Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

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

Updated February 20, 2024

On November 20, 2023, the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit) in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment* affirmed a federal district court ruling that Section 2 of the Voting Rights Act (VRA) does not confer a private right of action. As a result, private individuals and organizations cannot bring suit under Section 2 of the VRA for alleged violations in states within the Eighth Circuit's jurisdiction: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Until the rulings in this case, courts have generally permitted private plaintiffs—including individuals, nonprofit organizations, and political parties—to file enforcement actions under Section 2. However, in 2021, Justice Neil Gorsuch, joined by Justice Clarence Thomas, suggested in a concurring opinion in *Brnovich v. Democratic National Committee* that whether Section 2 may be enforced by private parties remains "an open question." On November 10, 2023, before the Eighth Circuit's ruling, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) ruled that private litigants have "a right" to bring claims under Section 2, thereby creating a conflict or "split" with the Eighth Circuit. The Eighth Circuit's ruling in *Arkansas State Conference NAACP* has drawn attention because, if other circuit courts agree with the court's ruling, then only the U.S. Attorney General will be permitted to bring such enforcement lawsuits in those jurisdictions 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 recent Eighth Circuit rulings. It concludes by noting potential outcomes and considerations for Congress.

Section 2 of the VRA

Section 2 of the VRA (found at 52 U.S.C. § 10301) 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

Congressional Research Service
https://crsreports.congress.gov
LSB10954

alleged to diminish or weaken minority voting power. Courts have also assumed that Section 2 suits can properly be brought by private citizens and organizations and have considered such suits.

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 *Allen v. Milligan*, the Court affirmed 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. Under Section 5, the covered states and jurisdictions were required to obtain preclearance from either the Department of Justice (DOJ) or a three-judge panel of the U.S. District Court for the District of Columbia before implementing a change to any voting law or practice. To be granted preclearance, jurisdictions had the burden of proving that the proposed law would have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. A proposed change to a voting law would be considered to have a discriminatory effect if it would have led to *retrogression*—that is, members of a racial or language minority group would have been "worse off than they had been before the change." 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. 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 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 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 vote dilution (i.e., that the map created 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.

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 district 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 [Section] 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.

Arkansas State Conference NAACP v. Arkansas Board of Apportionment: Eighth Circuit Rulings

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, a divided three-judge panel of the Eighth Circuit affirmed the federal district court's ruling that only the U.S. Attorney General can sue to enforce Section 2 of the VRA. Applying the first prong of the *Sandoval* precedent, whether Congress created an individual right, the court determined that "[i]t is unclear whether [Section] 2 creates an individual right."

Applying the second prong of the *Sandoval* precedent—whether Congress gave private plaintiffs the ability to enforce the statute—the court emphasized that "[e]veryone agrees that [Section] 2 itself contains no private enforcement mechanism" and that the statute merely specifies unlawful conduct. Like the district court, the Eighth Circuit analyzed Section 12 of the VRA in comparison, observing that while Section 12 empowers the Attorney General to bring enforcement actions, it does not mention private litigants. The court cited an "elemental canon" of statutory interpretation, which the Supreme Court described as generally instructing courts that, "where a statute expressly provides a remedy, courts must be reluctant to provide additional remedies." Hence, the Eighth Circuit concluded that, by specifying one method of enforcement in Section 12 and remaining silent about private enforcement in Sections 2 and 12, Congress meant for Section 2 to be enforced solely by the Attorney General.

Similarly, the court rejected plaintiff's argument that Section 3 of the VRA, which provides for relief when "the Attorney General or an aggrieved person" brings suit "under any statute to enforce" constitutional voting guarantees, under certain circumstances, creates a private right of action in Section 2. The court concluded that this reference to "any statute" included only those laws "that already allow for private lawsuits"—which, pursuant to the court's analysis above, did not include Section 2. As the court

stated, by amending Section 3 to include a private right of enforcement, Congress sought "to address those cases brought pursuant to the private right[s] of action that already existed or that would be created in the future."

