IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

ARKANSAS STATE CONFERENCE NAACP, et al.,

Plaintiffs,

v.

THE ARKANSAS BOARD OF APPORTIONMENT, et al.,

Defendants.

Civil Action No. 4:21-cv-01239-LPR

STATEMENT OF INTEREST OF THE UNITED STATES

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INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." This case presents important questions regarding enforcement of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (Section 2). Congress has vested the Attorney General with authority to enforce Section 2 on behalf of the United States. *See* 52 U.S.C. § 10308(d). Accordingly, the United States has a substantial interest in ensuring Section 2's proper interpretation. The United States submits this limited Statement of Interest to address the availability of a private cause of action to enforce Section 2.

Private plaintiffs can enforce Section 2 as a statutory cause of action prohibiting both voting practices that result in denial or abridgment of the right to vote on account of race or membership in a language minority group and voting practices that involve intentional racial discrimination in voting. Plaintiffs Arkansas State Conference NAACP and Arkansas Public Policy Panel have brought a Section 2 claim challenging the 2021 redistricting plan for the Arkansas House of Representatives (Arkansas House). Longstanding case law, the structure of the Voting Rights Act, the Act's broad enforcement provisions, and authoritative sources of Congressional intent confirm that there is a private cause of action under Section 2 to challenge such redistricting plans. Thus, Plaintiffs' status as private parties does not preclude their Section 2 claim. The United States expresses no view on the merits of any claim, nor any issues other than those set forth in this brief.

PROCEDURAL BACKGROUND

On November 29, 2021, the Arkansas Board of Apportionment adopted a redistricting plan for the Arkansas House and filed it with the Secretary of State. *See* Ark. Bd. of

Apportionment, 2021 House Boundaries, https://arkansasredistricting.org/wp-content/uploads/2021/11/House2021_FinalBoundaries_Landscape.pdf. Thirty days later, on December 29, 2021, the redistricting plan went into effect. *See* Ark. Const. art. 8, § 4.

That same day, Plaintiffs filed a complaint challenging the 2021 redistricting plan for the Arkansas House. *See* Compl., ECF No. 1. Plaintiffs' Complaint alleges that the 2021 redistricting plan for the Arkansas House violates Section 2 of the Voting Rights Act under the discriminatory results test. *See id.* at ¶¶ 18-35. Also on December 29, 2021, Plaintiffs filed a motion for preliminary injunction, which seeks, *inter alia*, to enjoin the new districts created by the 2021 redistricting plan for the Arkansas House from being used in the 2022 election cycle. *See* Mot. for Prelim. Inj., ECF 2. The Arkansas Board of Apportionment and other state officials (State Defendants) filed their response in opposition to the motion for preliminary injunction on January 19, 2022. *See* Resp. in Opp'n to Mot. for Prelim. Inj., ECF No. 53. Their response did not argue in any way that Plaintiffs lacked a cause of action. *See id.* Plaintiffs filed their reply on January 26, 2022. *See* Reply Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 68. And a preliminary injunction hearing is scheduled to begin on February 1. *See* ECF No. 66.

On January 20, 2022, the Court issued an Order requesting that the parties address the following legal issues at the hearing, as well as in their reply or surreply: "(1) whether private right of action questions are considered jurisdictional in the Eighth Circuit; and (2) whether there is a private right of action that authorizes the claims brought and the relief sought by the Plaintiff-organizations in this case." Order, ECF No. 55 at 1. The Court expressed interest in these questions in the context of examining if it "has an independent obligation to consider these issues" at the preliminary injunction stage. *Id.* Because the answer to the second question is that

Section 2 indeed provides a private right of action for the Plaintiffs to challenge the Arkansas House plan, the first question does not bear on this case and the United States does not address it.

STATUTORY BACKGROUND

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). Section 2(a) prohibits any state or political subdivision from imposing or applying a "voting qualification," a "prerequisite to voting," or a "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 52 U.S.C. § 10301(a); *see also* 52 U.S.C. § 10303(f)(2). Like the Fourteenth and Fifteenth Amendments, Section 2 prohibits voting laws and practices adopted with a discriminatory purpose. *See Chisom v. Roemer*, 501 U.S. 380, 392, 394 n.21 (1991); *see also, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). A violation of Section 2 can also "be established by proof of discriminatory results alone." *Chisom*, 501 U.S. at 404.

Of particular relevance to this case, the Supreme Court has held that Section 2 prohibits vote dilution through the use of redistricting plans that "minimize or cancel out the voting strength of racial [minorities in] the voting population." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (internal citations and quotation marks omitted). *See also Jeffers v. Clinton*, 730 F. Supp. 196, 198, 203-04 (E.D. Ark. 1989) (three-judge court) (holding that Arkansas's 1981 legislative apportionment violated Section 2(b)'s "'results' test"), *aff'd*, 498 U.S. 1019 (1991) (per curiam).

