**United States Court of Appeals**
***For The Eighth Circuit***
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April 25, 2022

Ms. Valencia Richardson
CAMPAIGN LEGAL CENTER
Suite 400
1101 14th Street, N.W.
Washington, DC 20005

RE: 22-1395 AR State Conference NAACP, et al v. AR Board of Apportionment, et al

Dear Ms. Richardson:

The amicus curiae brief of the amicus Former Department of Justice Attorneys in support of the appellants has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

BNW

Enclosure(s)

cc: Ms. Jacki L. Anderson
Mr. Jonathan Backer
Mr. Nicholas J. Bronni
Mr. Adriel I. Cepeda Derieux
Ms. Ceridwen Cherry
Mr. Jonathan Diaz
Ms. Erin H Flynn
Mr. Sam Horan
Mr. Dylan L. Jacobs
Ms. Sophia Lin Lakin
Ms. Danielle Marie Lang
Ms. Angela Liu

Ms. Jennifer L. Merritt
Mr. Luke M. Reilly
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Ms. Shannon S. Smith
Mr. Asher Steinberg
Mr. Neil Steiner
Mr. Gary L. Sullivan
Mr. Jonathan Topaz
Mr. Matthew F. Williams
Mr. Orion de Nevers

District Court/Agency Case Number(s): 4:21-cv-01239-LPR

No. 22-1395

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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Arkansas Conference of the NAACP, *et al.*,
*Plaintiffs-Appellants,*

v.

Arkansas Board of Apportionment, *et al.*,
*Defendants-Appellees.*

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On Appeal from the United States District Court for the Eastern District of Arkansas, Case No. 4:21-cv-01239-LPR

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# BRIEF OF AMICI CURIAE FORMER DEPARTMENT OF JUSTICE ATTONREYS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Jonathan Diaz
Valencia Richardson
Orion de Nevers
Sam Horan
Danielle Lang
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005

*Counsel for Amici Former Department of Justice Attorneys*

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## STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

*Amici curiae* Bruce Adelson, David Becker, Gilda Daniels, Charles Fried, Paul Hancock, J. Gerald Hebert, Steven Mulroy, Stephen Pershing, Mark Posner, Lee Rubin, and Ellen Weber are former U.S. Department of Justice ("DOJ") attorneys who regularly litigated cases to enforce Section 2 of the Voting Rights Act ("VRA") during their respective tenures. *See infra* Appendix. *Amici* served at DOJ at various times during both Republican and Democratic presidential administrations, including the Ford, Carter, H.W. Bush, Clinton, and W. Bush Administrations. Each *amicus* worked in the Voting Section at DOJ, with the exception of *amicus* Charles Fried, who served as United States Solicitor General, where he represented the United States as *amicus curiae* in the landmark Section 2 case, *Thornburg v. Gingles,* 478 U.S. 30 (1986). While at DOJ, *amici* collectively litigated the following cases, among others, under Section 2 of the VRA: *Johnson v. De Grandy,* 512 U.S. 997 (1994); *Gingles*, 478 U.S. 30; *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996); *Garza v. County. of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990); *United States v. Berks County*, 250 F. Supp. 2d 525 (E.D. Pa 2003); *United States v. Bessemer*, CV83-C-3050-S (N.D. Ala. 2000); *DeGrandy v. Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992); *Ketchum v. City Council of the City of Chicago, Ill.*, 630 F. Supp. 551 (N.D. Ill. 1985).

*Amici* have a demonstrated interest in this appeal as former DOJ attorneys who are committed to the robust enforcement of the protections of Section 2. *Amici* have expertise in the enforcement of the VRA and its history and purpose, as well as the importance and legality of private enforcement of Section 2's provisions.

This brief is filed pursuant to Federal Rule of Appellate Procedure 29 because all parties consent to filing this brief.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief. FRAP 29(a)(4)(E).

## SUMMARY OF ARGUMENT

Decades of legislative enactments and reenactments, judicial rulings, and a common understanding among private parties and the federal government have left no question that Congress intended that Section 2 of the Voting Rights Act ("VRA") confer a private right of action from the time of its passage in 1965 through the present day. Indeed, the private right of action inherent in Section 2 reflects the Department of Justice's ("DOJ") limited resources and lack of capacity to vindicate the rights protected by the VRA without the participation of private litigants. The VRA's private right of action has been affirmed by Congress in every reauthorization of the VRA, as well as by a long line of Supreme Court cases.

Consistent with Congress's intent to ensure widespread enforcement of Section 2's nationwide prohibition against racial discrimination in voting, the private right of action has been crucial to the successful enforcement of that mandate. Since the Supreme Court's decision in *Shelby County v. Holder,* 570 U.S. 529 (2013) significantly circumscribed DOJ's role in enforcing the VRA, private enforcement of Section 2 has become even more indispensable to accomplishing the VRA's goals. As former officials and attorneys who litigated Section 2 cases on behalf of the United States, *amici* understand the significance of the shared public-private responsibility to ensure that jurisdictions comply with Section 2, especially in light of *Shelby County* and ongoing attacks on the sacred right to vote in the states.

Section 2 of the Voting Rights Act is one of the most important pieces of legislation ever enacted by Congress. Its success depends on the participation of affected voters, jurisdictions, *and* DOJ. Congress intended this broad range of participation by both the private and public sectors, which is why both Congress and the Supreme Court have repeatedly affirmed that a private right of action exists to enforce the VRA for the last 50 years. For these reasons, this Court should reverse the lower court's rogue decision to the contrary.

## ARGUMENT

### I. Private Enforcement of Section 2 Advances the Purposes of the Voting Rights Act.

#### a. The History of Voting Rights Enforcement Demonstrates that the Department of Justice Cannot Enforce Section 2 on Its Own.

