

No. 23-3655

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

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Turtle Mountain Band of Chippewa Indians, et al.,  
*Plaintiffs-Appellees,*

v.

Michael Howe, in his official capacity as Secretary of State of North Dakota,  
*Defendant-Appellant.*

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On Appeal from the United States District Court for the District of North Dakota  
(No. 3:22-cv-00022)

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**BRIEF OF FORMER U.S. DEPARTMENT OF JUSTICE ATTORNEYS AS  
*AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES'  
PETITION FOR REHEARING *EN BANC***

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## DISCLOSURE STATEMENT

*Amici* submit this Disclosure Statement, through their undersigned counsel, pursuant to [Federal Rule of Appellate Procedure 26.1](#) and Eighth Circuit Rule 26.1A.

None of these *amici* are for-profit organizations, meaning that none have any parent company, and no person or entity owns them or any part of them. They are unaware of any publicly held corporations not a party to this proceeding with a financial interest in its outcome.

*/s/ Jessica Ring Amunson*

Jessica Ring Amunson  
Counsel for *Amici*

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

*Amici curiae* are 16 former U.S. Department of Justice (“DOJ”) attorneys who litigated cases to enforce Section 2 of the Voting Rights Act (“VRA”). A complete list of *amici* appears in Appendix A. *Amici* collectively served at DOJ’s Civil Rights Division and Voting Section from 1965 through 2022, during six Republican and five Democratic presidential administrations. *Amici* have a demonstrated interest in this rehearing petition given their deep expertise with DOJ’s enforcement of the VRA, its history and purpose, and the critical role that private enforcement of Section 2 plays.

This brief is filed pursuant to Rule 29. 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, nor any person other than *amici* or their counsel, contributed money intended to fund preparing or submitting this brief.

## SUMMARY OF ARGUMENT

The VRA is one of the most important pieces of civil-rights legislation ever enacted. Without private enforcement, its prohibition against discrimination in voting is little more than a parchment guarantee.

As *amici*’s experience attests, DOJ is not—and never has been—capable of fully safeguarding the promise of the VRA on its own. That responsibility is one that Congress entrusted to both public enforcers and private citizens. Earlier civil-rights

laws failed to adequately protect voting rights, and when Congress enacted the VRA in 1965, it intended for its prohibition on discrimination in voting to be vigorously enforced. Since then, Congress has repeatedly reauthorized Section 2 against the backdrop of widespread private enforcement. Consistent with Congress's intent, the Supreme Court has blessed private enforcement of the VRA—in *Allen v. State Board of Elections*, [393 U.S. 544](#) (1969), in *Morse v. Republican Party of Virginia*, [517 U.S. 186](#) (1996), and by regularly exercising jurisdiction, without reservation, over Section 2 cases brought by voters.

If voters cannot sue, the great bulk of VRA enforcement will vanish. The data prove this: Voters bring the vast majority of Section 2 cases and the vast majority of successful Section 2 claims. Since 1982, private parties have been the sole plaintiffs in approximately 430 cases under Section 2. The United States has been a plaintiff in fewer than 45.

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, [91 F.4th 967](#) (8th Cir. 2024), this Court denied rehearing in part because private enforcement of Section 2 remained available under Section 1983. The divided panel below has now foreclosed that avenue, leaving voters from the seven States within this Circuit without any means for private enforcement of the VRA. Rehearing *en banc* is necessary.



## ARGUMENT

### I. Private Enforcement of Section 2 Advances the Purposes of the VRA.

#### A. Congress Understood that DOJ Could Not Enforce Section 2 on Its Own.

The VRA was predicated on vigorous enforcement, including by individual voters. Congress passed the VRA in large part because laws at the time—including the Civil Rights Acts of 1957, 1960, and 1964—had failed to thwart racial discrimination in voting. In direct response, the VRA codified not only the right to vote absent discrimination, but also a comprehensive set of tools for enforcing this right.

Congress initially tried to use public enforcement alone to eradicate discrimination in voting. 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), but that law fell woefully short. 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), 1965 U.S.C.C.A.N. 2508, 2544. Those same officials ensured that voter-registration records disappeared with them, leaving DOJ without evidence. *See id.* As a result, minority voters remained disenfranchised across the country.

