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Legal Sidebar

Recent Developments in the Rights of Private Individuals to Enforce Section 2 of the Voting Rights Act

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Cases pending in the federal courts could significantly affect the Voting Rights Act (VRA). Most prominently, in *Allen v. Milligan*, the Supreme Court is considering standards that reviewing courts apply in determining whether redistricting maps comport with Section 2 of the VRA. Another case working its way through the courts, however, may affect *who* can sue to enforce Section 2. In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit) is considering whether Section 2 of the VRA confers a private right of action. Last year, a federal district court held that Section 2 does not confer such a right. Until this ruling, lower courts have generally permitted private plaintiffs—including individuals, nonprofit organizations, and political parties—to file enforcement actions under Section 2. In 2021, however, Justice Neil Gorsuch suggested in a concurring opinion in *Brnovich v. Democratic National Committee (DNC)* that it remains "an open question" whether Section 2 may be enforced by private parties. *Arkansas State Conference NAACP* has drawn attention because, if other courts agree with the district court ruling, then only the U.S. Attorney General will be permitted to bring such lawsuits in the future.

This Legal Sidebar begins with an overview of Section 2 of the VRA, including briefly describing recent Supreme Court jurisprudence concerning its application. It then discusses the district court ruling in this dispute and the arguments before the Eighth Circuit. It concludes by noting potential outcomes and considerations for Congress.

Section 2 of the VRA

Section 2 of the VRA prohibits discrimination in voting based on race, color, or membership in an enumerated language minority group. The statute provides a right of action for the federal government to challenge state discriminatory voting practices or procedures, including those alleged to diminish or weaken minority voting power. Courts have also assumed that Section 2 suits can be brought by private citizens and organizations.

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Until recently, Section 2 lawsuits primarily challenged redistricting maps, known as *vote dilution* cases. In certain circumstances, the Supreme Court has interpreted Section 2 to require the creation of one or more "majority-minority" districts in which a racial or language minority group comprises a voting majority. In those cases, the creation of such districts can avoid minority vote dilution by helping ensure that the racial or language minority group is not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of choice. In *Thornburg v. Gingles*, the Supreme Court held that a violation of Section 2 is established if, based on the "totality of the circumstances" and "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." (In the pending case, *Allen v. Milligan*, the Court is evaluating the *Gingles* standard.)

Plaintiffs have invoked Section 2 more recently to challenge other types of state voting and election administration laws, which are often called *vote denial* cases. The 2013 Supreme Court ruling in *Shelby County v. Holder* has likely contributed to the expanded reliance by plaintiffs on Section 2 in this context. In *Shelby County*, the Court invalidated the coverage formula in Section 4(b) of the VRA, thereby rendering the preclearance requirements in Section 5 inoperable. Since then, plaintiffs have increasingly turned to Section 2 to challenge state voting and election administration laws, such as absentee voting procedures and voter identification requirements.

In *Brnovich v. Democratic National Committee (DNC)*, the Supreme Court interpreted Section 2 for the first time in this context, holding that two Arizona voting laws—restrictions on out-of-precinct voting and third-party ballot collection—do not violate Section 2. In *Brnovich*, Justice Gorsuch, joined by Justice Thomas, wrote a concurrence, asserting that the Court's Section 2 cases "have assumed—without deciding—that the [VRA] furnishes an implied cause of action under §2." In support, the concurrence cited a four-Justice plurality opinion in the 1980 Court decision *City of Mobile, Alabama v. Bolden*, which "[a]ssum[ed], for present purposes, that there exists a private right of action to enforce" Section 2. Further, Justice Gorsuch's concurrence in *Brnovich* stated that lower courts have likewise regarded this issue "as an open question," citing a 1981 U.S. Court of Appeals for the Fourth Circuit ruling in *Washington v. Finlay*.

Arkansas State Conference NAACP v. Arkansas Board of Apportionment: Federal District Court Ruling

In February 2022, the U.S. District Court for the Eastern District of Arkansas held in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment* that only the U.S. Attorney General, and not individuals or private organizations, can sue to enforce Section 2 of the VRA. In so holding, the court acknowledged in a footnote that it was "the first federal court in the nation" to do so.

