My final point was actually the
6 supplemental authority, Your Honor. I'm happy to answer additional
7 questions if you all have them.
8 JUDGE GRIMBERG: Let me ask you this, Mr. Tyson. We
9 were fortunate to have Judge Branch here as part of this panel, but we
10 are operating as a District Court. Can you give me another context
11 outside of the VRA statute in which a District Court has overturned 50
12 plus years of an implied private right of action?
13 MR. TYSON: Your Honor, I don't believe that I can. I
14 think that the key word there is "overturned," though, so I think in
15 this case it's an assumption, there's not an overturning necessarily.
16 JUDGE GRIMBERG: Well, overturning in the context of the
17 fact that we have 50 plus years of case law that has implied that
18 private right.
19 MR. TYSON: Certainly. I think the *Arkansas NAACP* case
20 is the best one I can point you to on that. I have tried, myself, to
21 look at other contexts to see if there was something else. There was
22 long assumed facts that have been dealt with. I don't have a case on
23 it, but the only one I could come up with was the assumption that
24 compliance with the Voting Rights Act is a compelling government
25 interest in the redistricting context. There's a lot of assumptions

1 about that, but not necessarily a decision on that point so making a
2 decision on that point, we don't believe, would be overturning things,
3 it would just be recognizing what's in the text.
4 JUDGE JONES: I guess what Judge Grimberg's saying is
5 something similar to what they said in the *Singleton vs. Merrill*
6 case - and I had this written down - holding that Section 2 does not
7 provide a private right of action would work a major upheaval in the
8 law - and here's the point I think Judge Grimberg may be talking
9 about - "and we're not prepared to step down that road today." I
10 guess is this panel prepared to step down -- are you asking us to step
11 down that road?
12 MR. TYSON: We are, Your Honor. And I think that one
13 of the things to remember is this doesn't mean that Section 2 claims
14 can't be brought. The Department of Justice and the Attorney General
15 have shown no hesitancy to sue the State of Georgia when they believe
16 there's something going on here that needs to be addressed and the
17 only issue here is this case even would continue on the constitutional
18 grounds that are before this Court. The only issue is does the
19 Section 2 portion continue or does the Attorney General need to get
20 involved to bring that Section 2 piece in?
21 If the Court doesn't have any further questions, I'll
22 reserve my time. Thank you, Your Honor.
23 JUDGE BRANCH: Mr. Rosenberg.
24 MR. ROSENBERG: Thank you, Your Honor -- Your Honors.
25 It's a pleasure to be here also. It's my first time down here in a

1 long time. I'm from New Jersey. My name is Ezra Rosenberg. I'm with
2 the Lawyers' Committee for Civil Rights Under Law and we represent the
3 plaintiffs.
4 I begin with the *Morse* case and the reason I begin
5 there -- defendants in their brief argued that we should begin with
6 the text. Well, I think we can be excused if there is a basis upon
7 which to save Your Honors from reinventing the wheel to show that
8 there is, in fact, a dispositive Supreme Court case on the issue and
9 *Morse* is that case. We understand that it's a two-justice lead
10 opinion, but there's also a three-justice concurring opinion, and the
11 concurrence and the lead are identical on the issue that there is a
12 private right of action under Section 2.
13 JUDGE JONES: Tell me why Mr. Tyson's wrong when he
14 said it's *dicta.*
15 MR. ROSENBERG: I'm sorry, Your Honor?
16 JUDGE JONES: Tell me why Mr. Tyson's wrong when he
17 says it's *dicta*. He says what they say in *Morse* is *dicta*.
18 MR. ROSENBERG: Well, let me read, Your Honor, the lead
19 opinion which says that - let me get that - "Congress has not only
20 ratified *Allen's* construction of Section 5 and subsequent
21 reenactments," and cites the House Report, "but extended its logic to
22 other provisions of the Act. Although Section 2, like Section 5,
23 provides no right to sue on its face, the existence of the private
24 right of action under Section 2 has been clearly intended by Congress
25 since 1965" - and they cite to the Senate Report and then conclude -