Congress next passed the Civil Rights Act of 1960, but progress remained “painfully slow.” H.R. Rep. No. 89-439 (1965), 1965 U.S.C.C.A.N. 2437, 2441. The Civil Rights Act of 1964 “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. African-American voter-registration rates “barely inched” forward between 1957 and 1965. *Id.*; see also *Hearings on S. 1564 before the House Committee on the Judiciary*, 89th Cong., 1st Sess. (1965–1966) (testimony of Att’y Gen. Katzenbach describing failures of prior civil-rights laws to remedy voting discrimination).

Enforcement by DOJ alone was inadequate: Between 1957 and 1965, DOJ brought 71 voting-rights lawsuits, but these cases did little to eradicate widespread and intransigent voting discrimination. H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. at 2441. The complexity of the suits also sapped DOJ’s time and resources. *See id.*

To address the problem, Congress passed the VRA, with Section 2 unambiguously conferring a federal statutory right—specifically “a right to be free from ... [state or local] practices,” H.R. Rep. No. 89-439 (1965), 1965 U.S.C.C.A.N. at 2454, that “deny or abridge the right of any citizen of the United States to vote on account of race or color,” Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, [79 Stat. 437, 437](#); *see id.* § 1, 79 Stat. at 437 (“[T]his Act shall be known as the ‘Voting Rights Act of 1965.’” (emphasis added)); *id.* § 12(a), 79 Stat. at 443 (establishing

criminal penalties for “depriv[ing] any person of *any right secured by section 2*” (emphasis added)); *id.* § 12(f), 79 Stat. at 444 (referring to persons “asserting rights under the provisions of this Act”). Failing to recognize that Section 2 confers a right that can be privately enforced would doom it to join the prior Civil Rights Acts—whose very shortcomings animated Congress to pass the VRA—as another “empty promise.” *Allen*, [393 U.S. at 557](#).

### **B. Congress Clearly Intended for Private Enforcement of the VRA.**

The VRA was passed against the backdrop of Supreme Court precedent adopting a presumption in favor of private rights of action. *See J.I. Case Co. v. Borak*, [377 U.S. 426, 433](#) (1964) (creating a presumption where “necessary to make effective the congressional purpose”), *abrogation recognized by Touche Ross & Co. v. Redington*, [442 U.S. 560](#) (1979). Since then, however, Congress has repeatedly explicitly stated that it intended for voters to file suit to vindicate their rights under the statute.

In the Senate Report to the VRA’s 1975 Amendments, Congress reaffirmed that “private persons are authorized to request the application of the Act’s special remedies in voting rights litigation,” and it explained that it is “sound policy to authorize private remedies” and thereby establish a “dual enforcement mechanism.” S. Rep. No. 94-295, at 40 (1975). The Report further acknowledged that the VRA “depends heavily upon private citizens to enforce the fundamental rights involved.”

*Id.* As a result, the 1975 Amendments added an attorney-fee provision to give “private citizens ... a meaningful opportunity to vindicate” their rights under the VRA. *Id.* at 41; *see* [52 U.S.C. § 10310\(e\)](#) (authorizing fee awards to prevailing parties “other than the United States”). Attorneys’ fees do not make any sense if voters cannot sue.

Congress again reaffirmed the importance of a private right of action during the 1982 VRA reauthorization, while adding statutory text specifically identifying “members of a class of citizens protected by [Section 2].” Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, [96 Stat. 131](#), [134](#). The House Report explained that these statutorily protected “citizens have a private cause of action to enforce their rights under Section 2.” H.R. Rep. No. 97-227, at 32 (1981). And the Senate Report agreed, “reiterat[ing that] the existence of the private right of action under Section 2[] ... has been clearly intended by Congress since 1965.” S. Rep. No. 97-417, at 30 (1982).

In 2006, Congress expanded the provision awarding fees to prevailing plaintiffs, *see* Pub. L. No. 109-246, § 6, [120 Stat. 577](#), [581](#), and reaffirmed the availability of private enforcement yet again. The House Report to the 2006 Amendments recognized that the assistance of “private citizens ... has been critical to” enforcing the VRA’s protections. H.R. Rep. No. 109-478, at 42 (2006).

