No. 16-1068

IN THE

Supreme Court of the United States

NORTHEAST OHIO COALITION FOR THE HOMELESS,
COLUMBUS COALITION FOR THE HOMELESS,
and OHIO DEMOCRATIC PARTY,

Petitioners,

—v.—

JON HUSTED, OHIO SECRETARY OF STATE and
THE STATE OF OHIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Brennan Center for Justice at NYU School of Law is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve the systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society.[1] Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote of every eligible citizen, to ensure that voting is free, fair, and accessible for all eligible Americans, and to prevent partisan manipulation of electoral rules. The Center conducts empirical, qualitative, historical, and legal research on electoral practices and has litigated or participated in numerous voting rights cases before courts across the country.

In particular, the Brennan Center has regularly assisted private plaintiffs in exercising their private rights of action under federal voting rights statutes by pursuing civil lawsuits to combat unlawful burdens and restrictions on their right to vote. The Brennan Center's lawsuits have included challenges on behalf of private citizens under Section

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[1] Pursuant to Supreme Court Rule 37.6, The Brennan Center for Justice affirms that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amicus* or its counsel made such a monetary contribution. All parties have consented to the filing of this brief. This brief does not purport to represent the position of NYU School of Law.

10101's Materiality Provision addressed in this case. If allowed to stand, the Sixth Circuit's ruling denying a private right of action under the Materiality Provision will undermine the Brennan Center's ability to assist its clients in enforcing their voting rights.

SUMMARY OF ARGUMENT

The Sixth Circuit's ruling in this case, which bars individual suits under the Materiality Provision of Section 10101, 52 U.S.C. § 10101, crystallizes a federal circuit split that threatens a retrenchment of voting rights enforcement and requires this Court's review. This Court observed more than fifty years ago that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Private litigation under federal voting rights laws—including Section 10101—has been, and continues to be, a critical vehicle for ensuring that American citizens are able to exercise their fundamental right to vote free of unlawful barriers and restrictions.

For nearly 100 years, from its enactment in 1870 until the advent of the Voting Rights Act in 1965, Section 10101[2] was the sole federal statutory provision aimed at protecting citizens' voting rights under the Fourteenth and Fifteenth Amendments.

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[2] This brief follows the Petition in using the current statutory section number throughout. The statutory section was previously codified at 42 U.S.C. § 1971 and, before that, at 8 U.S.C. § 31.

Throughout that period, and until recently, the availability of a private right of action under Section 10101 remained essentially unquestioned by the courts, even well after Congress's adoption of an amendment in 1957 extending specific enforcement authority to the Attorney General under that provision. In recent years, however, an increasing number of federal district court decisions have sowed doubt about the private right of action in cases arising under the Materiality Provision and other portions of Section 10101, culminating in the Sixth Circuit's recent decision squarely rejecting it. These developments stand in stark contrast to the rule forcefully articulated by the Eleventh Circuit, and accepted by others, recognizing the integral importance and availability of the private right of action under the Materiality Provision.

Private enforcement of voting rights laws is the chief mechanism for vindicating voting rights and is a critical part of the federal statutory scheme. Both the robust record of civil litigation under Section 10101 and the legislative history of amendments to that provision reflect a steadfast recognition by Congress and the courts that the protection of the franchise at all levels of federal, state, and local government cannot, and should not, be consigned to the Attorney General alone. Although the Department of Justice has played an important role in prosecuting major voting rights cases, private actions by individuals have been, and should remain, the mainstay of effective protection of voting rights under Section 10101.

This Court should grant certiorari to resolve the circuit split as to the availability of private enforcement under the Materiality Provision of Section 10101—an important question of law that can seriously impact the enforcement of federal voting rights.