1 "Based on that rationale, that it would be anomalous, to say the
2 least, to hold that both Section 2 and Section 5 are enforceable by
3 private action, but Section 10 is not."
4 Justice Breyer in the concurrence, joined in by
5 Justices O'Connor and Souter, specifically refers, then, to the
6 Court's discussion of *Allen* and, in fact, cites to the pages that the
7 Court talks about *Allen* as the basis and states in parens "(Congress
8 established private right of action to enforce Section 5), applies
9 with similar force not only to Section 2 but also to Section 10,"
10 cites to the Senate Report for the proposition that "Implied private
11 right of action to enforce Section 2 has been clearly intended by
12 Congress since 1965," precisely the same authority and precisely the
13 same language used by the majority.
14 It goes on to say "I do not know why Congress would
15 have wanted to treat enforcement of Section 10 differently from
16 enforcement of Sections 2 and 5, precisely the same language that was
17 used by the majority," and concludes "Congress intended to establish a
18 private right of action to enforce Section 10, no less than it did to
19 enforce Section 2 and Section 5," precisely the reason. Then we go to
20 the *Marks*' case.
21 JUDGE GRIMBERG: But does that answer the question that
22 Judge Jones asked?
23 MR. ROSENBERG: I'm sorry, Your Honor?
24 JUDGE GRIMBERG: Does that answer the question that
25 Judge Jones asked is why is that not *dicta?*

1 MR. ROSENBERG: The reason it's not *dicta* is because
2 that rationale was essential to the holding that Section 10 also
3 creates an implied cause of action. The Supreme Court has defined
4 *dicta* in the *Permian Basin* case that defendants have cited in their
5 brief. For example, there they said *dicta* often takes the form of
6 "if" propositions, if on the other hand this was that sort of case,
7 and the Supreme Court in *Permian Basin* says that's the quintessential
8 *dicta* example. If a proposition is necessary to uphold the conclusion
9 that the Court reaches, then it's not *dicta*.
10 JUDGE JONES: Mr. Tyson's saying that was not the
11 issue -- that was not the main issue in front of the *Morse* court.
12 MR. ROSENBERG: It was not the -- the issue of whether
13 or not Section 2 created a private right of action was not the issue
14 that was in front of the court, but they reached that issue in order
15 to reach the ultimate conclusion that Section 10 did imply a private
16 right of action.
17 JUDGE JONES: Well, what's the definition of *dicta*?
18 MR. ROSENBERG: I'm sorry, Your Honor?
19 JUDGE JONES: What's the definition of *dicta?*
20 MR. ROSENBERG: The definition of *dicta* is that which
21 is not necessary to reach the conclusion of the Court.
22 JUDGE JONES: Okay. And that was not the main issue in
23 front of that court.
24 MR. ROSENBERG: But it was necessary to reach that
25 issue in the sense that if they had found, for example, that Section 2

1 did not create an implied cause of action then that would undercut
2 whether or not Section 10 would. And even if it's *dicta*, as Judge
3 Branch I think alluded to, I think she was perhaps alluding to the --
4 JUDGE JONES: I agree totally with Judge Branch.
5 MR. ROSENBERG: Excuse me?
6 JUDGE JONES: I agree totally with Judge Branch.
7 MR. ROSENBERG: I understand there's *dicta* and then
8 there's *dicta* and then there's Supreme Court *dicta* and the Eleventh
9 Circuit has said that in the *Schwab vs. Cox* case.
10 JUDGE BRANCH: But surely you recognize if we think
11 this is *dicta* -- *Morse* was decided under the old permissive *ancien*
12 *regime* for identifying implied causes of action that the Supreme Court
13 later did away with in *Alexander v. Sandoval*. So if we think it's
14 *dicta*, and given how much the doctrine has changed in the intervening
15 years, should we really be giving the Court's statement in *dicta* in
16 *Morse* significant weight?
17 MR. ROSENBERG: Well, Your Honor, even if you believe
18 it's *dicta* - and I'm certainly ready and will be arguing that it
19 doesn't matter in terms of the ultimate conclusion here - but the fact
20 of the matter is the Eleventh Circuit has twice indicated that *Morse*
21 is at least guidance, if not controlling, albeit in non-precedential
22 opinions of -- I think it's the Fox vs. Strange -- *Ford vs. Strange*
23 and the *Alabama NAACP* case which was vacated on other grounds. But in
24 both of those cases the Eleventh Circuit said that *Morse* did control
25 the decision of whether or not there was implied cause of action.