Indeed, for decades, federal courts have overseen a “steady stream” of Section 2 lawsuits brought by voters. *Brnovich v. Democratic Nat’l Comm.*, [594 U.S. 647, 660 n.5](#) (2021) (listing cases). Congress has amended the VRA repeatedly, but has never limited private enforcement, and “Congress is presumed to ... adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, [434 U.S. 575, 580](#) (1978).

### **C. Supreme Court Precedent Confirms that Voters May Enforce the VRA.**

The Supreme Court has confirmed that the VRA provides for private enforcement. In *Allen*, the Supreme Court found that the VRA “could 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 556–57](#). That case concerned VRA Section 5, explaining that without private enforcement “[t]he guarantee of § 5 that no person shall be denied the right to vote ... might well prove an empty promise.” *Id.* at 557. Then in *Morse*, the Court reaffirmed that “the existence of a private right of action under section 2 ... has been clearly intended by Congress since 1965.” *Morse*, [517 U.S. at 232](#) (quotation marks omitted); *see id.* (explaining that the Court has “entertained cases brought by private litigants to enforce § 2”).

Moreover, when the Court held in *Shelby County v. Holder*, 570 U.S. 529 (2013), that the coverage formula underlying enforcement of Section 5 was unconstitutional, the Court went out of its way to note that Section 2 enforcement remained available, including to private plaintiffs. *See id.* at 537 (noting that “[b]oth the Federal Government and individuals have sued to enforce § 2”).

And the Supreme Court has repeatedly and unreservedly exercised jurisdiction over Section 2 claims brought by private plaintiffs—including several times in recent years. *See, e.g., Allen v. Milligan*, 599 U.S. 1 (2023); *Brnovich*, 594 U.S. 647.

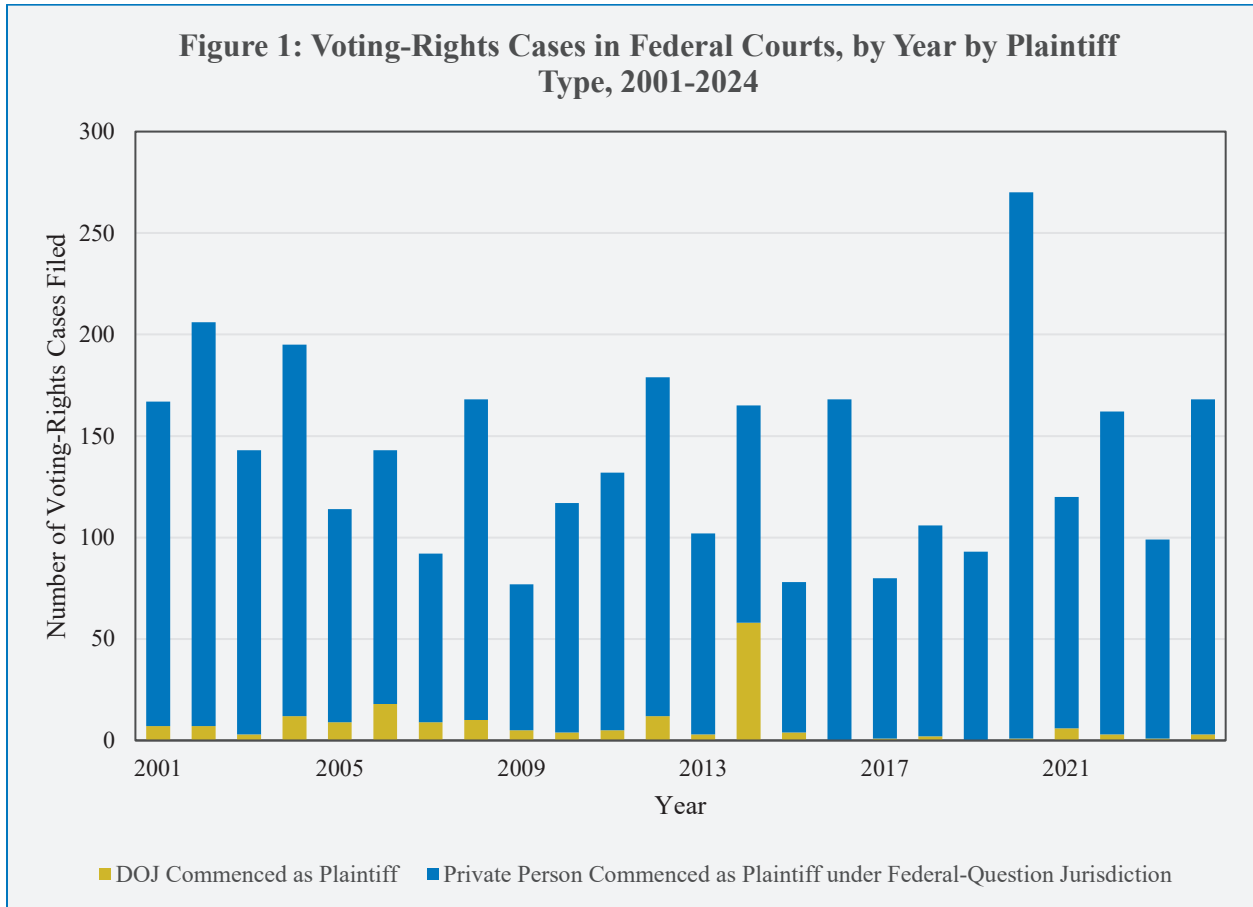
## II. Eliminating Private Enforcement Would Cripple the VRA.