REASONS FOR GRANTING THE PETITION

I. There Is An Entrenched Circuit Split, Jeopardizing The Longstanding Rule That Section 10101 Is Privately Enforceable

A. Recent Federal Court Decisions Have Unsettled The Law, Resulting In An Entrenched Circuit Split

1. Notwithstanding the long-established rule and practice of private enforcement under Section 10101, federal law in this area has become unsettled in recent years. An increasing number of district courts, and repeated decisions by the Sixth Circuit, have refused to recognize the right of individuals and institutions to enforce Section 10101 through private lawsuits—rulings that are in direct conflict with the law of the Eleventh Circuit and other jurisdictions. Clarification by the Supreme Court is necessary to restore uniformity among the circuits in this important area of federal law.

For over a century, every court to consider Section 10101 expressly or implicitly found that it was enforceable by private citizens. *See infra* Section I.B. Indeed, prior to 1978, no court had refused to recognize the right of private citizens to enforce Section 10101 rights. That consensus was disrupted in *Good v. Roy*, 459 F. Supp. 403, 406 (D. Kan. 1978), in which a Kansas district court declared that "the unambiguous language of Section [10101] will not permit us to imply a private right of action." Eighteen years later, another district court summarily adopted the holding in *Good* and dismissed a citizen's private action under Section 10101. *See Willing v. Lake Orion Cmty. Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996).

Not until *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), however, did a federal appellate court adopt the same view, concluding that "Section [10101] is enforceable by the Attorney General, not by private citizens." Without further analysis, the Sixth Circuit followed the holding of *Willing*, which itself had relied uncritically upon *Good*.

In the case at bar, the Sixth Circuit reaffirmed its ruling in *McKay,* again without significant legal analysis. *See Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir.), *pet. for rehearing en banc denied,* No. 16-3603, Dkt. 79 (6th Cir. Oct. 6, 2016). Although the Sixth Circuit acknowledged the contrary authority in other jurisdictions upholding the private right of action under Section 10101(a), the panel declared itself bound to follow the ruling in *McKay*. *See id.*

Despite the venerable pedigree of the private right of action under Section 10101, *see infra* Section I.B, recent federal district court decisions have continued to seize upon *Good*'s reasoning in dismissing lawsuits brought by private litigants under Section 10101. *See e.g.*, *Hayden v. Pataki*, No. 00 Civ. 8586(LMM), 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004); *Spivey v. Ohio*, 999 F. Supp. 987, 996 (N.D. Ohio 1998); *Cartagena v. Crew*, No. CV-96-3399 (CPS), 1996 WL 524394, at *3 n.8 (E.D.N.Y. Sept. 5, 1996).

At the same time, other courts continue to entertain private litigation under Section 10101. Recently, in *Davis v. Commonwealth Election Comm'n*, a citizen of the Northern Mariana Islands challenged a provision of the commonwealth's constitution (along with implementing legislation) restricting voting on certain issues to "persons of Northern Marianas descent." No. 1-14-CV-00002, 2014 WL 2111065, at *1 (D. N. Mar. I. May 20,

2014). The district court concluded that the restriction on voting was invalid under Section 10101(a). In its analysis, the court explicitly found that a private right of action exists to enforce Section 10101. *See id.* at *10 (concluding that authorization of public enforcement in the Civil Rights Act of 1957 "could hardly have been intended to shut down existing means of enforcement" of Section 10101); *see also Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm.*, No. SACV 12-00927 DOC(JPRx), 2012 WL 3239903, at *5 n.3 (C.D. Cal. Aug, 7, 2012) (concluding that Section 10101 provides "plaintiffs with a private right of action for an injunction and declaratory relief"). While the Ninth Circuit did not find it necessary to reach this issue on appeal, they did not disturb the lower court's ruling regarding a private right of action. *See Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087 (9th Cir. 2016).

As highlighted by the Petition, the creeping confusion among lower courts has now solidified into a direct conflict among the federal circuit courts. *Compare McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) *with Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003). In *Schwier*, the Eleventh Circuit thoroughly analyzed the basis for the private right of action under Section 10101, holding that neither the 1957 amendment authorizing enforcement by the Attorney General nor Congress's failure to provide expressly for a private right of action in Section 10101 meant "that Congress did not intend such a right to exist." *Schwier*, 340 F.3d at 1296. As this case and other recent lower court decisions demonstrate, however, the status of the private right of action under Section 10101 remains unsettled.