1 JUDGE BRANCH: At best that would be persuasive, that's
2 not controlling.
3 MR. ROSENBERG: It is absolutely not controlling because
4 one was not a published opinion and the other was vacated on other
5 grounds. But Your Honors could also do what Judge Jones did in the
6 *Alpha Phi* case is understand that, at the minimum, *Morse* provides
7 guidance and until there is further direction from a higher court on
8 the issue of this motion that says there's no implied right of
9 action --
10 JUDGE JONES: I had some concerns when you started off
11 with *Morse* asking us it to be controlling. Maybe I misunderstood you.
12 But when you started off with that argument, I'll say to myself, well,
13 I've not accepted that as controlling. I only took it as persuasive
14 in my prior order.
15 MR. ROSENBERG: I understand, Your Honor, and I'm ready
16 to jump into the statutory construction just to say that --
17 JUDGE JONES: That might not be a bad idea.
18 MR. ROSENBERG: Okay. I will do that.
19 JUDGE JONES: I can only speak for myself. Judge
20 Branch and Judge Grimberg may want to talk about it more.
21 MR. ROSENBERG: Your Honors, we don't need the
22 controlling authority or even the persuasive authority of *Morse*
23 because if Your Honors apply the *Sandoval* framework to this case, it
24 is easily based, quite frankly, on the text and structure in the
25 statute, even though you can go to look at the legislative history and

1 the legal context.
2 On the first prong of *Sandoval,* whether or not the
3 statute creates -- has rights-creating language, not even Judge
4 Rudofsky in his thorough, we believe, wrong opinion ventured to
5 address the issue of whether or not there was rights-creating language
6 and no court has ever found there is not rights-creating language in
7 Section 2 and there clearly is. Section 2(a) provides that any
8 citizen of the United States is protected against their right to vote
9 being denied or abridged on account of race, that is, race that is
10 rights-creating language.
11 Now, defendants say, oh, but Section 2(b) talks in
12 terms of members of a group having to show that they were denied
13 less-than-equal opportunity to participate in the political process
14 and that creates some sort of group right. Well, *LULAC vs. Perry* and
15 *Shaw vs. Hunt* both say explicitly that this is an individual right
16 that's created under Section 2(a) of the Voting Rights Act, not a
17 group right. It makes absolutely a lot of sense, quite frankly, for a
18 court to create an individual right against discrimination and then
19 say in another section one of the ways you have to prove this right,
20 as it does in 2(b), is to show some sort of impact on the group of
21 which you're saying is discriminated against, that is not a surprising
22 way for the Congress to have drafted this statute.
23 Interestingly, one of the cases that defendants rely on
24 in support of this group theory is *Gingles*. *Gingles* was a case that
25 was brought by an individual plaintiff so there's absolutely no case

1 that supports the proposition that there is a group right only. There
2 is a creation of an individual right under Section 2(a) of the Voting
3 Rights Act.
4 Then we go to the second prong of the *Sandoval*
5 framework, which is whether or not the statute indicated an intent of
6 Congress to create remedies for individuals and we have set forth
7 Sections 3(a), 3(b), 3(c), Section 14(e), that group of provisions
8 talk first under Section 3(e) adds the phrase "aggrieved person who
9 has initiated proceedings under any statute to enforce the rights
10 guaranteed under the Fourteenth and Fifteenth Amendment," and last
11 year, Your Honor, Judge Grimberg in the *Rose* v. *Raffensperger* case,
12 relying on the *United States vs. Marengo County,* stated that of course
13 an action under Section 2(a) is an action to enforce those guarantees
14 under the enforcement clause of the Fifteenth Amendment.
15 JUDGE BRANCH: What about the fact that Section 2
16 prohibits a huge swath of conduct that the amendments do not? How
17 then does the statute enforce the voting guarantees of the amendments
18 rather than an entirely distinct set of rights that are strictly
19 statutory in nature?
20 MR. ROSENBERG: I'm sorry, Your Honor. I may have lost
21 the beginning of your question.
22 JUDGE BRANCH: What about the fact - and this argument
23 has been raised by the defendants - that Section 2 prohibits a huge
24 swath of conduct that the amendments do not?
25 MR. ROSENBERG: Well, but Section 3(a) talks in terms

