

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

MISSOURI PROTECTION & ADVOCACY)
SERVICES, VOZKC, Susana Elizarraraz,)
Manuel Rey Abarca IV, and Barbara Sheinbein;)

Plaintiffs,)

v.)

Case No. 2:22-cv-04097-RK)

JOHN R. ASHCROFT, in his official capacity as)
the Missouri Secretary of State;)
Kansas City Board of Election Commissioners;)
St. Louis County Board of Elections; and)
Boone County Clerk;)

Defendants.)

PLAINTIFFS' STATUS REPORT

The plaintiffs submit this status report in accordance with the Court's January 17, 2024 Order. Doc. 60.

On October 25, 2022, this case was held in abeyance pending the Eighth Circuit's decision in *Arkansas United, et al. v. Thurston, et al.*, No. 22-2918 (8th Cir.). Doc. 53. On January 26, 2023, in *Arkansas United, et al. v. Thurston, et al.* after appellants' opening brief was filed but before appellee's responsive brief was filed, the parties filed a joint motion requesting that the case be held in abeyance pending the Eighth Circuit's decision in *Arkansas State Conference NAACP, et al. v. Arkansas Board of Apportionment, et al.*, No. 22-1395 (8th Cir.). *Arkansas State Conference NAACP, et al. v. Arkansas Board of Apportionment, et al.* raised the issue of whether Section 2 of the Voting Rights Act is privately enforceable. This case and *Arkansas United, et al. v. Thurston, et al.* raise a similar issue of whether Section 208 of the Voting Rights Act is privately enforceable. A motion to resume *Arkansas United, et al. v.*

Thurston, et al. and remove it from abeyance status was filed by appellees on August 30, 2023, in light of the United States Supreme Court ruling in *Allen v. Milligan*, 143 S. Ct. 1487 (2023), as well as upcoming elections in Arkansas. In their motion, appellees argued that there was no need to continue to hold the case in abeyance because *Milligan* confirmed there is an implied private right of action for violations of the Voting Rights Act. In *Milligan*, where a challenge was brought by private parties under Section 2 of the Voting Rights Act, the United States Supreme Court upheld a lower district court's decision to strike down Alabama's 2020 congressional map as racially gerrymandered. Appellants opposed the motion. The motion was denied on September 14, 2023, and *Arkansas United, et al. v. Thurston, et al.* remains in abeyance.

Arkansas State Conference NAACP, et al. v. Arkansas Board of Apportionment, et al., No. 22-1395, was argued on January 11, 2023. On November 20, 2023, a three-judge panel of the Eighth Circuit entered its opinion and judgment upholding the district court's judgment. *See Arkansas State Conference NAACP, et al. v. Arkansas Bd. of Apportionment, et al.*, 86 F.4th 1204 (8th Cir. 2023). Despite fifty years of precedent in which courts, including the Eighth Circuit and the United States Supreme Court, decided cases in which claims were premised on a private right of action under Section 2 of the Voting Rights Act, the Eighth Circuit panel held that Section 2 of the Voting Rights Act is not privately enforceable. *See generally id.* On December 11, 2023, appellants filed a petition for *en banc* rehearing and also for rehearing by panel. On December 26, 2023, appellees filed their response in opposition to the petition for rehearing *en banc*. The request for rehearing is currently pending.

While dismissing the appellants' claims, the Eighth Circuit panel recognized that there had been a "request to add a § 1983 claim to their complaint." *Arkansas State Conference NAACP*, 86 F.4th at 1218. The theory being that voters can enforce Section 2 of the Voting

Rights Act as it is a “law” of the United States. *See id.* (citing 42 U.S.C. § 1983). There, the Eighth Circuit determined that because a request to amend to add a § 1983 claim had not been presented to the district court, they “decline[d] to say anything further about what would have happened if the advocacy groups had acted sooner” and requested to amend the complaint to add such a claim. *Id.* (citing *Steele v. City of Bemidji*, 257 F.3d 902, 905 (8th Cir. 2001) (explaining that plaintiffs cannot amend their complaint on appeal because they need to ask the district court for permission first)).

Plaintiffs await the Eighth Circuit’s ruling on the pending petition for rehearing in *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment*.¹

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¹ Notably, Plaintiffs are preparing a motion to amend their complaint in this case accordingly.

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2024, a copy of the foregoing was filed electronically and served on all counsel of record by operation of the CM/ECF system.

/s/ Gillian R. Wilcox