2. Absent the Court's intervention, lack of uniformity in the law will continue and likely become more entrenched. To date, other circuits have

entertained private suits brought under Section 10101 without directly addressing the question of whether the statute affords a private right of action.[3] Particularly in light of the Sixth Circuit's holding in this case, other circuits are likely to see additional challenges to the private right of action under Section 10101, raising the specter of deeper legal confusion and continuing erosion of the voting rights enforcement regime.

Moreover, the lack of clarity as to the availability of private enforcement results in a particular harm for voting rights. Protracted litigation over the availability of the private right can delay resolution until after an election, depriving aggrieved parties of their right to vote even in cases where the court eventually recognizes the private right of action. Particularly in cases where a relatively small number of individuals are affected, uncertainty concerning private enforcement is likely to deter individuals and groups from pursuing voting rights cases at all.

B. The Sixth Circuit's Holding Upends Over 100 Years Of Settled Law And Is Contrary To The Text And History Of Section 10101

1. *Good* and its progeny, including the Sixth Circuit's holding in this case, cannot be reconciled with the hundred-year line of cases preceding *Good*,

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[3] *See, e.g.*, *Hoyle v. Priest*, 265 F.3d 699 (8th Cir. 2001); *Coalition for Educ. in Dist. One v. Bd. of Elections of City of New York,* 495 F.2d 1090 (2d Cir. 1974); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967).

in which private parties litigated Section 10101 actions.

Private litigation under Section 10101 dates back to 1870, shortly after the predecessor to Section 10101 was enacted, in which plaintiffs sought to recover statutory penalties for deprivations of their Fifteenth Amendment rights.[4] *See e.g.*, *McKay v. Campbell*, 2 Abb. U.S. 120 (D.C.D. Or. 1870) (proceeding by plaintiff against judge of election who allegedly denied plaintiff the right to vote); *see also Kellogg v. Warmouth*, 14 F. Cas. 257 (C.C.D. Md. 1872). Congress enacted Section 10101's predecessor in exercise of its Fifteenth Amendment "power to enforce this article by appropriate legislation," U.S. Const. amend. XV, § 2, and the provision was meant to "cloth[e] the candidate of the voter with the right to prevent or redress the wrong attempted or perpetrated upon the voter, by an appropriate civil action or procedure." *Kellogg*, 14 F. Cas. at 258.

For over a century since 1870, court decisions recognizing—or, just as often, taking as given—the existence of a private right of action drew an unbroken line through the statutory history of amendments to Section 10101. Significant amendments to Section 10101 were enacted in 1957 and 1964. In 1957, Congress outlawed interference with individuals' voting rights through intimidation or coercion and augmented the enforcement of Section 10101 by giving the Attorney General express statutory authority to enforce its provisions.

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[4] *See* Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870). The provisions providing for criminal and civil penalties were repealed in 1894. *See* 28 Stat. 36 (1894).

See 52 U.S.C. § 10101(b), (c); Act of Sep. 9, 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634. In conjunction with the Civil Rights Act of 1964, Congress further amended Section 10101 by adding the Materiality Provision, which prohibits states from denying any eligible person the right to vote based upon errors or omissions in voter registration and application papers that are not "material" to determining whether such individual is qualified to vote under applicable state law. The 1964 amendments also added provisions that prohibit state actors from using literacy tests as qualifications for voting unless administered and conducted entirely in writing and mandate that voting standards and procedures be uniformly applied to all persons qualified to vote. *See* 52 U.S.C. § 10101(a)(2)(A)-(C); Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241.