The court disputed the contention that the legislative history accompanying Section 2 supports finding a private right of enforcement. While acknowledging that when the law was amended in 1982, the Senate and House Judiciary Committee reports stated that Congress intended for private litigants to enforce Section 2, the court said that "[t]here are many reasons to doubt legislative history as an interpretative tool." The court concluded that the legislative history told the court "nothing" regarding "the text and structure of the Voting Rights Act." The court further concluded that elevating the importance of a committee report beyond "more than the opinions of just a few legislators would circumvent the Article I process" by prioritizing these statements over the text enacted by the full Congress.

In addition, the court concluded that judicial precedent supplied "no firm answer" as to whether Section 2 contains a private right of enforcement. Specifically, the court rejected the argument that the Supreme Court's ruling in *Morse v. Republican Party of Virginia*, interpreting Section 10 of the VRA, supports such a determination. Instead, the court observed that while five Justices of the Court agreed that Section 10 contains an implied private right of enforcement, there was not a majority opinion. Furthermore, the court emphasized that those Justices, in mere dicta, "assume[d] that a private right of action exists under [Section] 2" but with "hardly any analysis of why § 2 is privately enforceable."

Finally, the court declined to grant a late request made by the challengers to add a claim to their complaint under 42 U.S.C. § 1983, which authorizes individuals to sue for violations of their rights that are protected by the Constitution or a federal statute. As the court explained, such requests may be granted in cases where "the proper resolution is beyond any doubt." However, the court concluded that, in this case, "very little ... is beyond doubt."

On December 11, 2023, the challengers filed a petition with the court seeking a rehearing and/or an en banc rehearing. Among other things, the challengers argued that the court should reaffirm a "line of unbroken precedent" permitting private enforcement of Section 2. On January 30, 2024, the court denied the petition. A dissenting opinion, among other arguments, maintained that the three-judge panel in this case should have applied, as precedent, the Supreme Court's ruling in *Morse*. According to the dissent, a majority of the Supreme Court in *Morse* "necessarily decided that [Section] 2 is privately enforceable."

Potential Outcomes and Considerations for Congress

As a result of the Eighth Circuit ruling, private individuals and organizations within this circuit's jurisdiction are not able to bring enforcement lawsuits under Section 2 of the VRA. Therefore, all such enforcement actions under Section 2 of the VRA within this jurisdiction must be brought by DOJ, which has claimed to be unable to fully enforce Section 2 because of limited resources.

Since the 2022 district court ruling in *Arkansas State Conference NAACP*, other district courts have determined or assumed without deciding, that Section 2 *does* confer a private right of action. At the appellate level, the Fifth Circuit on December 15 denied a petition for a rehearing en banc. While observing that the circuit courts have not examined the issue often, the Fifth Circuit noted that in 1999 the Sixth Circuit held, without analysis, that Section 2 confers a private right of action, and in 2020, the Eleventh Circuit reached the same conclusion in a case that was later dismissed as moot. As a result of the Eighth and Fifth Circuits reaching opposite conclusions as to the private enforceability of Section 2, a conflict or "split" between the two circuits has been created.

The challengers in *Arkansas State Conference NAACP* may decide to appeal the Eighth Circuit's ruling to the U.S. Supreme Court. In view of the "split" between the Eighth and the Fifth Circuits, the Supreme

Court could be more likely to decide to consider the issue. As discussed in this CRS report, a split among the circuits on a question of federal law often results in the Supreme Court agreeing to hear an appeal.

Regardless of how the courts ultimately 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. Moreover, as the concurring opinion in the Eighth Circuit's January 30 ruling denying en banc review discussed, private plaintiffs might also have the option of suing to enforce Section 2 under 42 U.S.C. § 1983. However, as the concurring opinion observed, the challengers in *Arkansas State Conference NAACP* did not include this claim in their original complaint, and hence the Eighth Circuit did not rule on the issue.

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 *City of Mobile v. 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.

Author Information

L. Paige Whitaker
Legislative Attorney

Disclaimer