No. 22-1395

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

ARKANSAS STATE CONFERENCE NAACP, *et al.*,

Plaintiffs-Appellants,

v.

ARKANSAS BOARD OF APPORTIONMENT, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
No. 4:21-cv-01239-LPR

AMICUS BRIEF OF SENATOR TOM COTTON IN SUPPORT OF APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Senator Tom Cotton is a United States Senator from the State of Arkansas. As a member of Congress representing the interests of Arkansans in the federal government, Senator Cotton is familiar with the constitutional and federal statutory law that States are tasked with applying in their congressional redistricting processes. He closely followed Arkansas's own 2021 redistricting process.

Senator Cotton has an interest in ensuring that federal statutes are enforced as they are written, and he believes that the text and structure of federal statutes are the most reliable guides to how they ought to be enforced. *See* A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) (identifying as the first principle of statutory interpretation that "purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires"). To that end, Senator Cotton asserts that the Voting Rights Act of 1965, 52 U.S.C. § 10301 *et seq.*, does not contain an express private right of action to enforce the strictures of Section 2. Nor should any federal court imply a private right of action because the text and structure of the statute as a whole clearly indicate that the sole right to enforce Section 2 rests with the Attorney General of the United States. To infer otherwise would be an act of

judicial lawmaking incompatible with the power of the federal judiciary under Article III.

Counsel for *Amicus* certifies that they authored this brief in its entirety, and no party or its counsel, nor any person or entity other than *Amicus* and his counsel, made a monetary contribution to this brief's preparation or submission. Amicus has requested and obtained the written consent of all parties to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Neither Supreme Court precedent nor traditional methods of statutory interpretation compel the recognition of a private right of action to enforce Section 2 of the Voting Rights Act (the "VRA"). Although the Supreme Court has recognized private rights of action to enforce other provisions of the VRA, it has never squarely considered or decided the question with regard to Section 2. Moreover, there is strong textual evidence that Congress intended to empower only the Attorney General to bring civil lawsuits to enforce Section 2.

Plaintiff-Appellants rely heavily on Supreme Court opinions whose legal reasoning is now questionable, or that do not stand for the proposition for which they are cited. In *Allen v. State Board of Elections,* 393 U.S. 544 (1969), the Supreme Court recognized a private right of action to enforce Section 5 of the VRA under the rationale that to decide otherwise would defeat the major purpose of the overall statute. In *Morse v. Republican Party*, 517 U.S. 186, 232 (1996), a

fractured Court recognized a private right of action to enforce Section 10 of the VRA, and separate sets of concurring Justices referenced a similar right to enforce Section 2. But the existence of a Section 2 private right was not a question presented to the Court in *Morse*, and any holding in that case concerning Section 2 was therefore dicta not carrying the force of law.

In the absence of any VRA-specific controlling precedent, a reviewing court must fall back on the Supreme Court's more general decisions concerning implied private rights of action. Those decisions, exemplified by *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), require that the text of a given statute express both a congressional intent to create a private right *and* an intent to create a private remedy for the vindication of that right before a court may recognize an implied private right of action. Comparing the text of Section 2 with the text of Section 5 illuminates differences indicative of differing congressional intent. Section 5 is focused on the individual right of a person to vindicate their right to vote, whereas Section 2 is framed as a broad prohibition on the ability of states and political subdivisions to enact laws that have a particular racially discriminatory effect. These differences in language demand a different interpretation.

Plaintiff-Appellants have identified no cause of action that allows them to bring a Section 2 claim as private litigants. In the absence of precedential or statutory support, their claim must fail. Senator Cotton writes in support of

Defendant-Appellees and urges this Court to find in favor of Defendant-Appellees for the reasons set forth in their Brief, and for the additional reasons explained herein.

ARGUMENT

I. This Court Should Not Imply a Private Right of Action to Enforce Section 2 of the Voting Rights Act.

The United States Supreme Court has long affirmed that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded," but the mere existence of a remedy does not imply that the remedy is available to *any* potential litigant. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Here, Plaintiffs have brought a single claim alleging vote dilution under Section 2 of the Voting Rights Act (the "VRA"), but the lower court determined that the VRA supplies no private right of action to bring such a lawsuit. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No.: 4:21-cv-01239-LPR, 2022 U.S. Dist. LEXIS 29037, at *4 (E.D. Ark. Feb. 17, 2022) (concluding that "this case may be brought only by the Attorney General of the United States"). The lower court decided this question correctly, and this Court should affirm its reasoning.