The VRA's private right of action—and the hybrid public-private enforcement scheme it enables—is no mere feature of the law; it is a central premise upon which the VRA was based and is essential to its success. Congress passed the VRA in 1965 to respond, in part, to the Department's inability to address racial discrimination in voting under then-existing civil rights laws—namely, the Civil Rights Acts of 1957, 1960, and 1964. The Department's experience enforcing those laws and its first-hand understanding of their shortcomings was central to the VRA's design. After nearly a decade of dispiriting efforts to deliver the "promise of the ballot" through "litigation" alone, DOJ was forced to conclude that the approach had "been tried and found wanting." Hearings on S. 1564 before the House Committee on the Judiciary, 89th Cong., 1st Sess. at 4-5 (testimony of Nicholas Katzenbach, Att'y Gen. of the United States). The VRA's key innovation—which responded directly to DOJ's experience—was to codify legal protections for the franchise in combination with a comprehensive set of tools for enforcing those new protections. A comprehensive enforcement scheme, in other words, was as important to the VRA as its substantive protections prohibiting literacy tests, poll taxes, and the like. Understanding the history of DOJ's role in shaping the VRA makes plain that robust public *and* private enforcement is central to the VRA's purpose.

Passed in 1965, the VRA marked the culmination of nearly a decade of legislative efforts to address racial discrimination in voting. Initially, the Civil Rights

Act of 1957 "authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds." *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). That law fell short of achieving its goals for a variety of reasons. State officials facing suits for injunctive relief simply withdrew from their official positions, leaving DOJ without a defendant to sue. S. Rep. No. 89-162 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2544. Those same officials ensured that voter registration records disappeared with them, a tactic that left DOJ as short on evidence as it was of proper defendants. *Id.* As a result, Black voters remained disenfranchised throughout the South. Determined to empower DOJ—and to rein in the "intransigence" and "dilatory tactics" used to evade the 1957 law—Congress passed the Civil Rights Act of 1960. *Id;* H.R. Rep. No. 89-439, (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2441. But progress remained "painfully slow," and "had to be gauged not in terms of months—but in terms of years." H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. at 2441. The Civil Rights Act of 1964 "expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify" Black voters from participating in federal elections. *Katzenbach*, 383 U.S. at 313. But this, too, was not enough; nearly a decade of legislating and litigating had proved fruitless in delivering the franchise to Black voters: African American voter registration rates "barely inched" forward between 1957 and 1965, remaining below 7% in Mississippi and trailing white registration

rates by over 50% throughout the South. *Id; see also* Hearings on S. 1564, *supra,* at 4 (testimony of Nicholas Katzenbach, Att'y Gen. of the United States) (describing the failures of prior civil rights bills to remedy voting discrimination).

Congress passed the VRA to remedy the "disappointing" failure of the three previous civil rights bills in "eliminating voting discrimination." S. Rep. No. 89-162 (1965), *as reprinted in* 1965 U.S.C.C.A.N. at 2544. Between 1957 and 1965, DOJ brought 71 voting rights lawsuits, but these cases did little to eradicate widespread voting discrimination due to "the ingenuity and dedication of those determined to circumvent the guarantees of the 15th amendment." H.R. Rep. No. 89-439 (1965), *as reprinted in* 1965 U.S.C.C.A.N. at 2441. The complexity of the suits also sapped DOJ's resources: "[T]he Attorney General testified before a judiciary subcommittee that an incredible amount of time . . . had to be devoted to analyzing voting records—often as much as 6,000 man-hours—in addition to time spent on trial preparation and the almost inevitable appeal." H.R. Rep. No. 89-439 (1965), *as reprinted in* 1965 U.S.C.C.A.N. at 2441. Hearing this testimony, Congress concluded that the Department could "not solve the voting discrimination problem" through "case-by-case litigation." S. Rep. No. 89-162 (1965), *as reprinted in* 1965 U.S.C.C.A.N. at 2544; *see also* H.R. Rep. No. 89-439 (1965), *as reprinted in* 1965 U.S.C.C.A.N. at 2441 ("[E]xperience amply demonstrates that [DOJ's] case-by-case approach has been unsatisfactory."). Congress passed the VRA to add both a new sword and shield

to the fight against voting discrimination. The VRA provided a shield in the form of Section 5, which prohibited covered jurisdictions from implementing new voting laws or policies unless they could demonstrate to DOJ or a federal court that the laws or policies would be non-discriminatory, *see* 52 U.S.C. § 10304, and a sword in the form of Section 2, which authorized affirmative suits against any jurisdiction that enacted racially discriminatory voting laws. *See* 52 U.S.C. § 10301.

Congress understood from the beginning, based on DOJ's experience enforcing previous civil rights laws, that the new sword-and-shield regime under the VRA would require both public and private enforcement to be effective. Congress clearly intended that the Section 2 and Section 5 confer a private right of action.[1] Indeed, as discussed *infra,* in Part I.b., the Supreme Court has expressly recognized as much, holding that Section 5 contained an implied private right of action necessary to effectuate "the broad purpose of the Act," *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969), and that a private right of action in Section 2 "has been clearly intended by Congress since 1965." *Morse v. Republican Party of Virginia,* 517 U.S. 186, 232 (1996).

[1] Congress passed the VRA against the backdrop of the Supreme Court's 1964 ruling in *J. I. Case Co. v. Borak,* 377 U.S. 426, 433 (1964) which favored a presumption of a private right of action where "necessary to make effective the congressional purpose." *Id.* at 433.

Congress has explicitly validated this understanding every time it has reauthorized Section 2 of the VRA. Starting in 1975, the Senate Report confirmed that, "private persons are authorized to request the application of the Act's special remedies in voting rights litigation," and explained that it is "sound policy" to establish a "dual enforcement mechanism" for enforcing the VRA. S. Rep. No. 94-295 at 9-10, 40 (1975). Indeed, the Report acknowledged that the VRA "depend[ed] heavily upon private enforcement," and, as a result, the 1975 Amendments added an attorney's fees provision to the Act for the express purpose of giving "private citizens . . . a meaningful opportunity to vindicate" their rights under the VRA. *Id.* Congress expressed the same understanding seven years later when it reauthorized the VRA and expanded the reach of Section 2. The 1982 House Report explained that "citizens have a private cause of action to enforce their rights under Section 2." H.R. Rep. No. 97-227, at 32 (1981). The Senate Report agreed, "reiterat[ing] the existence of the private right of action under Section 2." S. Rep. No. 97-417, at 30 (1982). And the most recent VRA amendments are no different, with the House Report to the 2006 Amendments recognizing that the assistance of "private citizens . . . has been critical to" enforcing the VRA's protections. H.R. Rep. No. 109-478, at 42 (2006).