ARGUMENT

Private plaintiffs can bring a cause of action under Section 2. Throughout decades of Section 2 litigation challenging redistricting plans and voting restrictions in Arkansas and

elsewhere, courts have never denied a private plaintiff the ability to bring Section 2 claims. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Houston Lawyers' Ass'n v. Att'y Gen.*, 501 U.S. 419 (1991); *Gingles*, 478 U.S. at 30; *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 941 (8th Cir. 2018); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1024 (8th Cir. 2006); *Jeffers*, 730 F. Supp. at 198, *aff'd*, 498 U.S. at 1019; *see also Larry v. Arkansas*, No. 4:18-CV-00116-KGB, 2018 WL 4858956, at *7 (E.D. Ark. Aug. 3, 2018) (concluding that "[t]he Voting Rights Act creates a private cause of action" in the context of examining a Section 2 claim") (citation omitted), *appeal dismissed*, 139 S. Ct. 641 (2018).[1] And for good reason. "[T]he existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965," and the Supreme Court, in turn, has "entertained cases brought by private litigants to enforce § 2." *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (internal citations and quotation marks omitted); *see also Brnovich*, 141 S. Ct. at 2333 & n.5 (collecting the "steady stream" of private Section 2 cases heard by the Court); *Shelby Cnty.*, 570 U.S. at 537 (recognizing that "individuals have sued to enforce § 2"). In fact, the

[1] For the last 25 years, other courts have unanimously concluded that there is a private right of action regarding Section 2. *See, e.g.*, *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999) (explaining that "an individual may bring a private cause of action under Section 2 of the Voting Rights Act") (citation omitted); *Singleton v. Merrill*, No. 2:21-cv-1291-AMM, slip op. at 209 (N.D. Ala. Jan. 24, 2022) (three-judge court) (rejecting the argument that "Section Two does not provide a private right of action," as such a holding "would work a major upheaval in the law"), Ex. 1; *League of Latin Am. Citizens v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 U.S. Dist. LEXIS 231524, at *6 (W.D. Tex. Dec. 3, 2021) (three-judge court) (denying the motion to dismiss because there was a private cause of action to enforce Section 2); *Ga. State Conf. of the NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1275 (N.D. Ga. 2017) (three-judge court) (explaining that "Section 2 contains an implied private right of action"); *Veasey v. Perry*, 29 F. Supp. 3d 896, 905-07 (S.D. Tex. 2014) (detailing the long history of "[o]rganizations and private parties" enforcing "Section 2 of the VRA"); *Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 362 (E.D. Va. 2009) (explaining that "[t]he Voting Rights Act creates a private cause of action"). Although Justice Gorsuch recently suggested that "[l]ower courts have treated this as an open question," his concurring opinion relied solely on a case from 1981 and did not account for the clarity of Congressional intent following the 1982 Voting Rights Act Amendments. *Brnovich*, 141 S. Ct. at 2350 (Gorsuch, J., concurring) (citing *Washington v. Finlay*, 664 F.2d 913, 926 (4th Cir. 1981)).

Supreme Court held that a private cause of action exists to enforce Section 10 of the Voting Rights Act, in part because it would have been "anomalous" for a court "to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language." *Morse*, 517 U.S. at 232 (opinion of Stevens, J., with one justice joining); *accord id.* at 240 (opinion of Breyer, J., with two justices joining); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (holding that an "individual citizen" may bring suit "to insure that his city or county government complies with" Section 5). Thus, although the Supreme Court has not addressed an express challenge to private Section 2 enforcement, the Court's precedent permits no other holding. *See also Morse*, 517 U.S. at 232-33 (establishing that voters may bring litigation to secure "a right" guaranteed by the Act); *Singleton*, slip op. at 209 (explaining that "ruling that Section Two does not provide a private right of action would badly undermine the rationale offered by the Court in *Morse*").