Voting-rights litigation in general has heavily depended on private plaintiffs. Figure 1 displays the number of cases filed in federal district courts from 2001 to 2024 involving a federal voting-rights claim brought by private plaintiffs (blue) and by DOJ (yellow).<sup>1</sup> Over this period, for every voting-rights case brought by DOJ, voters have filed more than 17 suits. This disparity has grown especially pronounced in recent years. In the last decade for which the Administrative Office of the United

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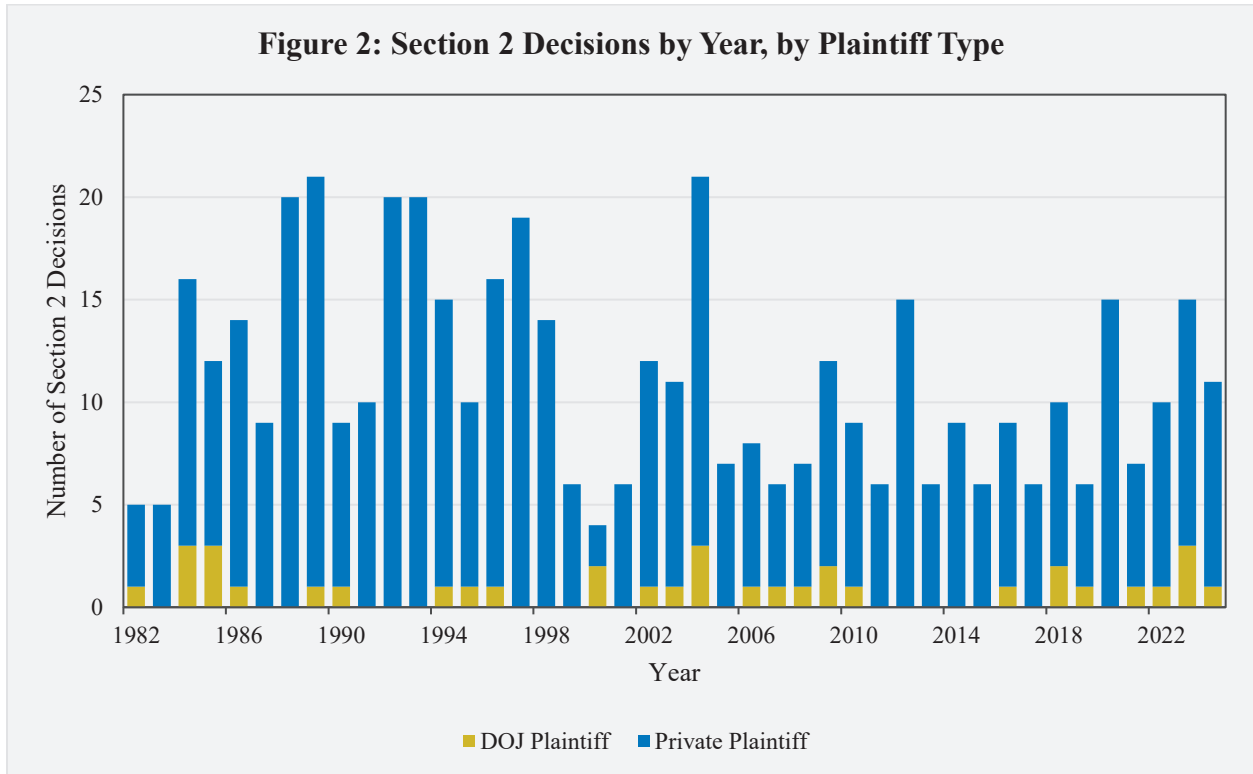
<sup>1</sup> For data underlying Figure 1, *see* Table C-2 of the *Statistical Tables for the Federal Judiciary, 2001 to 2024*, Administrative Office of the United States Courts (Dec. 31, 2024), <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>.