Throughout this time, DOJ has maintained that shared enforcement is necessary to fulfill the VRA's promise. DOJ has consistently filed briefs on behalf

of the United States in cases brought by private plaintiffs that acknowledge the critical role such plaintiffs play in enforcing the VRA—including in the court below. *See, e.g.*, Statement of Interest of the United States at 3-8, *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 4:21-CV-01239-LPR, 2022 WL 496908 (E.D. Ark. Feb. 17, 2022); Statement of Interest of the United States at 5 n.3, *Ga. State Conf. of the NAACP v. Raffensperger*, No. 1:21-cv-1259-JPB, (N.D. Ga. Dec. 9, 2021); Statement of Interest of the United States at 3-8, *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex. Nov. 30, 2021). Indeed, "filing amicus briefs" and "statements of interest" in "Section 2 cases initiated by private plaintiffs" is one of the key mechanisms through which the "Voting Section enforces Section 2."[2]

Stripping Section 2 of its shared enforcement model would doom it to join the Civil Rights Acts—whose very shortcomings animated Congress to pass the VRA—as another "empty promise." *Allen*, 393 U.S. at 557. Among the VRA's central premises was the recognition that, although prior civil rights laws "were intended to supply strong and effective remedies, their enforcement . . . encountered serious

[2] Off. of the Inspector Gen., U.S. DOJ, *A Review of the Operations of the Voting Section of the Civil Rights Division* 12 ("OIG Report") (2013), https://oig.justice.gov/reports/2013/s1303.pdf; *see also* U.S. DOJ, *Under Section 2 of the Voting Rights Act, 52 U.S.C. 10301, for Redistricting and Methods of Electing Government Bodies* 3 (2021), https://www.justice.gov/opa/press-release/file/1429486/download ("The Division can also consider participating as amicus curiae in cases in any federal or state court that raise issues under Section 2 of the Voting Rights Act.").

obstacles." H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. at 2440-41. So too, would VRA enforcement without a dual enforcement regime. This Court should not countenance such a radical departure from Congress's repeated affirmation of the VRA's intended structure and purpose.

**b. Supreme Court Precedent Reinforces *Amici*'s Understanding that Section 2 Provides a Private Right of Action.**

During *amici*'s time at DOJ, a long line of Supreme Court decisions, including *Allen v. State Board of Election*, 393 U.S. 544 (1969), *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) confirmed *amici's* understanding that Section 2 provides a private right of action to affected voters to vindicate their fundamental right to vote.

In *Allen,* the Supreme Court expressly considered whether another key provision of the VRA was enforceable by private parties. *See* 393 U.S. at 555. In *Allen*, the Court heard a case brought by private plaintiffs to enforce the preclearance provisions in Section 5 of the VRA. *See id.* at 553-54. At the outset, the Court noted that because the case had been initiated by private citizens, "an initial question [was] whether private litigants may invoke the jurisdiction of district courts" for Section 5 enforcement. *Id.* at 554. The Court recognized that "[t]he Voting Rights Act does not *explicitly* grant or deny private authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the [VRA]." *Id.* at 554-55 (emphasis added). However, the Court reasoned that "[a]nalysis of [the statutory]

language in light of the major purpose of the [VRA] indicate[d] that appellants may seek" to enforce Section 5 as private litigants in a federal district court. *Id.* at 555.

Much of the Court's reasoning in *Allen*, considering the purpose and goals of the VRA, also extends to Section 2. The *Allen* Court recognized:

> The [VRA] was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens.
>
> The achievement of the [VRA]'s laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the [VRA] extend to States and the subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the [VRA] to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.

*Id.* at 556–57 (footnotes omitted). These arguments are even more stark in the context of Section 2 litigation. Unlike Section 5, which applied to only a subset of covered jurisdictions across the country, Section 2 applies to every state, county, city, and other political subdivision in the United States. The amount of oversight and regulation that would be required by DOJ if it were the only enforcing authority nationwide is substantially greater. Thus, the Court's decision in *Allen*, combined with its willingness to hear Section 2 cases brought by private litigants, reinforced the conclusion that the provision includes a private right of action.

Later, in *Gingles*—a case brought by private citizens—the Supreme Court first considered the scope of Section 2's updated protections for private plaintiffs

following the 1982 amendments to the VRA. *See* 478 U.S. at 34. There, the Court unanimously ruled in favor of private plaintiffs who were Black citizens and residents of North Carolina, striking down a multi-member districting scheme used for the State's General Assembly. *Id*. at 80. In *Gingles*, it was so clear that Section 2 contained a right of action enforceable by private plaintiffs that the unanimous Supreme Court did not even question its existence. The Court's language in *Gingles* describing the test for violating Section 2 confirms that understanding of the provision; in explaining the preconditions for establishing a violation of Section 2, the Supreme Court framed its test in terms of what voters themselves—not the United States—must establish to succeed in a challenge brought under Section 2. *See id.* at 50-51. The Court held:

> First, *the minority group* must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, *the minority group* must be able to show that it is politically cohesive. . . . Third, *the minority* must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate. In establishing this last circumstance, *the minority group* demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

*Id.* at 50–51 (emphasis added) (citations omitted). The only natural reading of the *Gingles* Court's presentation of this test in terms of what must be proved by private citizens, and not solely by the United States, is that the Court understood Section 2

to provide a private right of action. That the Court exercised its jurisdiction—which would have been available only if Section 2 incorporated a private right of action—to rule in favor of the private plaintiffs in *Gingles* confirms that understanding.

Not only did the Supreme Court entertain a private right of action in *Gingles*, but DOJ on behalf of the United States also expressed views consistent with the position that Section 2 provides a right of action to private plaintiffs, despite its opposition to the plaintiffs' claims on the merits. *See* Brief of the United States as Amicus Curiae Supporting Appellants, *Gingles*, 470 U.S. 30 (No. 83-1968), 1985 WL 669641. Rather than intervene as a party, DOJ submitted an amicus brief in support of the State of North Carolina, expressing its views on the proper interpretation of Section 2. In its brief, the United States implicitly accepted the existence of a private right of action under Section 2. The government asserted: "The United States has the *primary* responsibility for enforcing the Voting Rights Act and thus has a substantial interest in ensuring that the Act is construed in a manner that advances, rather than impedes, its objectives." *Id.* at 1 (emphasis added). DOJ did not argue that it has the sole responsibility for enforcing Section 2 or that private parties lack enforcement authority under the VRA. Rather, by asserting that DOJ is the "primary" party with enforcement powers, it accepted that other parties—such as private plaintiffs—may similarly enforce the provision.