While the Voting Rights Act does not expressly provide for private enforcement of Section 2, the structure of the Act makes clear that private plaintiffs can secure their own rights. For example, Section 3 provides for certain remedies in actions brought by "the Attorney General *or an aggrieved person* . . . under *any* statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(a), (c) (emphases added); *see also Roberts v. Wamser*, 883 F.2d 617, 621, 624 (8th Cir. 1989) (stating, in the context of a Section 2 case, that "aggrieved" voters could have standing to bring a Voting Rights Act claim); S. Rep. No. 94-295, at 40 (1975) (stating, in the context of amendments to the Voting Rights Act, that "an individual or an organization representing the interests of injured persons" would be an "aggrieved person"). "Section 3 does not speak of actions to enforce *this section*; section 3 speaks of actions under '*any statute* to enforce the voting guarantees of the fourteenth or

fifteenth amendment.'" *Fla. State Conf. of the NAACP v. Lee*, No. 4:21cv187-MW/MAF, 2021 U.S. Dist. LEXIS 245348, at *30-*31 (N.D. Fla. Dec. 17, 2021) (emphases in original), Ex. 2; *see also Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790 (W.D. Ark. 2021) (concluding that 52 U.S.C. § 10302 "explicitly creates a private right of action to enforce the VRA" in the context of a Section 208 case) (citation omitted). Given the statutory language, it would be passing strange for Section 3 to provide a remedy for aggrieved persons to enforce the voting guarantees of the Reconstruction Amendments if such persons could not bring enforcement actions under Section 2, whose original language "elaborates upon that of the Fifteenth Amendment." *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980). Similarly, Section 14(e) allows "the prevailing party, *other than the United States*" to seek attorney's fees "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e) (emphasis added). The availability of fees presupposes that a private cause of action is available to enforce the core provisions of the Voting Rights Act. *See Shelby Cnty. v. Lynch*, 799 F.3d 1173, 1185 (D.C. Cir. 2015) ("Congress intended for courts to award fees under the [Voting Rights Act] . . . when prevailing parties helped secure compliance with the statute."); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) ("Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief."). And, tellingly, courts consistently have awarded fees to private plaintiffs who prevail in Section 2 cases. *See, e.g.*, *Veasey v. Abbott*, 13 F. 4th 362, 368 (5th Cir. 2021) (affirming availability of attorney's fees to prevailing parties in Section 2 litigation); *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, No. 4:14 CV 2077 RWS, 2020 WL 2747306, at *1 (E.D. Mo. May 27, 2020) (awarding attorney's fees to prevailing parties in a Section 2 case).

The legislative history of the Voting Rights Act confirms the existence of a private cause of action to enforce Section 2. *See Casarez v. Val Verde Cnty.*, 957 F. Supp. 847, 852-53 (W.D. Tex. 1997). The Report of the Senate Judiciary Committee accompanying the 1982 Voting Rights Act Amendments expressly "reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965." S. Rep. No. 97-417, at 30 (1982). The Senate Report is the "authoritative source for legislative intent" behind Section 2 of the Voting Rights Act, as amended, *Gingles*, 478 U.S. at 43 & n.7, and the Supreme Court routinely relies on this "oft-cited Report," *Brnovich*, 141 S. Ct. at 2332-33. *See also, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476-77, 479 (1997); *Holder v. Hall*, 512 U.S. 874, 884 (1994); *Gingles*, 478 U.S. at 43-46, 48, 55-56, 62-63, 65-66, 69, 71, 73, 75, 79. The House Committee Report accompanying the 1982 Amendments similarly declares that "[i]t is intended that citizens have a private cause of action to enforce their rights under Section 2." H.R. Rep. No. 97-227, at 30 (1981); *see also, e.g.*, *Brnovich*, 141 S. Ct. at 2332 (relying on the 1981 House Report).

These statements of congressional intent not only stand on their own, but feed into the longstanding canon of construction that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). There is no case before (or after) 1982 denying private plaintiffs a right of action under Section 2, and when Congress amended the Voting Rights Act in 1982, it is presumed to have been "aware of this unanimous precedent." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015). Thus, it was "with that understanding [that Congress] made a considered judgment to retain the relevant statutory text." *Id.*

The limited federal resources available for Voting Rights Act enforcement reinforce the need for a private cause of action. As the Supreme Court has noted, "[t]he Attorney General has a limited staff" who may not always be able "to uncover quickly new regulations and enactments passed at the varying levels of state government." *Allen*, 393 U.S. at 556. This is particularly true now that the formula in Section 4(b) of the Voting Rights Act "can no longer be used as a basis" for requiring states and local jurisdictions to submit voting changes for preclearance. *Shelby Cnty.*, 570 U.S. at 557 (observing that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2"). Thus, "[t]he achievement of the Act's laudable goal [would] be severely hampered, . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen*, 393 U.S. at 556; *see also Morse*, 517 U.S. at 231-32 (attaching "significance to the fact that the Attorney General had urged us to find that private litigants may enforce the Act").

CONCLUSION

Private plaintiffs have a cause of action under Section 2 of the Voting Rights Act. For the reasons set out above, Plaintiffs' status as private parties should not preclude their Section 2 claim.

Date: January 28, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2022, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

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