States Courts has published data (2015 to 2024, inclusive), DOJ has commenced 21 federal voting-rights suits, compared with private plaintiffs having filed 1,323.



With respect to Section 2 suits specifically, voters bring the vast majority of cases—including the lion’s share of successful claims. As *amici* know from experience, litigating a Section 2 claim is resource-intensive, and the Department cannot pursue every worthy claim. *See* Off. of the Inspector Gen., U.S. DOJ, *A Review of the Operations of the Voting Section of the Civil Rights Division* 23 (Mar. 2013) (“*OIG Report*”). Without a private right of action, most VRA Section 2 enforcement would grind to a halt.

Illustrating this point, Figure 2 shows the number of final Section 2 decisions in each year since 1982, with each decision classified by whether DOJ appeared as a plaintiff (or plaintiff-intervenor).<sup>2</sup>

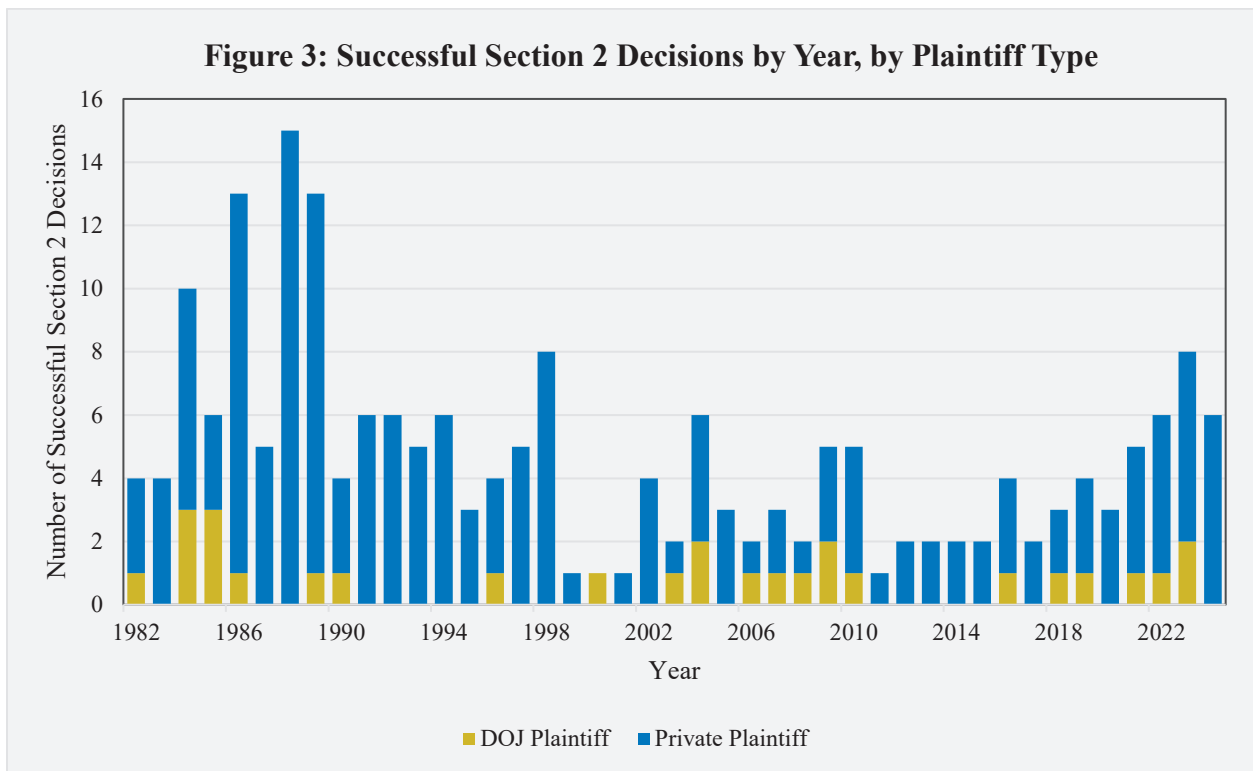