Finally, in *Morse*, the Supreme Court expressly held that a private right of action exists to enforce Section 2 of the Voting Rights Act. 517 U.S. at 232. Considering a challenge under a separate provision, the Court explained: "'[T]he existence of the private right of action under Section 2 ... has been clearly intended by Congress since 1965.' . . . We, in turn, have entertained cases brought by private litigants to enforce § 2." *Id.* (quoting S. Rep. No. 97-417, at 30) (citing H.R. Rep. No. 97–227 at 32) (citations omitted). Following the Court's precedent in *Morse*, the federal courts have consistently concluded that Section 2 confers a private right of action. *See, e.g.*, *Mixon v. State of Ohio*, 193 F.3d 389, 406 (6th Cir. 1999) ("An individual may bring a private cause of action under Section 2 of the Voting Rights Act. . ."); *Singleton v. Merrill*, No. 2:21-CV-1291, 2022 WL 265001, at *79 (N.D. Ala. Jan. 24, 2022) ("Holding that Section Two does not provide a private right of action would work a major upheaval in the law, and we are not prepared to step down that road today."), *cert. granted sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022); *League of United Latin Am. Citizens v. Abbott*, No. EP-21-CV-00259, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (declining "to break new ground" and hold that Section 2 lacks a private right of action).

Likewise, in the decades since the 1982 amendments to the Voting Rights Act, the federal courts have overseen a "steady stream" of lawsuits brought by private

plaintiffs to enforce Section 2.[3] *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2333 & n. 5 (2021) (listing cases). During this time, federal courts, including the Supreme Court and the Eighth Circuit, have uniformly heard private claims under Section 2. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 409-10 (2006) (ruling in a case brought by private plaintiffs that one of a state's congressional districts violated Section 2); *Johnson v. De Grandy*, 512 U.S. 997, 1000-01 (1994); *Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991); *Houston Lawyers' Ass'n v. Att'y Gen.*, 501 U.S. 419, 421 (1991); *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 931, 941 (8th Cir. 2018) (ruling in favor of private plaintiffs and holding that the challenged at large school board elections "denied [B]lack residents a meaningful opportunity to elect representatives of their choice"); *Bone Shirt v. Hazeltine*, F.3d 1011, 1016-17 (8th Cir. 2006); *Jeffers v. Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989) (three-judge court), *aff'd* 498 U.S. 1019 (1991); *c.f. Larry v. Arkansas*, No. 4:18-CV-00116, 2018 WL 4858956, at *7 (E.D. Ark. Aug. 3, 2018) ("The Voting Rights Act creates a private cause of action permitting plaintiffs to file suit if they are an 'aggrieved person.'") (quoting 52 U.S.C. § 10302(a))). The overwhelming number of cases brought by private plaintiffs under Section 2 where the Supreme Court, Eighth Circuit, and other federal

[3] Indeed, in the decades since *Gingles,* private litigation has far outpaced litigation by the Department of Justice. *See infra* Part II.

courts—consistent with precedent—have exercised jurisdiction confirms *amici*'s understanding that the provision contains a private right of action and reinforces the conclusion that the decision to the contrary in the court below is a national outlier.

## II. Private Enforcement of Section 2 Is Consistent with *Amici's* Experience Enforcing the Voting Rights Act.

### a. Section 2's Shared Enforcement Mechanism Maintains Adequate Levels of Enforcement.

Historical enforcement actions by the Department are consistent with the view of *amici* that Section 2 incorporates a private right of action. Described *supra,* Part I, the VRA has "been clearly intended by Congress" to include a private right of action since 1965. S. Rep. No. 97-417, at 30. Consistent with this conclusion is the VRA's shared public-private enforcement mechanism, which ensures the effective enforcement of Section 2's nationwide prohibition against racial discrimination in voting. Since Congress expanded the scope of Section 2 in 1982, that shared enforcement mechanism has been necessary to the fulfillment of Section 2's broad mandate. Moreover, since *Shelby County v. Holder*, 570 U.S. 529 (2013), private Section 2 litigation has been particularly indispensable to the continued administration of the VRA.

As former DOJ attorneys tasked with the enforcement of the VRA, *amici* recall months-long investigations preceding the initiation of any Section 2 claim. Importantly, investigating voting rights violations has become even more daunting since *Shelby County* functionally eliminated DOJ's oversight function under federal

preclearance. *See id.* at 557 (2013) (noting that even though Section 5 is no longer operative, Section 2 enforcement remains available). Compounding the bureaucratic hurdles of an investigation, Plaintiffs—public and private alike—face a high evidentiary burden to initiating a Section 2 case. Plaintiffs must compile granular statistical evidence, retain experts in statistics and racial discrimination, and gather witnesses from the community, among other evidentiary burdens.[4] Section 2 cases are also time-consuming, and take years to litigate on average.[5] And, unlike private litigants, the United States cannot recover attorneys' fees under the VRA. *See* 52 U.S.C. § 10310(e); *Morse*, 517 U.S. at 234. These costs greatly hinder the ability of a resource-constrained Department to bring Section 2 cases.

Even before the passage of the VRA, DOJ attorneys were "spread thinly among numerous lawsuits in many different jurisdictions," which in part motivated Congress to develop the system of federal preclearance under Section 5. S. Rep. No. 97-417, at 5; *see also supra,* Part I.a. During *amici*'s tenure with DOJ, the preclearance process provided a means to monitor jurisdictions' compliance with the VRA, which in turn enabled officials to monitor voting conditions on the ground in

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[4] *E.g.,* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143, 2157 (2015).

[5] *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 at 74 (2005) ("A full section 2 case litigated just through the end of trial is at least 2 years.").

support of Section 2 investigations. Because jurisdictions had to preclear voting changes with DOJ, preclearance jurisdictions developed an ongoing relationship with the Department.[6] After *Shelby County,* those relationships diminished and, correspondingly, so did the Department's capacity to monitor the thousands of previously covered jurisdictions.[7] Because the Department is no longer involved in preclearing submissions from covered jurisdictions, it must proactively monitor local conditions, resurrecting the capacity issues at DOJ that the VRA was designed to alleviate.[8]

Private plaintiffs fill in the gaps left open in the wake of *Shelby County* by monitoring voting changes in their own communities. The VRA's private right of action allows litigants to bring lawsuits in rapid response to discriminatory changes in voting laws and policies. Since Congress amended the VRA in 1982, private plaintiffs have brought the vast majority of Section 2 cases and have secured the vast majority of victories. *See infra* Part II.b.[9] In particular, most Section 2 litigation is

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6 *Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before the Subcomm. on the Constitution, Civil Rights Act, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. at 10 (2021) (Statement of Kristen Clarke, Assistant Attorney General, U.S. Department of Justice), available at https://www.justice.gov/file/1425226/download.