1 of initiating of proceedings under any statute to enforce the
2 guarantees so sufficiently broad. Section 14(e), which talks in terms
3 of prevailing parties other than the United States, clearly referring
4 to individuals talking about proceedings to enforce the provisions of
5 the voting guarantees of the Fourteenth and Fifteenth Amendments, so
6 those are commensurately broad with Section 2(a).
7 JUDGE BRANCH: But Section 2 goes beyond the
8 amendments, I would assume that you would concede that there -- with
9 Section 2, for example, facially neutral redistricting that has the
10 effect of vote dilution, even when there was no intent to discriminate
11 on the basis of race, that is, in fact, activity that statutes
12 reaching that goes beyond the amendments?
13 MR. ROSENBERG: I'm sorry, I misunderstood your
14 question.
15 It goes beyond the amendments. The results prong that
16 was created in 1982 by Congress in response to the *Mobile* case, it
17 specifically does not require a finding of intent. However, it is
18 clear from the law - and Judge Grimberg in the *Rose* case so found -
19 that under the enforcement clause of the Fifteenth Amendment, it's
20 also true under the enforcement clause of the Fourteenth Amendment,
21 Congress is empowered to go beyond just curing the specific violation
22 that had been prohibited under the Fifteenth Amendment, but can
23 provide legislation that deters acts that can provide what is called
24 prophylactic measures and this is set forth in the *Nevada Human*
25 *Resources vs. Hibbs* case, 538 US -- I think it's at 721, Page 727.

1 It's set forth in the *United States vs. Marengo County* case, Judge
2 Wisdom's opinion in 1984 that was relied on by Judge Grimberg in the
3 *Rose* case. In both of those cases, in addition to *South Carolina vs.*
4 *Katzenbach,* a slew of cases recognized the proposition that Congress
5 has the power to go beyond simply curing a violation of the Fourteenth
6 or Fifteenth Amendment but can provide prophylactic measures.
7 JUDGE BRANCH: Let me make sure that you're
8 understanding my question. So I'm not questioning that -- I'm not
9 asking a question about the validity of Section 2 as a statutory
10 provision, I'm not challenging the constitutionality of it. What I'm
11 asking is: As you are here trying to establish that a Section 2
12 challenge is a proceeding to enforce the guarantees of the Fourteenth
13 and Fifteenth Amendments and Section 2 goes beyond that so how do you
14 address the defendants' argument that because the statute goes further
15 it is not, in fact, a proceeding to enforce the voting guarantees of
16 the Fourteenth and Fifteenth Amendments?
17 MR. ROSENBERG: And my answer, Your Honor, is that the
18 case law supports the proposition that doing things that go beyond the
19 strict terms of the Fourteenth and Fifteenth Amendments are, in fact,
20 legitimate and constitutional means by which Congress enforces those
21 guarantees and I think the case law, including the *Marengo* case,
22 including the *Nevada Human Resources* case, including *South Carolina*
23 *vs. Katzenbach* fully supports that.
24 We also have Section 12(f) of the Voting Rights Act
25 which provides an additional basis on which to -- that indicates