<sup>2</sup> Figures 2 and 3 display data from the University of Michigan Law School Voting Rights Initiative (“VRI”). For 1982 to 2021, Figure 2 displays VRI data current as of 2021, classifying all Section 2 cases in the VRI database by plaintiff. See Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, U. Mich. L. Sch. Voting Rights Initiative (2022), <https://voting.law.umich.edu>. For 2022 to 2024, Figures 2 and 3 display data from the updated VRI database, current as of December 31, 2024. Ellen D. Katz et al., U. Mich. L. Sch. Voting Rights Initiative (2025), <https://voting.law.umich.edu/>. Decisions were classified following the approach of *amici* in *Arkansas State Conference*. Brief of Amici Curiae Former DOJ Attorneys in Support of Plaintiffs-Appellants, *Arkansas State Conference*, No. 22-1395 (8th Cir. Apr. 25, 2024), Entry ID 5150448.

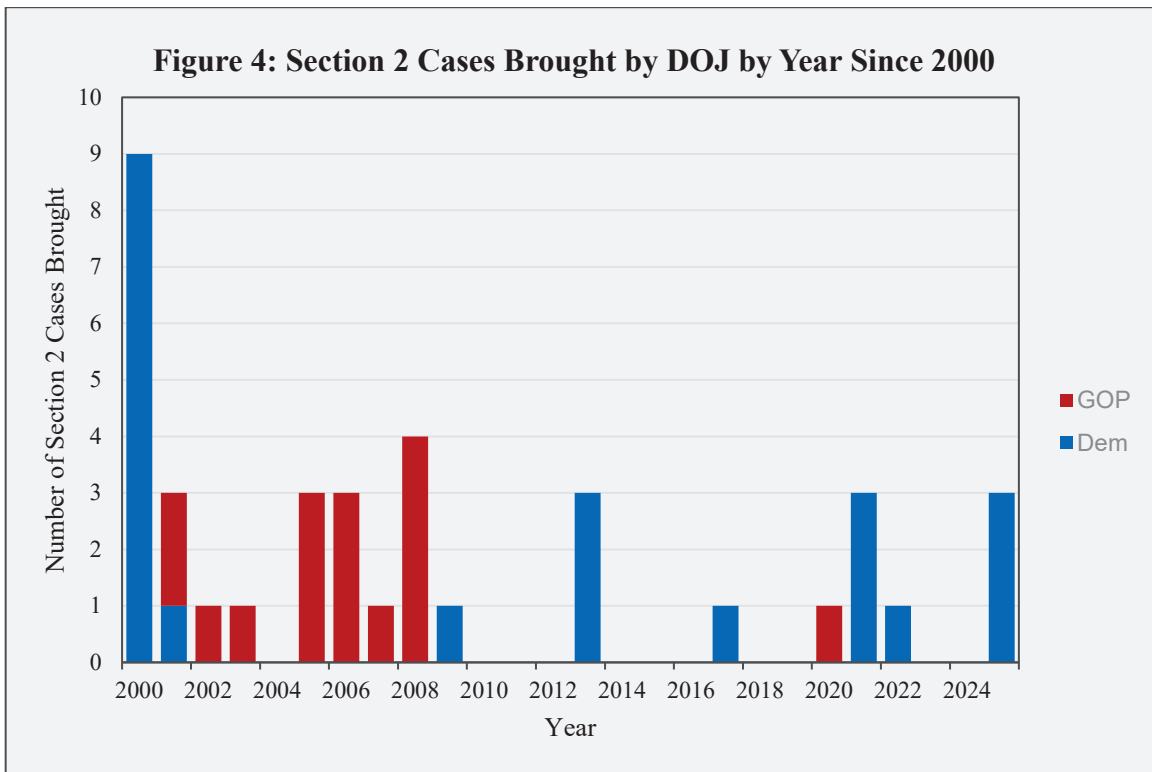


Figure 2 also demonstrates the volume of precedent from which the decision below deviated: Over the past four decades, courts have adjudicated more than 400 Section 2 claims brought by private plaintiffs.