7 *See id.* at 12.

8 *Id.*

9 *See also* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 652, 654 (2006) (collecting cases brought under Section 2 between

brought by Black plaintiffs.[10] Given the purpose of the VRA to eviscerate long-standing, invidious voting discrimination facing Black voters in particular, Black voters' participation in Section 2 litigation evinces the VRA's very purpose. *See* S. Rep. No. 97-417, at 5-7 (discussing legislative efforts to remedy voting discrimination faced by Black voters). Evidencing the seriousness of their commitment to equal access in voting, private litigants spend millions of dollars enforcing Section 2's prohibition against racial discrimination in voting.[11]

This shared enforcement responsibility is particularly important given the itinerant nature of state and local policymaking, and the benefit of private plaintiffs' relationships to the local communities in which they litigate Section 2 cases. Private plaintiffs are the direct victims of the denial, abridgment, and dilution of the franchise challenged in Section 2 cases. Voting conditions can change as fast as policymakers can implement them; at the local level, changes may not even require

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the VRA's passage and 2005); *The Use of Section 2 to Secure Fair Representation*, Brennan Ctr. for Just. (Aug. 13, 2021), https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation (collecting successful cases brought since the 2006 amendments to the VRA); Nicholas O. Stephanopolous, *The South After Shelby County,* 2013 Sup. Ct. Rev. 55.

[10] Ellen D. Katz, Brian Remlinger, Andrew Dziedzic, Brooke Simone & Jordan Schuler, *The Evolution of Section 2: Numbers and Trends*, U. Mich. L. Sch. Voting Rights Initiative (2022), https://voting.law.umich.edu/findings/.

[11] *See The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation as of September 2021*, NAACP Legal Def. Fund (Sept. 2021), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-9.19.21-Final.pdf (noting the costs of Section 2 litigation).

a formal legislative process. For example, since the Supreme Court's decision in *Shelby County*, 13 states have closed more than 1,688 polling places.[12] Such changes are often made through "bureaucratic maneuvers" without formal public input or notice.[13] Private plaintiffs' proximity to affected communities means they are often better situated to engage in the resource-intensive fact-finding process necessary to support a Section 2 claim. Voters who become private plaintiffs follow state and local policymaking closely and can document changing local conditions as they occur; thus, they are uniquely positioned to bring Section 2 cases. This responsibility is not only contemplated in the enforcement of the Act, but vital to its success.

**b. Without a Private Right of Action, Enforcement of the Voting Rights Act Would Diminish.**

Experience from decades of VRA litigation shows that private plaintiffs bring the vast majority of Section 2 suits—including the lion's share of *successful* claims. Moreover, private litigation has become increasingly important as DOJ's enforcement of Section 2 has declined. Enforcement of Section 2 by the United States has dwindled in recent years, across both political parties, because of declining resources and internal organizational issues. *See OIG Report*, *supra* note 2, at 115, 251 (discussing the various conditions that caused declining enforcement

[12] *See* Joel Park, *Voting Under Siege: Eight Years of Shelby County v. Holder*, Leadership Conference on Civil and Human Rights (June 25, 2021), https://civilrights.org/blog/voting-under-siege-eight-years-of-shelby-county-v-holder.

[13] *Id.*

of Section 2 within DOJ). At the same time, however, private plaintiffs consistently maintain enforcement of Section 2, while bringing a steady stream of meritorious claims. As a result, the district court's erroneous conclusion significantly undermines the statutory scheme Congress designed.

The number of Section 2 cases brought by private plaintiffs dwarfs the number brought by DOJ. Using data collected by the University of Michigan Law School's Voting Rights Initiative, Figure 1 shows the number of final Section 2 decisions available on Westlaw or Lexis for each year since 1982, with each decision classified by whether DOJ appeared as a plaintiff in connection with a Section 2 claim.[14] As the chart demonstrates, cases brought by private plaintiffs far outnumber those brought by the Department. This finding is unsurprising: as *amici* know from experience, litigating a Section 2 claim is incredibly resource intensive, and the Department cannot pursue every possible claim. *Cf. OIG Report*, *supra* note 2, at 26

[14] For the underlying database of Section 2 cases, see Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, U. Mich. L. Sch. Voting Rights Initiative (2022), https://voting.law.umich.edu. The data is current as of December 31, 2021. *See id.* Cases were classified by plaintiff type by manually inspecting each decision listed in the database to determine whether the United States appeared as a plaintiff in connection with a Section 2 claim, including instances where the United States intervened in a private Section 2 case to defend the statute's constitutionality rather than to bring its own merits claim. Notably, data from this database was also a part of the evidentiary record in the 2006 reauthorization of the Voting Rights Act. *See* Brief of Amicus Curiae Ellen D. Katz at 2, *Shelby County v. Holder,* No. 12-96, 2013 WL 457386 (Feb. 1, 2013).

(noting resource constraints affecting DOJ Section 2 enforcement). Accordingly, without a private right of action to raise Section 2 claims, most enforcement of the statute would grind to a halt.