A. A Private Right of Action to Enforce Section 2 Is Not Compelled by Precedent or Legislative History.

Plaintiff-Appellants rely on *Allen v. State Board of Elections,* 393 U.S. 544 (1969) as support for the alleged existence of an implied private right of action to

enforce Section 2. As an initial matter, the Court in *Allen* was interpreting Section 5 of the VRA, not Section 2—a completely different provision with different text that does not compel an identical conclusion. The appellants in *Allen* were private parties who alleged that various election laws adopted in their states violated Section 5 of the VRA because they were enacted without first obtaining preclearance from the Department of Justice. *Id.* at 550. The *Allen* Court correctly identified the question presented in that case: "whether private litigants may invoke the jurisdiction of the district courts to obtain *the relief requested in these suits*"—not whether the statute authorized private litigants to enforce *every* one of its provisions. *Id.* at 554 (emphasis added). Although the question here is the same, the underlying statutory provision is not. That makes all the difference.

Allen's legal reasoning is no more illuminating in the Section 2 context than its holding, for the underlying precedent on this issue has changed. Even the *Allen* Court conceded that the VRA provided no express private right of action. *Id.* at 555 (noting as a global matter that the VRA "does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act"). Without an express private right, the only remaining possibility for private enforcement lies in a right implied by the text and structure of the statute as a whole—not in the Court's conception of the "major purpose" of the statute, which was the determinative factor for the *Allen*

Court. *Id.* Although Plaintiff-Appellants might prefer that the Court's permissive 1960s implied right-of-action jurisprudence were frozen in amber, it is no longer the prevailing law on this question. The Court's thinking on implied private rights of action underwent a considerable evolution shortly after *Allen* was decided, and it is these more recent cases that control here.

It is no longer the "*ancien regime*" of *Allen*, but the narrower two-part test adopted by the Supreme Court in *Alexander v. Sandoval* that this Court must apply. 532 U.S. at 287. Per *Sandoval*, to determine whether an implied private right of action exists to enforce a given statute, a court must first assess whether the statute demonstrates "a congressional intent to create new rights;" second, the court must determine whether the statute "manifest[s] an intent to create a private remedy[.]" *Id.* at 288-89. The alpha and omega of this inquiry is "the text and structure of [the statute];" any alternative sources of congressional intent, such as legislative history, are irrelevant. *Id.* Even when one considers the entire VRA and not just Section 2 in isolation, it is apparent that the statute fails the *Sandoval* test. Plaintiff-Appellants essentially argue that "'it is the duty of the courts . . . to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute," but the Court itself has acknowledged that it "abandoned that understanding in *Cort v. Ash*, 422 U.S. 66 (1975) . . . and ha[s] not returned to it since." *Id.* at 287 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

Plaintiff-Appellants have presented no compelling reason why the VRA uniquely compels a return to this discredited interpretive method when other federal statutes do not.

Faced with unfavorable caselaw, Plaintiff-Appellants point to the committee reports from the 1982 VRA amendment process as support for their position. Pl.-Appellants' Br. 31. Both the Senate and House Judiciary Committee reports make brief reference to the existence of a private right of action to enforce Section 2, calling this right "clearly intended by Congress since 1965." S. Rep. No. 97-417, p. 30 (1982); *see also* H. R. Rep. No. 97-227, p. 32 (1981). Five members of the Supreme Court in *Morse v. Republican Party* relied on these committee reports and the reasoning of *Allen* to recognize a private right of action to enforce Section 10 of the VRA. 517 U.S. at 232; *id.* at 240 (Breyer, J., concurring). Those five Justices also assumed the existence of a private right to enforce Section 2, but Section 2 was not at issue in *Morse* so those discussions are nothing more than dicta. *Id.* at 190, 232 (explaining that the *Morse* appellants brought claims under Sections 5 and 10 of the VRA, but not Section 2). This might be compelling evidence of congressional intent if a single committee could be said to speak for the Congress as a whole, and if the statutory amendments ultimately adopted reflected this alleged intent.