Section 2 suits brought by private plaintiffs are critical to the Act’s effective enforcement. Illustrating this, Figure 3 shows, by year, final Section 2 decisions in which plaintiffs obtained a successful outcome—a victory on the merits, a consent decree, or a favorable settlement. Since 1982, voters have been the sole plaintiffs in more than 170 successful Section 2 cases.



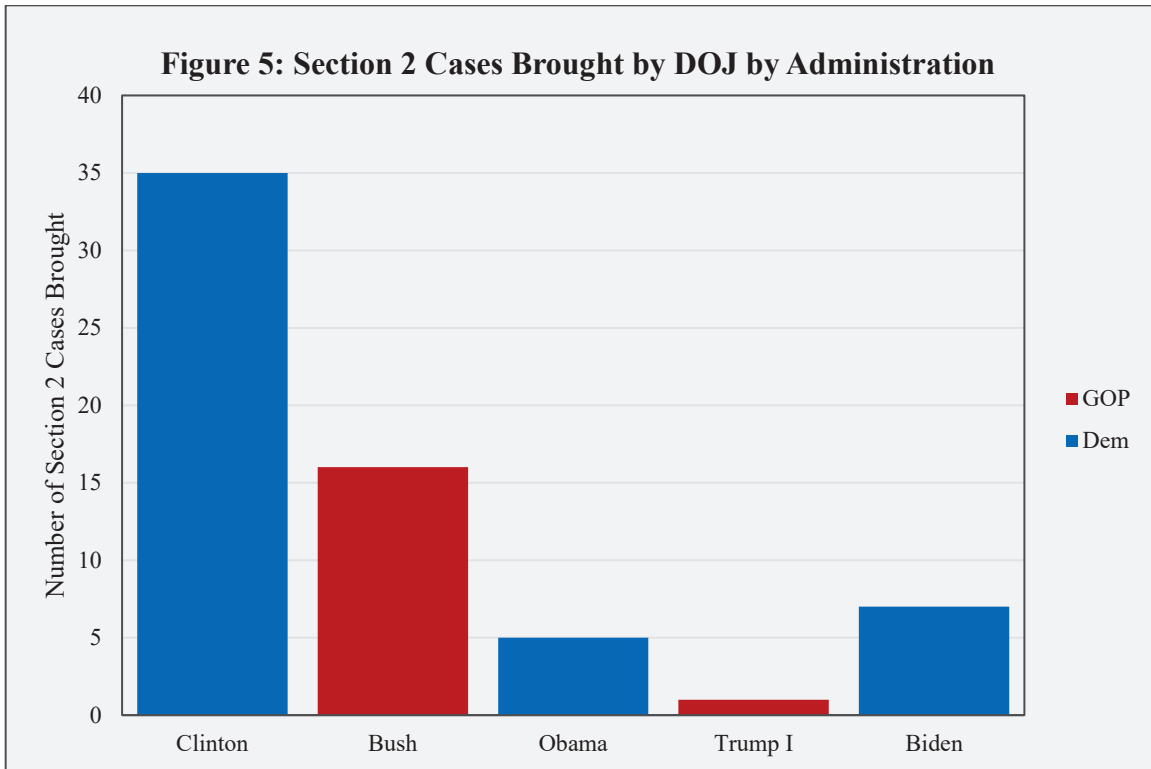
Moreover, as Figure 4 shows, the already-limited number of cases brought by DOJ has declined further in recent years.<sup>3</sup> From 2000 to 2010, DOJ filed 26 Section 2 complaints. Since 2010, DOJ has filed less than half that number—only 12, and never more than three in a single year. On the other hand, private enforcement of meritorious Section 2 claims has remained steady over this same period.



The decline in DOJ enforcement cuts across political parties. As Figure 5 illustrates, the Clinton Administration filed seven times as many Section 2 cases as

<sup>3</sup> For data underlying Figure 4, see *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DOJ, <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0> (updated Jan. 23, 2025) (“*Section 2 Claims*”).

the Obama Administration.<sup>4</sup> In recent years, under both President Trump and President Biden, DOJ has pursued only a select set of cases.