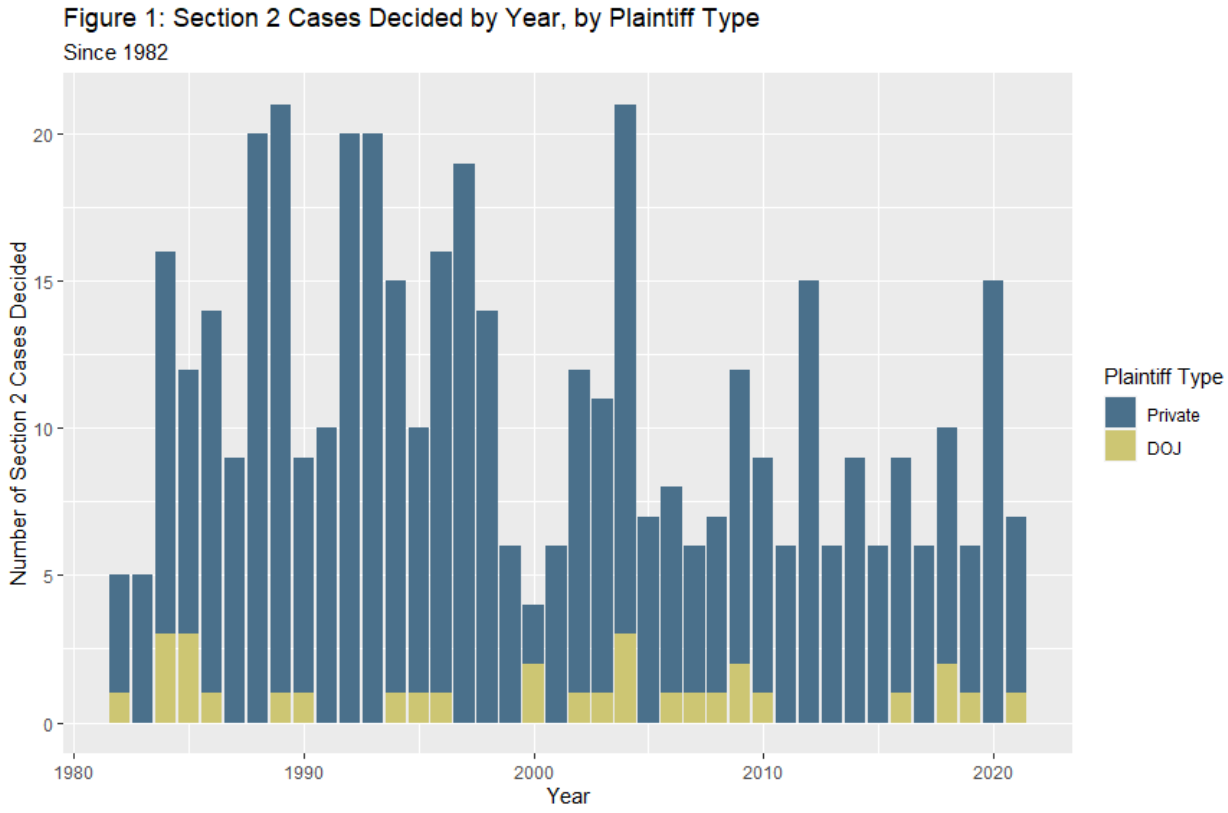
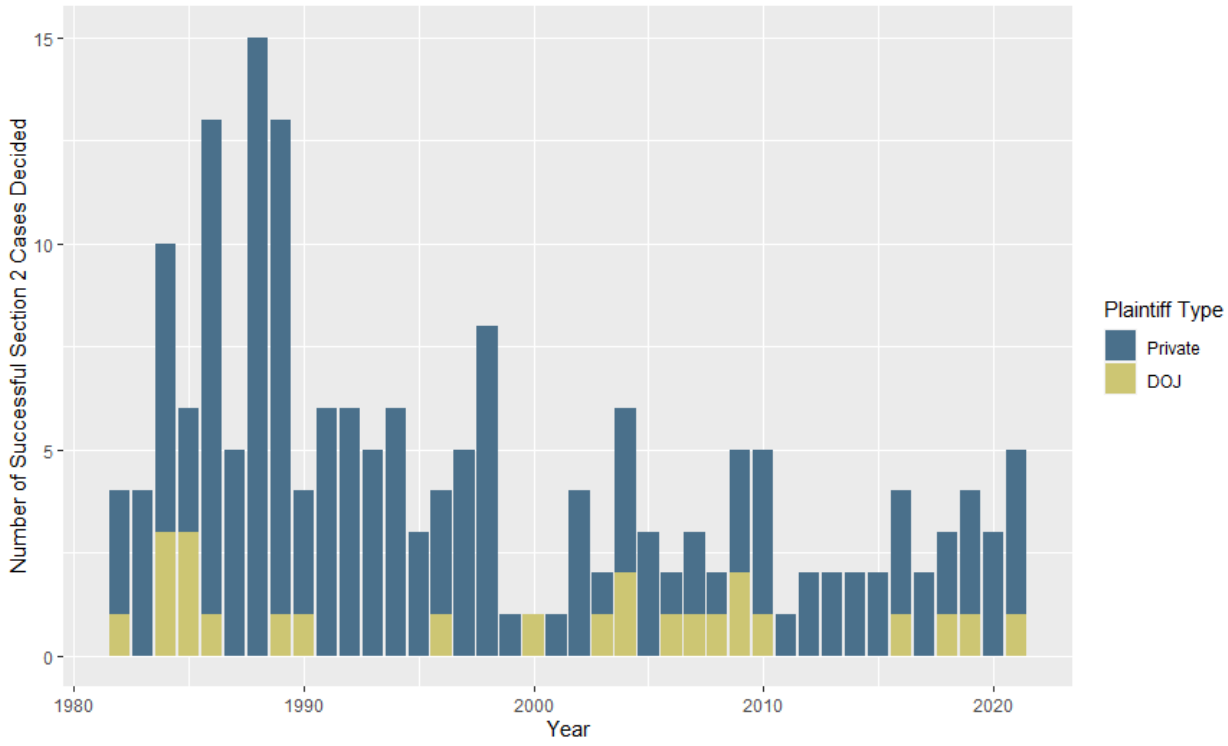



Figure 1 also demonstrates the volume of precedent from which the decision below deviated: *hundreds* of courts over the past four decades have adjudicated Section 2 claims brought by private plaintiffs. Yet, under the district court's holding, the hundreds of courts hearing *all* of the cases marked in blue in this Figure all improperly adjudicated these Section 2 claims.

Private Section 2 cases are not just numerous—they are vital. Figure 2 shows, by year, final Section 2 decisions in which available records indicate that the

plaintiffs obtained a successful outcome—for example, a victory on the merits or a favorable settlement.[15] In this respect, private suits again far outnumber DOJ complaints. These data indicate that Section 2 suits brought by private plaintiffs are not redundant or frivolous—they are critical to the Act's effective enforcement. Restricting Section 2's enforcement authority to only DOJ would inevitably leave a multitude of meritorious claims unvindicated, directly resulting in the denial, abridgment, or dilution of countless Americans' right to vote on discriminatory grounds.