But of course, this Court must "begin (and . . . end) [its] search for Congress's intent with the text and structure of" Section 2. *Sandoval*, 532 U.S. at 288. Even the most clearly elucidated legislative intention found in a committee report is completely inconsequential if that idea never found expression in the statutory language enacted by a majority of both houses of Congress and signed by the President. It is wrong "to regard committee reports as drafted more meticulously and as reflecting the congressional will more accurately than the statutory text itself." *Abourezk v. Reagan*, 785 F.2d 1043, 1054 n.11 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.). "Committee reports . . . do not embody the law. Congress, as Justice Scalia [frequently] noted, votes on the statutory words, not on different expressions packaged in committee reports." *Id.* (citing *Hirschey v. FERC*, 777 F.2d 1, 7-8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring)). It is no answer to claim that Congress "intended" to do something if there is no evidence of that intent apparent in the text and structure of the law that was enacted. Maybe it did, maybe it didn't, but the question is not susceptible to reliable judicial resolution. Judicial review is not a fail-safe for legislative ineptitude, and Congress cannot depend on the courts to paper over gaps in its work.

To summarize, the Court in *Allen* recognized an implied private right of action to enforce Section 5 of the VRA based upon what it called "the major purpose of the Act," 393 U.S. at 555, an interpretive approach that has been

consistently rejected by the Court for nearly five decades. The relevant congressional committees then expressed an intent to extend *Allen*'s Section 5 reasoning to Section 2 when amending the VRA in 1982, although they made no changes to the statutory text to reflect that alleged intent and the Court no longer finds such evidence persuasive, S. Rep. No. 97-417, p. 30; H. R. Rep. No. 97-227, p. 32. And, the Court in *Morse* relied on those committee reports to claim the existence of a private right of action to enforce Section 2, although no Section 2 claim was raised in that case. 517 U.S. at 232. The Court and Congress have continuously passed the buck back and forth, with Congress gesturing towards Court opinions predicated on obsolete interpretation to explain away its failure to definitively act on this question and the Court relying on Congress's apparent acquiescence to extend its legal reasoning to decide questions it was not required to answer. At no point in this saga has either branch correctly exercised the power it is constitutionally authorized to wield.

As recognized by Justices Gorsuch and Thomas in a recent concurrence and demonstrated by the history above, the Court has never formally decided whether there exists a private right of action to enforce Section 2. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring). Because the VRA-specific Supreme Court opinions relied upon by Plaintiff-Appellants do not

supply the answers they claim, this Court must turn to the most reliable indicator of congressional intent: The text and structure of the statute itself.

B. The Text and Structure of the Voting Rights Act Indicate There Is No Private Right of Action to Enforce Section 2.

Even accepting Plaintiff-Appellants' factual assertions as true, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979). The Voting Rights Act, like every other federal statute, must be interpreted in light of its text and structure. It does not undermine the purpose of a statute to enforce its plain terms. Nor does it make sense to claim that the Court's recognition of implied private rights of action to enforce Section 5, *see Allen*, 393 U.S. at 555, or Section 10, *see Morse*, 517 U.S. at 232, necessitates an identical answer with regard to Section 2, because each individual section of the VRA uses different language to accomplish a different goal and therefore lends itself to a different interpretation. This brief will not regurgitate all of the lower court's cogent analysis of the meaning of Section 2, but it will address certain meaningful elements of the text of the VRA that the lower court did not.

In *Allen*, the Court extrapolated an implied private right of action from the text of Section 5, and specifically from language providing that "*no person* shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]." *Allen*, 393 U.S. at 555 (quoting 52 U.S.C. §

10304(a)) (alteration in original) (emphasis added). The Court determined that this language, which focused on the right of an individual to vote without being impeded by a state law that had been enacted outside of the Section 5 preclearance process, illuminated "the major purpose of the Act that [private parties] may seek a declaratory judgment that a new state enactment is governed by § 5." *Id.* Hence, if a person believed that their state had acted in violation of Section 5 and that their individual failure to comply with that unlawful state enactment would prevent them from voting, then that person was individually entitled to file suit to protect his or her own right to vote. The private lawsuits contemplated by *Allen* do not demand a particularly fact-intensive inquiry on the part of the voter—either a newly enacted state election law received Section 5 preclearance, or it did not—and individual voters were well-equipped to assess the impact of a given law on their individual ability to cast a ballot.

One look at Section 2 reveals that it is not identical to Section 5. Section 2 prohibits states and political subdivisions from enforcing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*[.]" 52 U.S.C. § 10301(a) (emphasis added). There are several relevant portions of this language that point towards a different outcome than the Court reached in *Allen*.