Both before and after the 1957 and 1964 amendments, private citizens frequently invoked their private right of action under Section 10101 by initiating and often prevailing in lawsuits challenging violations of that provision. *See e.g.*, *Brown v. Baskin*, 78 F. Supp. 933, 942 (E.D. S.C. 1948) (issuing an injunction to protect African-American participation in Democratic primaries in South Carolina); *Brown v. Post*, 279 F. Supp. 60, 64 (W.D. La. 1968) (school board member election in Louisiana void due to discrimination against African-American voters). Throughout the life of Section 10101, private parties have initiated dozens of cases invoking its protections, and litigation by private citizens has long been the bedrock of voting rights

enforcement under Section 10101.[5] Indeed, many of the early advances in voting rights protection were achieved through private litigation initiated by individuals and private citizen groups. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 383 (1915) (affirming award of damages against Maryland state officials for denying three African-Americans the right to vote); *Smith v. Allwright*, 321 U.S. 649, 666 (1944) (reversing dismissal of action brought against Texas election officials for refusing to allow African-American plaintiff to vote in Democratic primary); *see also infra* Section II.

2. While the current split in federal law originates with *Good v. Roy*, the *Good* court's superficial rationale for its conclusion is not supported by the text or legislative history of Section 10101.

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[5] *See e.g.*, *Coalition for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974)*; Toney v. White*, 476 F.2d 203 (5th Cir. 1973), *vacated in part* 488 F.2d 310 (5th Cir. 1973) (en banc rehearing); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Reddix v. Lucky*, 252 F.2d 930 (5th Cir. 1958); *Ball v. Brown,* 450 F. Supp. 4 (N.D. Ohio 1977); *Frazier v. Callicutt*, 383 F. Supp. 15 (N.D. Miss. 1974); *Ballas v. Symm*, 351 F. Supp. 876 (S.D Tex. 1972); *Brier v. Luger*, 351 F. Supp. 313 (M.D. Pa. 1972); *Shivelhood v. Davis*, 336 F. Supp. 1111 (D. Vt. 1971); *Brooks v. Nacrelli*, 331 F. Supp. 1350 (E.D. Pa. 1971); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *Anderson v. Courson*, 203 F. Supp. 806 (M.D. Ga. 1962); *Brown v. Baskin*, 78 F. Supp. 933 (E.D. S.C. 1948); *Elmore v. Rice*, 72 F. Supp. 516 (E.D. S.C. 1947); *Kellogg v. Warmouth*, 14 F. Cas. 257 (C.C.D. La. 1872).

Indeed, the court's analysis in *Good* focused exclusively on the fact that Section 10101 contains an express grant of authority for public enforcement by the Attorney General. The court declared that the Attorney General provision was an "unambiguous" indication that Congress intended to foreclose a private right of action under Section 10101. *Good*, 459 F. Supp. at 406.

As the petition for certiorari ably points out, however, that interpretation cannot be squared with the language of the statute at issue. As noted above, the paragraph granting the attorney general enforcement power was added to Section 10101 as part of the amendments enacted in 1957. *See* Act of Sep. 9, 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634. In that same amendatory legislation, Congress conferred jurisdiction on district courts to hear actions for damages and equitable relief brought under any federal voting rights statute. *See id.* § 121 ("[D]istrict courts shall have original jurisdiction of . . . any civil action . . . to recover damages or to secure equitable or other relief . . . under any Act of Congress providing for the protection of . . . the right to vote."). Since Section 10101 was the only federal statutory voting rights protection in existence at the time of the 1957 amendments, Congress must have contemplated private litigation under that provision when it conferred jurisdiction on district courts to hear damages actions under federal voting rights laws. Any other interpretation would illogically presume that in one section of its legislation Congress expressly provided jurisdiction for damages actions under voting rights laws, while in the very next section it foreclosed private citizens' ability to bring such actions under the only statutory vehicle then available.

This Court should not leave the circuit split spawned by *Good* unaddressed. As the many cases

cited above demonstrate, the confusion emanating from this ill-considered denial of the private right of action under Section 10101 has continued to spread, as has its corrosive and discouraging impact on citizen initiative in protecting their Section 10101 rights.