Figure 2: Successful Section 2 Cases Decided by Year, by Plaintiff Type
Since 1982

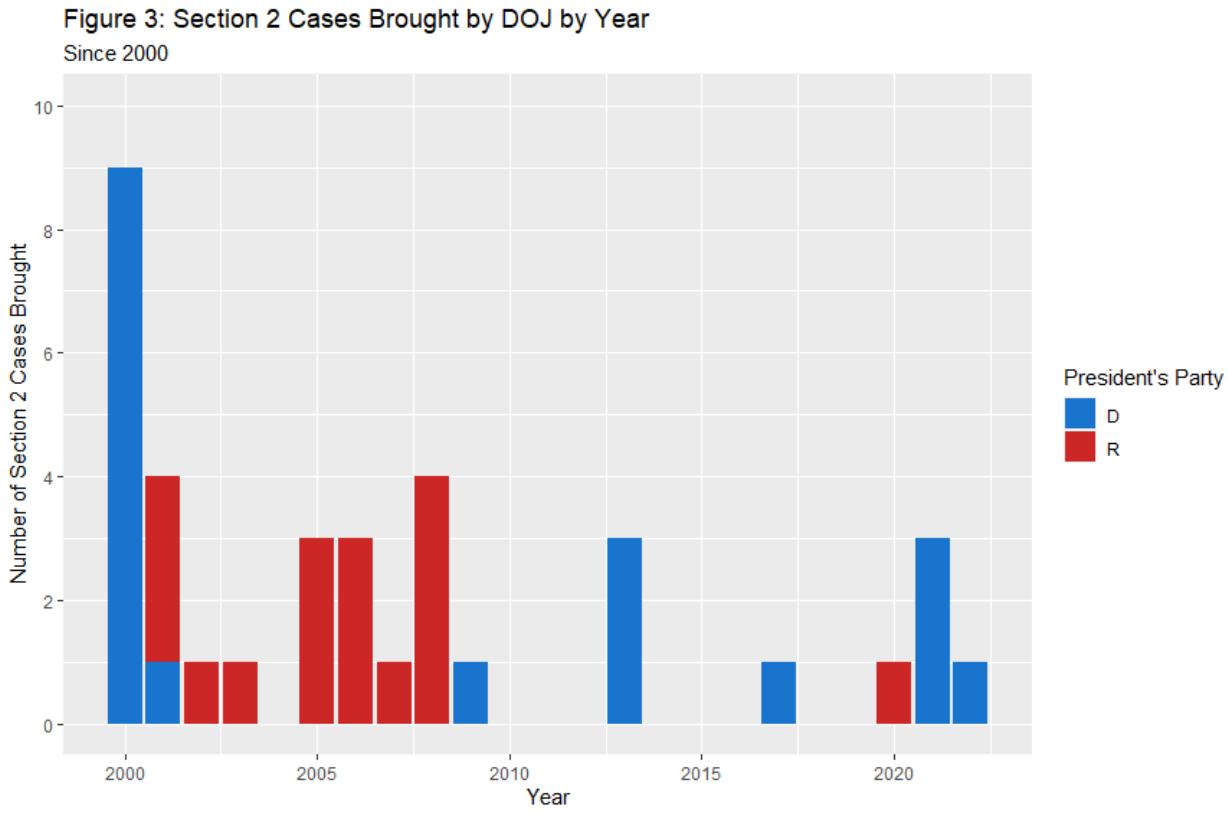



[15] Like Figure 1, Figure 2 builds on a database created by the University of Michigan Law School's Voting Rights Initiative, including that database's coding of successful claims. *See* Katz et al., *supra* note 14.

Moreover, as Figure 3 shows, the already-limited number of cases brought by DOJ has declined still further in recent years.[16] From 1993 to 2000, the Department filed 35 Section 2 complaints, including 9 in 2000 alone. In the over 21 years since, DOJ has filed a *total* of 27 Section 2 complaints, and never more than 4 in a single year. As early as 2013, even the Department's own Inspector General observed that "[t]he data reflected a noteworthy difference in the number of cases filed from 1993 through 2000, and from 2001 through 2012." *OIG Report*, *supra* note 2, at 24. The trend has continued since, with particularly sparse DOJ enforcement—just 6 complaints filed—over the past 8 years. As the Inspector General noted, several issues within the Department (irrespective of the political administration in charge)—including enforcement priorities—contribute to the decline. *See id,* at 115, 251. On the other hand, as demonstrated in Figures 1 and 2, private enforcement of meritorious Section 2 claims has remained steady. The availability of a private cause

[16] For the data underlying Figure 3 and this paragraph, see *OIG Report*, *supra* note 2, at 24-32; *Cases Raising Claims Under Section 2 of the Voting Rights Act* ("*Section 2 Claims*"), U.S. DOJ, https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0 (Apr. 8, 2022); and Press Release, Dep't of Justice, *Justice Department Files Voting Rights Lawsuit Against Galveston County, Texas to Challenge County Redistricting Plan* (Mar. 24, 2022), https://justice.gov/opa/pr/justice-department-files-voting-rights-lawsuit-against-galveston-county-texas-challenge. Figure 3 begins with 2000 because it is the earliest year for which these sources disclose filings by year, rather than by presidential administration or multiyear range.