First, Section 2 is focused on prohibiting sub-federal jurisdictions from enforcing their election laws in a particular manner rather than protecting individual voting rights per se (even if the underlying rationale for policing state enforcement is to avoid the widespread diminution of the right to vote). Compare the text of the two provisions: "No voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in [a race-based abridgement of voting rights]" versus "[N]o person shall be denied the right to vote for failure to comply with [state election laws that have not received Section 5 preclearance]." *Id.* §§ 10301(a), 10304(a). Section 2 is squarely focused on regulating the conduct of the potential bad actors—*i.e.*, the States—whereas Section 5 is focused on ensuring that individual voters have the ability to protect their own rights. This choice of language carries real import for statutory interpretation: "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Section 5 focuses on the individuals protected, but Section 2 is focused on the entities regulated. It is a "general ban" on a particular manner of state law enforcement. *California*, 451 U.S. at 294. Therefore, even applying the stricter *Sandoval* test, the text of Section 5 implies the existence of a private right of action even as the text of Section 2 does not.

Second, moving beyond the subject of the provision, the nature of a Section 2 violation as described in the statute also indicates that private enforcement was not intended. Section 2 does not prohibit the enactment of a particular kind of state election law, but rather a particular kind of enforcement: namely, enforcement of *any* state election law "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a). The 1982 VRA amendments made clear that proving a racially discriminatory intent was no longer necessary to establish a Section 2 violation; what mattered was the *effect* of the law. This is once again meaningfully distinct from Section 5, which holds that "no person" shall be denied the right to cast their ballot due to their "failure to comply" with an improperly enacted state law. *Id.* § 10304(a). It is relatively simple for an individual to determine whether their individual "failure to comply" with a given state law will prevent him or her from voting, but it is far more difficult to determine whether a state law—including a facially neutral state law—is being enforced in a racially discriminatory manner on a statewide basis. This is the kind of fact-intensive inquiry that lends itself to enforcement by the Department of Justice rather than individual private plaintiffs.

Third, Section 2 prohibits states from enforcing election laws in a racially discriminatory manner—or, to be more precise, it prohibits enforcement "in a manner which results in a denial or abridgement of the right of any citizen of the

United States to vote *on account of race or color*[.]" 52 U.S.C. § 10301(a) (emphasis added). The Supreme Court has never decided what the "on account of race or color" language in Section 2(a) means, *see Brnovich*, 141 S. Ct. at 2337 (declining to "decide what this text would mean if it stood alone"), but we can be sure that it means something. In general, "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). By its own terms, Section 2 does not prohibit every kind of state enforcement of election law that results in a denial or abridgement of voting rights, but only those enforcements that abridge the right to vote "on account of race or color." 52 U.S.C. § 10301(a). Again, this is a difficult determination for an individual voter to make: Has their right to vote been denied because of their color, or because they were tardy in renewing their state driver's license? The Department of Justice and the Attorney General are better situated to gather and assess statewide evidence of racially discriminatory impacts.

Beyond the express terms of Section 2 itself, it is also meaningful that the VRA already provides a specific mechanism for enforcing Section 2. Section 12 appears to be the only section of the VRA that provides a remedy for a Section 2 violation, but that provision only provides for enforcement by the Attorney General of the United States. Section 12(d) authorizes the Attorney General—and *only* the Attorney General—to institute legal proceedings on behalf of the United

States "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by" Section 2 of the VRA. *Id.* § 10308(d). Ironically, Plaintiff-Appellants would have a stronger case if Section 12 did not exist at all, since according to *Sandoval*, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290. Without any textual or structural evidence to the contrary, we must assume that Congress meant what it said and nothing more.

It is perfectly reasonable to argue that this is an odd way to structure an enforcement provision, or that Congress should act immediately to add an express private right of enforcement to Section 2. While that might be advisable as a matter of policy, it is not a job for this Court or any other federal court. The revision of statutes is not just the kind of impermissible judicial action that bears "the hallmarks of legislation;" it *is* legislation. *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Alito, J., dissenting from denial of application for stay). Further amendment of the VRA will have to await legislative action from Congress. Until such action is taken, and in the absence of any non-VRA statutory cause of action supporting Plaintiff-Appellants' Section 2 claim, *see* Pl.-Appellants' Br. 9-10 (citing only Section 2), the only plaintiff authorized by the VRA to bring a Section 2 claim is the Attorney General himself.

CONCLUSION

Because Plaintiff-Appellants have failed to identify a cause of action supporting their Section 2 claim, this Court should affirm the decision below.

Dated: June 16, 2022

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Dated: June 16, 2022

/s/ Jason B. Torchinsky
Jason B. Torchinsky

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on June 16, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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