II. The Private Right Of Action Is An Essential Anchor For The Protection Of Voting Rights Under Section 10101

1. As noted in the Petition, the Materiality Provision is just one of a variety of protections afforded by Section 10101, including prohibitions against infringements of the right to vote through intentional racial discrimination by state actors, 52 U.S.C. § 10101(a)(1), and by intimidation or coercion "under color of law or otherwise," *id.* § 10101(a)(2)(b). The Sixth Circuit's denial of a private right of action under the Materiality Provision, on grounds arguably no less applicable to the other provisions of Section 10101, threatens to undermine individual citizens' ability to defend their right to vote against a broad range of unlawful encroachments.

Moreover, the Materiality Provision itself is an important component of the statutory scheme. Congress added this provision to Section 10101 in 1964 as part of a larger effort to forestall widespread abuse in state voting procedures and qualifications that prevented hundreds of thousands of qualified citizens from exercising the franchise. Prior to 1964, national attention focused on the discriminatory administration of voter registration requirements and the pervasive practice of disqualifying eligible voters for trivial errors in registration and voting papers. Congress responded by amending Section 10101 to mandate uniform administration of voting procedures and to prohibit disqualification based on immaterial errors in voting applications. *See*

§ 10101(a)(2)(A)-(C); *Hearings on H.R. 7152 Before the Committee on Rules, House of Representatives*, 88th Cong. 605 (1964) ("The purpose of this provision is to prevent the all too prevalent practice of using questions of differing degrees of difficulty depending upon [the applicant's race]…[and to] forbid denial[ ] of the right to vote because of trivial errors or omissions on applications for registration.") (statement of Rep. Seymour Halpern).

As this case illustrates, procedural irregularities and hyper-technical application of voter qualification standards continue to prevent many qualified citizens from exercising their voting rights today. Under the statute challenged in this case, scores of voters in Ohio were disqualified for trivial errors such as writing a name in legible cursive rather than in roman print; omitting a zip code from an otherwise ascertainable address; or missing a single digit in a social security number. *See* Pet. at 12, 16. The Materiality Provision provides a well-honed tool to counter such abuses by requiring an objective justification for voter registration criteria as material to the actual verification of individuals' eligibility to vote.

Historically, the private right of action has been critical to remedying the particular abuses targeted by the Materiality Provision. Numerous recent private suits have sought enforcement of rights conferred under the Materiality Provision of Section 10101. *See Hoyle v. Priest*, 265 F.3d 699, 704-05 (8th Cir. 2001); *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000); *Thrasher v. Illinois Republican Party*, No: 4:12-4071, 2013 U.S. Dist. LEXIS 15564, at *6-11 (C.D. Ill. Feb. 5, 2013); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839-42 (S.D. Ind. 2006); *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1211-1213 (S.D. Fla. 2006); *Gonzalez v. Arizona*, No. 06-1268, 2006 U.S. Dist. LEXIS

76638, at *30-33 (D. Ariz. Oct. 11, 2006); *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270-71 (W.D. Wash. 2006); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1370-71 (N.D. Ga. 2005); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370-72 (S.D. Fla. 2004); *McKay v. Altobello*, No. 96-3458, 1996 U.S. Dist. LEXIS 16651, at *3-4 (E.D. La. Oc. 31, 1996).

2. More generally, the vindication and protection of voting rights under the federal statutory scheme has been achieved in significant measure through the initiative of private litigants. This Court has recognized private rights of action under Sections 5, 2, and 10 of the Voting Rights Act of 1965, notwithstanding the absence of express language in the Act conferring such a right. *See* Pet. at 32-36. Private actions initiated by aggrieved individuals have been instrumental in securing milestone victories in voting rights cases, such as striking down state election poll taxes, declaring unconstitutional unequal apportionment of state legislatures, and enjoining racial gerrymandering. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (poll tax assessed in state elections declared unconstitutional in challenge brought on behalf of Virginia residents); *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964) (principle of "one person, one vote" applied to strike down state legislature apportionment in challenge brought by Alabama voters); *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (complaint alleging racial gerrymandering was sufficient to state a cause of action under Fourteenth and Fifteenth Amendments).