In this case, the Arkansas State Conference of the NAACP and the Arkansas Public Policy Panel sought to preliminarily enjoin a 2021 state legislative redistricting map, alleging that the map creates an insufficient number of majority-minority districts, "dilut[ing] Black voting strength in violation of Section 2." After observing that the challengers appeared to have presented "a strong merits case," the district court determined that it could not reach the merits in this case because only the U.S. Attorney General can bring such a claim. That is, the court concluded that it did not have the requisite subject-matter jurisdiction over the suit because Section 2 does not confer a private right of action.

As a threshold matter, in response to the challengers' contention that, in the absence of explicit text, the district court should "judicially imply" a private right of action under Section 2, the court noted that Justice Gorsuch's concurrence in *Brnovich* observed that this issue is an "open question." In endeavoring to answer that question, the district court explained that it would look to relevant Supreme Court precedent, which has illustrated that implied private rights of action are "extremely disfavored." The court

reasoned that if Congress wants a private party to have the ability to enforce a federal law, "Congress should express that desire in the statute." In accordance with a 2001 Supreme Court ruling, *Alexander v. Sandoval*, the district court explained that two conditions must be present in a federal statute before a private litigant can bring an enforcement suit based on an implied private right of action: Congress must have included "rights-creating language" and Congress must have set forth "a private remedy."

Applying those requirements, the district court determined that it need not ascertain whether Section 2 contains "rights-creating language" because even if it did, the statute does not contain "a private remedy." Applying *Sandoval*, the court analyzed "the text and structure" of the statute "to determine whether it displays an intent to create … a private remedy." Observing that Section 2 "is completely silent" regarding available remedies, the court expanded its examination to the remainder of the VRA. In so doing, the court determined that in Section 12 of the law, Congress set forth the only remedial language applicable to Section 2. As "[a] comprehensive reading of § 12 clearly establishes that it is focused entirely on enforcement proceedings instituted by the Attorney General of the United States," the court therefore concluded that Congress intended for the U.S. Attorney General to enforce Section 2 and not private litigants. The court emphasized, however that its ruling did not preclude voters and other private parties from filing lawsuits to enforce their constitutional rights to equal protection and the right to vote under the Fourteenth and Fifteenth Amendments, respectively.

Finally, the court criticized a Statement of Interest filed by the Department of Justice (DOJ). DOJ had asserted that "limited federal resources" impede DOJ's enforcement of Section 2, thereby necessitating enforcement by private entities. Dubious of this statement, the district court noted that the U.S. Attorney General in 2021 announced that DOJ intended to "rededicate" its resources to enforcing the VRA and double its enforcement staff.

Appeal Pending in U.S. Court of Appeals for the Eighth Circuit

The challengers in this case—the Arkansas State Conference NAACP and the Arkansas Public Policy Panel—appealed the district court's ruling to the Eighth Circuit. In January 2023, the appellate court heard oral argument.

On appeal, the challengers argued that controlling court precedent resolves the issue as to whether Section 2 provides a private right of action. In hundreds of cases since the VRA was enacted in 1965, all courts to have considered this issue have concluded as much and have allowed the suits to go forward, according to the challengers. Moreover, the challengers contended that the district court's reliance on *Sandoval* is misplaced because *Sandoval* did not overrule another Supreme Court decision—*Morse v. Republican Party of Virginia*—that held that private litigants can enforce Section 10 of the VRA, which prohibits poll taxes. The challengers argued that the Court's ruling in *Morse* relied on a majority of the Justices recognizing that Section 2 provides a private right of action. To conclude otherwise, the challengers contended, would necessitate reversal of *Morse*. Further, the challengers maintained that even if the *Sandoval* standard applies in this case, the language and text of Section 2 meets its strict requirements. Specifically, they argued that, by protecting the "rights of any citizen … to vote" without racial discrimination, Section 2 manifests Congress's intent to establish a private right of action, as required by the first prong of the *Sandoval* standard.

