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June 9, 2023

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

Re: Supplemental Authority in *Arkansas NAACP et al., v. Arkansas Board of Apportionment et al.*

Dear Mr. Gans,

Pursuant to F.R.A.P. 28(j), Appellants respectfully submit supplemental authority regarding whether private parties may enforce Section 2 of the Voting Rights Act (“Section 2”).

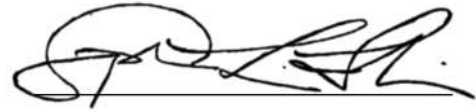
On June 8, in a Section 2 case brought solely by private plaintiffs, the Supreme Court affirmed a three-judge panel’s determination that “plaintiffs demonstrated a reasonable likelihood of success on their claim that [Alabama’s congressional redistricting plan] violates §2.” *Allen v. Milligan*, Nos. 21-1086 and 21-1087, 599 U.S. ___ (2023), slip op. at 9 (Exhibit A).

Milligan implicitly recognized a private right of action to enforce Section 2, pointing to 37 years of jurisprudence—including several private plaintiff suits—under the *Gingles* framework that “Congress has never disturbed.” *Id.* at 11. The Court in *Milligan* would not have affirmed an order requiring Alabama to redraw its congressional map if it lacked jurisdiction. Even the principal dissent recognized this is at most a waivable non-jurisdictional issue. *Cf. id.* at 47 n.22 (Thomas, J., dissenting) (noting question “whether §2 contains a private right of action” was “argued below but was not raised in this Court,” and not questioning the jurisdiction to reach the merits). This is fatal to Defendants-Appellees because the District Court found that the private right of action “issue was waived by Defendants.” *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 916 (E.D. Ark. 2022).

Also, on June 8, the Supreme Court held that private plaintiffs can enforce their rights created by federal statute via 42 U.S.C. § 1983. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, No. 21-806, 599 U.S. ___ (2023) (Exhibit B). The Court held that the presumption of § 1983 enforceability for federal statutory rights cannot be rebutted merely by pointing to “a detailed enforcement regime that also protects those interests,” unless that enforcement regime is “incompatible with individual enforcement under §1983.” *Talevski*, slip op. at 19 (citation omitted). *Talevski* clarifies that § 1983 provides another basis for Appellants to enforce their

Section 2 rights because the statute contains unambiguous rights-creating language and there is no detailed enforcement regime incompatible with individual enforcement.

Respectfully,

A handwritten signature in black ink, appearing to read 'S. Lakin', written over a horizontal line.

Sophia Lin Lakin

Attorney for the Appellants

American Civil Liberties Union
Foundation, Inc.