In particular, private actions invoking the protections guaranteed by Section 10101 have resulted in many of the landmark voting rights decisions addressing some of the most egregious and widespread tactics used to disenfranchise voters.

One early example is *Myers v. Anderson*, 238 U.S. 368 (1915), in which this Court declared restrictive grandfather clauses unconstitutional. Private individuals had brought the suit challenging a Maryland statute that restricted voter registration to male citizens who were entitled to vote in that state prior to 1868. The plaintiffs alleged violations of Section 10101 in an effort to enforce their rights under the Fifteenth Amendment. *See Anderson v. Myers*, 182 F. 223, 225 (C.C.D. Md. 1910). As noted earlier, Section 10101 was enacted to allow individuals to enforce the Fifteenth Amendment. *See supra* Section I.B (noting that Congress enacted Section 10101 in exercise of its Fifteenth Amendment authority "to enforce this article by appropriate legislation"). Striking down the law, this Court declared that the grandfather clause was "repugnant to the 15th Amendment." *Myers*, 238 U.S. at 379.

The widespread disenfranchisement perpetrated through the use of "white primaries" was also successfully challenged through private litigation under early versions of Section 10101. In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court entered a landmark decision holding that the Texas primary system, under which the Democratic Party of Texas excluded African-Americans from the primary elections it conducted, violated the "well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote." *Id.* at 666. *Allwright* originated with a civil lawsuit brought by a single black citizen of Texas alleging the deprivation of his rights under Sections 10101 and 1983. *See id.* at 651.

Allwright was followed by *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), and *Baskin v. Brown*, 174 F.2d 391 (4th Cir. 1949) two private-plaintiff class actions under Sections 10101 and 1984 which

resulted in injunctions prohibiting the use of white primaries in South Carolina. And in *Terry v. Adams*, this Court championed relief under Section 10101 in favor of Texas residents who challenged white-only preprimaries held by the Jaybird Democratic Association, a Texas political organization. 345 U.S. 461, 469 (1953); s*ee also* Brief for Petitioners at 2, *Terry v. Adams*, 345 U.S. 461 (1953), 1952 WL 82449, at *2.

Private actions continue to be a driving force in the enforcement of voting rights. By way of example, between June 29, 1982 and December 31, 2005, 331 federal cases with electronically published decisions were brought under Section 2 of the Voting Rights Act according to one study. *See* 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, 652-54 (2006) [hereinafter VRI Study]. Of those 331 suits, over 92 percent were initiated by private litigants (including voters, civil rights groups, political parties, or candidates) and/or state or local officials, without the Department of Justice. *See* Ellen Katz & The Voting Rights Initiative, VRI Database Master List (2006), *available at* https://web-beta.archive.org/web/20150915145952/http://sitemaker.umich.edu/votingrights/files/masterlist.xls (last visited April 4, 2017) [hereinafter VRI Study Master List]. Private parties prevailed in 110 of those cases.[6] The Department of Justice

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[6] In the VRI Study, "success" was defined as a lawsuit whose ultimate outcome was that the plaintiff proved a violation on the merits, or (if no published opinion stating a violation) won

(continued…)

participated as sole plaintiff in only seven of the 331 cases and successfully proved a violation of Section 2 in three cases. *See* VRI Study Master List. The Department of Justice served as a plaintiff or intervenor along with private litigants in an additional 17 cases, ten of which resulted in a judgment for the plaintiffs. *See id.*

3. As these figures illustrate, enforcement actions initiated by the Attorney General are not an adequate substitute for private litigation vindicating voting rights, notwithstanding the view of courts that refuse to recognize a private right of action. There are several reasons why exclusive enforcement by the Department of Justice cannot be an adequate substitute for private actions under Section 10101 and the statutory voting rights regime in general.