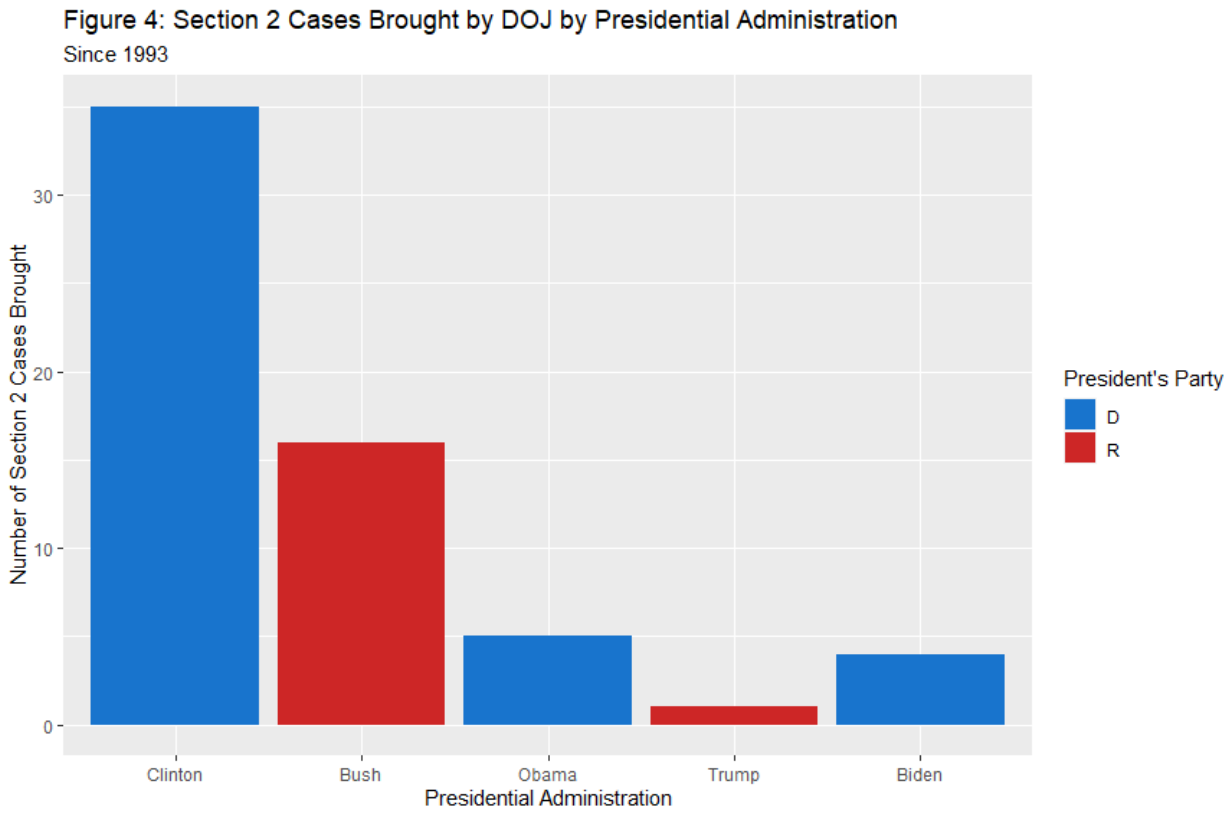
of action ensures that this decline in enforcement activity by DOJ does not undermine Section 2's effectiveness.




The decline in enforcement cuts across political parties. As Figure 4 illustrates, the Clinton Administration filed *seven times* more Section 2 cases than did the Obama Administration.[17] And while the Biden Administration has pledged to enforce Section 2, *see, e.g.*, Press Release, DOJ, *supra* note 16, the Department

[17] For the data underlying Figure 4, see *OIG Report*, *supra* note 2, at 24-32; *Section 2 Claims*, *supra* note 16; Press Release, DOJ, *supra* note 16; Tom Perez, Assistant Att'y Gen., *Remarks to the American Constitution Society*, U.S. Dep't of Justice (Dec. 18, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2009/12/23/perez_acs_speech.pdf.

has continued to pursue only a select set of cases, and *amici*'s experience indicates that the Department lacks the capacity to pursue every viable claim. Meanwhile, the Trump Administration filed only *one* Section 2 complaint in four years—one-sixteenth as many as the Bush Administration.




These declines may reflect shifting political or policy priorities, *cf., e.g.*, *OIG Report*, *supra* note 2, at 36-39 (discussing disputes over Department enforcement priorities), resource constraints, *see, e.g.*, *id.* at 26, or other factors. But private enforcement of Section 2, particularly by nongovernmental organizations with long-term missions to protect voting rights representing directly impacted community

members, ensures that shifting priorities and declining DOJ enforcement of Section 2 do not render the statute obsolete.

In short, the data show that availability of a private right of action is vital to effective enforcement of Section 2, and the elimination of that cause of action under the district court's decision would severely undermine the statutory scheme.

## CONCLUSION

Longstanding practice, history, and Congressional intent support the obvious conclusion that Section 2 of the Voting Rights Act includes a private right of action. For the foregoing reasons, this Court should reverse the decision of the lower court.

Dated: April 22, 2022

Respectfully submitted,

*/s/ Valencia Richardson*
Jonathan Diaz
Valencia Richardson
Orion de Nevers*
Sam Horan^
Danielle Lang
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005
(212) 736-2000
dlang@campaignlegalcenter.org
jdiaz@campaignlegalcenter.org
vrichardson@campaignlegalcenter.org
odenevers@campaignlegalcenter.org
shoran@campaignlegalcenter.org

**Licensed in CA, supervised by Danielle Lang, a member of the D.C. bar*

*^Licensed in MA, supervised by Danielle Lang, a member of the D.C. bar*

## APPENDIX

### *List of Amici Curiae*[18]

Bruce Adelson, United States Department of Justice, Civil Rights Division (2000-2006)

David Becker, United States Department of Justice, Voting Section (1998-2005)

Gilda Daniels, United States Department of Justice, Voting Section (1995-1998, 2000-2006)

Charles Fried, United States Solicitor General (1985-1989)

Paul F. Hancock, United States Department of Justice, Civil Rights Division (1970-1997)

J. Gerald Hebert, United States Department of Justice, Civil Rights Division (1973-1994)

Steven J. Mulroy, United States Department of Justice, Civil Rights Division (1991-2000)

Stephen B. Pershing, United States Department of Justice, Voting Section (1996-2005)

Mark Posner, United States Department of Justice, Voting Section (1980-1996)

Lee H. Rubin, United States Department of Justice, Voting Section (1989-1992)

Ellen Weber, United States Department of Justice, Voting Section (1980-1985)

[18] *Amici* submit this brief in their personal capacities. *Amici*'s institutional affiliations are for identification purposes only.

**CERTIFICATE OF COMPLIANCE WITH RULES 29 AND 32**
**Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.**

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 6,464 words, excluding the parts of the brief exempted by Rule 32(f). See Fed. R. App. P. 32(a)(7)(B).

This brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

*/s/ Valencia Richardson*
Counsel for *Amici*

## CERTIFICATE OF SERVICE

I, Valencia Richardson, hereby certify that on this date, April 22, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served the foregoing electronically.

Dated: April 22, 2022

*/s/*Valencia Richardson
*Counsel for Amici*