In addition, the challengers argued that Sections 3 and 14(e) of the VRA provide remedies for private causes of actions to enforce Section 2, thereby satisfying the second prong of the *Sandoval* standard. For example, the challengers observed that by broadly providing for relief in "proceeding[s]" brought by an aggrieved person or the U.S. Attorney General "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment," Section 3 contemplates a private right of action for Section 2

violations. In other words, they argued, private litigants can be considered "aggrieved persons," and Section 2 lawsuits can be considered "proceedings" to enforce a statute designed to enforce the Fourteenth and Fifteenth Amendments. Likewise, the challengers contended that by authorizing prevailing parties "other than the United States" to be awarded attorney's fees, "Section 14(e) therefore incorporates private plaintiffs into the VRA's fee-shifting structure, including for Section 2 claims."

Finally, the challengers argued that the Supreme Court has "repeatedly recognized" that Congress has understood that Section 2 contains a private right of action. In support of their argument, the challengers note that when amending the law in 1970, 1975, 1982, and 2006, Congress gave no indication that it disagreed with courts that had found a private right of action in Section 2.

In response, the Arkansas Board of Apportionment, the Board's three members (the Arkansas Governor, Secretary of State, and Attorney General, in their official capacities), and the State of Arkansas (hereinafter collectively referred to as "the Board") maintained that Section 2 does not establish a private right of action. Applying the first prong of *Sandoval*, the Board argued that the language of Section 2 "only confers rights on minority groups in the aggregate," not a right of action to any individual voter. Further, the Board argued that Section 2 does not meet the second prong of *Sandoval* because it is silent with regard to remedies. According to the Board, Supreme Court precedent suggests that such silence in Section 2, in contrast to another section of the VRA (Section 12) that expressly provides for remedies, is a manifestation of Congress's intent not to include a private right of action in Section 2.

The Board further argued that controlling Supreme Court precedent does not suggest that Section 2 is privately enforceable. For example, the Board emphasized that, contrary to the challengers' assertions, the Court in *Morse* did not recognize a private right of action in Section 2, but instead held that such a right is established in VRA Section 10. Challengers are relying on mere dicta in *Morse* and not the holding, the Board contended. The Board also disagreed with the challengers' assertion that when last amending the provision in 1982, Congress "ratified the Supreme Court's assumption" in *City of Mobile, Alabama v. Bolden* that Section 2 established a private right of action. A mere assumption, the Board maintained, is not tantamount to the Court deciding the issue, and supports the conclusion that the private enforceability of Section 2 remains unsettled law.

Potential Outcomes and Considerations for Congress

To date, the Eighth Circuit has not issued an opinion. Should the Eighth Circuit agree with the district court in *Arkansas State Conference NAACP*, then private individuals and organizations within this circuit's jurisdiction will no longer be able to bring enforcement lawsuits under Section 2 of the VRA. Therefore, all such enforcement actions within this jurisdiction would be brought by DOJ, which has claimed to be unable to fully enforce Section 2 because of limited resources.

Since the district court's ruling in *Arkansas State Conference NAACP*, in various federal circuits, other such courts have determined or assumed, without deciding, that Section 2 *does* confer a private right of action. Ultimately, however, in those circuits where federal appellate courts agree with the district court in this case, courts in such jurisdictions would be precluded from allowing Section 2 enforcement lawsuits brought by private parties to go forward.

Regardless of how the courts rule on whether Section 2 is privately enforceable, as the district court in this case noted, private litigants will still be able to challenge discriminatory state election laws under the Fourteenth or Fifteenth Amendments. However, such claims require a showing of discriminatory intent. In contrast, Section 2 violations may be established under either a discriminatory intent test *or* a discriminatory results test, which might be easier to prove.

As this case involves a question of statutory interpretation, Congress may consider legislation that would amend the law. For example, should Congress wish to clarify that Section 2 confers to private individuals

and organizations the right to bring suit, it could amend the law to provide expressly for such a cause of action. In contrast, if Congress decides that Section 2 suits are best brought by the U.S. Attorney General, it could likewise amend the law accordingly. By way of historical example, following the Court's 1980 decision in *Bolden*, holding that Section 2 required a showing of discriminatory intent—not only a discriminatory result—Congress amended Section 2 in 1982 to overturn the effects of that ruling.

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