Private plaintiffs bring most Section 2 claims because DOJ is limited in its capacity. *Amici* recall months-long investigations preceding the initiation of a Section 2 claim. Cases require painstaking evidence collection, including granular statistical data and sophisticated expert testimony, and they can take years to litigate.<sup>5</sup> Since the Supreme Court’s decision in *Shelby County*, private Section 2

<sup>4</sup> For data underlying Figure 5, see *OIG Report* at 24–32; *Section 2 Claims*, *supra* note 3.

<sup>5</sup> Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2157 (2015).

litigation has become particularly indispensable. *See Brnovich*, [594 U.S. at 700–01](#) (Kagan, J., dissenting) (“After *Shelby County*, the vitality of Section 2 ... matters more than ever.”).

Ultimately, voters are the direct victims of the denial, abridgement, and dilution of the franchise. Individual citizens’ participation as plaintiffs in Section 2 litigation reflects the very purpose of the VRA: to eradicate, once and for all, the invidious discrimination that still limits access to the franchise for too many Americans. Individual voters’ efforts to protect the right to vote not only are central to the original purpose of the VRA but remain vital to its success.

### **III. The Total Elimination of Private Enforcement Requires *En Banc* Review.**

In *Arkansas State Conference*, this Court denied rehearing in part because Section 1983 remained available to voters seeking to enforce VRA Section 2. *Ark. State Conf.*, [91 F.4th at 967](#) (Stras, J., concurring in the denial of rehearing *en banc*). Following the divided panel’s decision, voters in this Circuit now have no mechanism at all to enforce the promise of the VRA. That extraordinary result requires *en banc* review.

## CONCLUSION

The Court should grant Plaintiffs-Appellees' petition for rehearing *en banc*.

Dated: June 4, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 2,594 words, excluding parts of the brief exempted by Rule 32(f). *See* Fed. R. App. P. 32(a)(7)(B). This brief also complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it was prepared in a proportionally spaced typeface in 14-point Times New Roman. As required by Eighth Circuit Rule 28A(h), this brief has been scanned for viruses and is virus-free.

*/s/ Jessica Ring Amunson*

Jessica Ring Amunson  
Counsel for *Amici*

## CERTIFICATE OF SERVICE

I certify that on June 4, 2025, I electronically filed the foregoing with the Clerk of Court for the U.S. 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: June 4, 2025

/s/ Jessica Ring Amunson

Jessica Ring Amunson

Counsel for *Amici*

## APPENDIX A

### *List of Amici Curiae*<sup>6</sup>

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Bradley Heard, U.S. Department of Justice, Civil Rights Division (2010–2022),  
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Zita Johnson-Betts, U.S. Department of Justice, Civil Rights Division (1983–  
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Robert Kengle, U.S. Department of Justice, Civil Rights Division (1984–2005),  
Voting Section (1984–2005); *Deputy Chief, Voting Section*

Loretta King, U.S. Department of Justice, Civil Rights Division (1980–1990 and  
1992–2011), Voting Section (1992–1994); *Deputy Assistant Attorney  
General, Civil Rights Division (career), Deputy Chief, Voting Section*

Steven J. Mulroy, U.S. Department of Justice, Civil Rights Division (1991–1999),  
Voting Section (1991–1995)

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<sup>6</sup> *Amici* submit this brief in their personal capacities. *Amici*'s institutional affiliations are for identification purposes only.



Stephen B. Pershing, U.S. Department of Justice, Civil Rights Division (1996–2005), Voting Section (1996–2005)

Joseph Rich, U.S. Department of Justice, Civil Rights Division (1968–2005), Voting Section (1999–2005); *Chief, Voting Section*

Lee H. Rubin, U.S. Department of Justice, Civil Rights Division (1989–1995), Voting Section (1989–1992)

Jessica Dunsay Silver, U.S. Department of Justice, Civil Rights Division (1975–2014); *Principal Deputy Chief, Appellate Section*

Barry H. Weinberg, U.S. Department of Justice, Civil Rights Division (1965–2000), Voting Section (1969–2000); *Acting Chief and Deputy Chief, Voting Section*