To begin with, constraints on the Justice Department's staff and time prevent it from prosecuting every meritorious voting rights case. In fiscal year 2015, the Department of Justice, across all of its divisions, filed more than 100,000 civil cases in jurisdictions across the country, in addition to prosecuting over 50,000 new criminal matters. *See* U.S. Dep't of Justice, United States Attorneys' Annual Statistical Report, Fiscal Year 2015 4, 19.[7] But between 2012 to 2015, the Civil Rights Division Voting Section alone engaged in only 67 new voting cases nationwide. *See* U.S. Dep't of Justice, Civil

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an injunction, attorney's fees, remedy, or settlement. See VRI Study at 756.

[7] *Available at* https://www.justice.gov/usao/file/831856/download.

Rights Division, FY 2017 Performance Budget Congressional Submission 27 (2016), *available at* https://www.justice.gov/jmd/file/820981/ download. The Civil Rights Division Voting Section had only 38 attorneys at the start of 2016. *See* U.S. Dep't of Justice, General Legal Activities, Civil Rights Division, *available at* https://www.justice.gov /sites/default/files/jmd/pages/attachments/2015/01/30 /16_bs_section_ii_chapter_-_crt.pdf. Given how lengthy[8] and resource-intensive[9] many voting cases initiated by the Department of Justice have proven to be, it would be unreasonable to limit the monitoring and prosecuting of voting rights violations exclusively to the Justice Department.

Moreover, priorities in the Department of Justice change over time, making it an incomplete guarantor of the broad range of voting rights established under that regime. *See* U.S. Dep't of Justice, Office of the Inspector General, A Review of

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[8] *See* Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 100 (1966) (attorney general suits under voting rights legislation can be "scarcely more than a palliative" in the face of "protracted delays of litigation during which Negroes were denied participation in self-government").

[9] *See e.g.*, Larry F. Amerine, *Civil Rights*, 44 Tex. L. Rev. 1411, 1412 n.9 (1966) (quoting Attorney General Katzenbach testimony before House committee: "I could cite numerous examples of the almost incredible amount of time our attorneys must devote to each of the 71 voting rights cases filed under the Civil Rights Acts of 1957, 1960, and 1964. It has become routine to spend as much as 6,000 man-hours in analyzing the voting records in a single county—to say nothing of preparation for trial and the almost inevitable appeal.").

the Operations of the Voting Section of the Civil Rights Division 113 (2013), *available at* https://oig.justice.gov/reports/2013/s1303.pdf (noting that an "examination of the mix and volume of enforcement cases brought over the past ten years by the Voting Section revealed some changes in enforcement priorities over time, corresponding to changes in leadership."); *see also id.* at 21 (figure tracking new enforcement actions undertaken between 1993 and 2012).

While the Attorney General's priorities are subject to change over time, citizens' need for robust protection of their voting rights remains constant. Absent a private right of action, voters are left entirely dependent upon the federal government for sustained protection of federal voting rights. The private right of action ensures that this right remains enforced and enforceable for all citizens.

Finally, Section 10101 protects rights in numerous situations which might escape the Attorney General's attention. A school board election fits as neatly under the law's ambit as does a federal presidential election. This can be seen in cases brought under Section 10101 in a wide array on contexts outside of federal elections.[10] Procedural irregularities in such contests are no less

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[10] *See, e.g.*, *Brown*, 279 F. Supp. 60 (W.D. La. 1968) (school board election); *Coalition for Educ. in Dist. One*, 495 F.2d 1090 (2d Cir. 1974) (school board election); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) (election for Justice of the Peace); *Toney*, 476 F.2d 203 (5th Cir. 1973) (primary election for mayor, village marshal, board of alderman, and Democratic Executive Committee).

detrimental to the franchise than issues in larger elections. However, unless they involve significant numbers of individuals or egregious evidence of intent, such violations are unlikely to be the focus of the Justice Department.

CONCLUSION

For these reasons, and for those set out in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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