1 congressional intent to create a private right of action for Section
2 2. Defendants rely on the *Touche Ross* case for the proposition that
3 you can't use a jurisdictional provision to create a right and that's
4 true, but we're not saying that 12(f) creates the right. 2(a) creates
5 the right. 12(f) is simply another provision, together with Section 3
6 and Section 14(e), that shows congressional intent to create remedies
7 and interestingly --
8 JUDGE JONES: Why didn't Congress just say under
9 Section 2 there's a private right of action? You're arguing that's
10 what their intent was, that I need to go back to Section 12 and, I
11 think, Section 4. Why don't they just say it? I was always taught to
12 read it as it is.
13 MR. ROSENBERG: Judge Jones, I think that goes back to
14 the legal context of when the Voting Rights Act was first adopted in
15 1965 and first amended -- or second time amended in 1975, which was an
16 error, as Judge Branch has indicated, when the courts took a liberal
17 view -- a much more liberal view towards the implying of rights of
18 action to a statute. So the Congress at that time did not think it
19 was needed, particularly when it saw the *Allen* case, for example, in
20 1969 finding an implied right of action for Section 5 and therefore
21 when Your Honors look at the legislative history - and Your Honors are
22 completely allowed to look at the legislative history in this case, I
23 can get into that in a moment - that's why the Senate Report in 1975
24 and the Senate and House Reports in 1982 specifically say that there's
25 an implied right of action here. There's no need for them to do

1 otherwise. And, in fact, if they were concerned with something like
2 the *Allen* court or in 2006 when they -- I'm sorry. Yes, in 2006, when
3 they amended the statute again in light of the *Morse* case, which at
4 least was out there, and the *Mixon vs. Ohio* case, which was a Sixth
5 Circuit case which specifically said in so many words that there is a
6 private right of action under Section 2, in 2006 when Congress looked
7 at the statute again and amended the statute they could have at that
8 point said, "Wait. Hold on a second. You've implied a cause of
9 action here, that's not so," and they didn't do that. Not only that,
10 but in 2006 they actually amended 14(e), one of the provisions that
11 we're relying on to show congressional intent of implying a remedy, to
12 expand it to include not just attorney's fees for prevailing parties
13 other than the United States, but expert fees. So everything in the
14 legislative history and in the legal context argues in favor of
15 implied right of action. I don't know where I am on my time.
16 JUDGE JONES: How much time does he have, Ms. Wright?
17 Where are we?
18 THE CLERK: Two and a half minutes.
19 MR. ROSENBERG: Okay. Your Honors can decide this case
20 on the basis of the text and structure of the statute; however, it
21 would be in our favor. In *Sandoval,* the Court could not do that
22 because there was absolutely not a scintilla of evidence of
23 rights-creating language or remedies-creating language because there
24 they were talking about enforcing a regulation and the statute that
25 they were claiming under was simply a statute that empowered an agency

1 to promulgate the regulation, no rights-creating language, no
2 remedy-creating language. We have the total opposite here.
3 And even if Your Honors have some question about
4 whether Sections 3 and 14(e) and 12(f) are sufficient *indicia* of
5 congressional intent to imply a remedy that just means that Your
6 Honors can look at other things such as legislative history and legal
7 context because nothing in *Sandoval* said contrary. In fact, what
8 *Sandoval* said we don't do that here because there's no evidence
9 whatever - the word was "whatever" - of language implying a cause of
10 action so here you can do that.
11 In fact, in virtually every one of the cases that
12 *Sandoval* relied on, *Cannon vs. Chicago*, *Transamerica, Virginia Bank*
13 *Shares, Touche Ross,* in every one of those cases the Court went to
14 look at the legislative history. And if looking at the legislative
15 history here and at the 1982 Senate Report, in particular, which isn't
16 just any old Senate Report, it is a Senate Report which the Supreme
17 Court has said is the authoritative word on how to interpret Section
18 2(a) of the Voting Rights Act and as recently as *Brnovich* Justice
19 Alito also recognized that the Senate Report, in particular, has had a
20 place in the history of the Voting Rights Act unlike most
21 congressional reports.
22 I'm happy to field any further questions from Your
23 Honors.
24 JUDGE BRANCH: Thank you.
25 MR. ROSENBERG: Thank you very much.

1 JUDGE BRANCH: All right. Mr. Tyson, you have reserved
2 5 minutes.
3 MR. TYSON: Thank you, Your Honor.
4 I'll just begin, I think, with a little bit of context
5 that might be helpful because I think it's important to remember that
6 the amendments to Section 2 in the 1982 renewal came after the *Bolden*
7 case, as Mr. Rosenberg has referenced, that did say that Section 2, as
8 it existed before that point, was coextensive with the Fifteenth
9 Amendment and there was nothing beyond that. There was also a
10 question in *Mobile* vs. *Bolden* whether or not there was a private right
11 of action under Section 2. Congress then amended the statute. It did
12 not expressly say whether there was a private right of action. It
13 expanded the scope well beyond the constitutional pieces of the
14 puzzle.
15 But then I think what you see is a relatively limited
16 use of Section 2 over time up until the *Shelby County* case in 2013
17 because up until *Shelby County* there was another mechanism available
18 with Section 5 and the preclearance process to address the types of
19 issues in voting practices that now plaintiffs are using Section 2 to
20 address.
21 So to kind of get back to our larger point of, you
22 know, why revisit those after 45, 50 years, I think part of that is
23 there now is a broader use of Section 2 today than there was prior to
24 *Shelby County* just because of the shift that's happened over time.
25 I think it's also important for Mr. Rosenberg's

1 discussion of the various pieces here that trying to cobble together,
2 well, maybe it's in 3, maybe it's in 12(f), maybe it's in 14(e), we're
3 trying to put all these pieces together cuts against the whole point
4 of *Sandoval* which is there has to be some clear intent by Congress to
5 create this private right of action and when you look at it in context
6 of the very clear right created for the Attorney General, the trying
7 to cobble together of individual rights to bring this, it just doesn't
8 hold the weight that the plaintiffs are trying to make it hold on this
9 particular case.
10 *Gingles*, to address the point, was brought by an
11 individual. But as the courts are aware, when you bring a Section 2
12 case, it's not just that "I was disenfranchised." There has to be a
13 broader practice or a broader issue that it's disenfranchising voters,
14 which is the nature of the group right that's included in (b) of
15 Section 2, that's what we focused on, not just one individual voter,
16 we're focused on groups, which is different than the normal
17 antidiscrimination cases where one person can bring an
18 antidiscrimination case in other contexts. So, again, this is where
19 this is very different.
20 I think, again, going back to the *Morse* piece of the
21 puzzle, I think that the language Mr. Rosenberg quoted is exactly what
22 I was arguing earlier, that Justice Breyer's concurrence argues from
23 *Allen* to Section 2 and Section 10. It doesn't argue from Section 2 to
24 Section 10. The two justices' concurrence did and that's clear. But
25 I don't think we can point clearly to five votes that show that that's

1 binding.

2 Judge Jones, you asked about obviously persuasive to

3 have the Supreme Court look at that. Just, again, it was a 1996 case.

4 We had *Sandoval* come out several years later that very clearly said

5 this is not how we do private rights of action and so although we had

6 the *Allen* kind of regime and how we approached Section 5, we now have

7 a different way that we look at in private rights of action today, and

8 without binding precedent that says that that private right exists the

9 Court can't continue -- you need to decide whether that right actually

10 exists instead of continuing to assume as courts have done over time.

11 So with that, Your Honors, I think that's the main

12 points I wanted to make in rebuttal. If you have further questions,

13 I'm happy to answer them. I appreciate you alls consideration today.

14 JUDGE BRANCH: Thank you, Mr. Tyson.

15 Thanks to all of you for being here. We have your

16 arguments. We will take the case under advisement and court is

17 adjourned.

18 (Proceedings concluded at 10:46 a.m.)

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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF GEORGIA
3 CERTIFICATE OF REPORTER
4
5 I do hereby certify that the foregoing pages are a true and
6 correct transcript of the proceedings taken down by me in the case
7 aforesaid.
8
9
10 This the 4th day of August, 2022.
11
12
13 /S/ Alicia B. Bagley
14 ALICIA B. BAGLEY, RMR, CRR
OFFICIAL COURT REPORTER
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