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Federal Court of Appeals Rules that Private Citizens Can't Sue to Protect Their Own Voting Rights

Client Alert

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It just got a bit harder for private parties to vindicate voting rights in federal court.

On November 20, 2023, the United States Court of Appeals for the Eighth Circuit released its opinion in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 2023 WL 8011300 (8th Cir. 2023), in which it ruled that only the Attorney General of the United States, *not* private parties, may sue to enforce § 2 of the Voting Rights Act of 1965 (the "VRA").

What started the lawsuit?

Two advocacy groups, the Arkansas NAACP and the Arkansas Public Policy Panel, sued the State of Arkansas, alleging that its new electoral map for the Arkansas House of Representatives, drawn up following the decennial Census in 2020, diluted black citizens' votes. The map—which created "11 majority-black districts out of 100 for electing members of" the state house—purportedly did this through a combination of two methods, both of which the plaintiffs argued offended § 2 of the VRA. The first is "packing"—"which involves drawing lines that concentrate a cohesive political group into a limited number of districts"—and the second is "cracking"—which "takes a cohesive political group and divides its members among multiple districts, where other voters can numerically overwhelm them."

What is the VRA?

The Eighth Circuit explained that it was enacted "to address entrenched racial discrimination in voting." And § 2, specifically, prohibits "any State or political subdivision" from enacting any "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." 52 U.S.C. § 10301(a). Crucially,

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the VRA lists only one person who can sue under § 2: the United States Attorney General, who is empowered to bring “an action for preventive relief . . . for a temporary or permanent injunction, restraining order, or other order.” 52 U.S.C. § 10308(d).

Why can't private parties sue under the VRA?

The Eighth Circuit explained that Congress' choice to not list anyone else as a possible plaintiff meant that § 2 must be read as not authorizing a private right of action—in part because implied causes of action have been disfavored in recent years. In addition, the fact that Congress included broader language just one year before the passage of the VRA, in the Civil Rights Act of 1964—which allows “a civil action for preventive relief” to “be instituted by the person” experiencing discrimination, 42 U.S.C. § 2000a-3(a)—is another piece of historical-textual evidence in favor of interpreting § 2 as not allowing private plaintiffs to sue under it.

Finally, the court did not grant the plaintiffs leave to amend their complaint to add a claim under 42 U.S.C. § 1983. That statute creates a private right of action to sue any “person” who, “under color of” law violates the rights of “any citizen of the United States” that are “secured by the Constitution and laws.” The plaintiffs argued they should be permitted to go back to the district court and proceed under § 1983 because § 2 of the VRA is a “law []” within the meaning of § 1983. The Eighth Circuit disagreed, explaining that resolution of the issue was not clear enough to warrant a belated correction of the plaintiffs' pleading failure. It affirmed the district court's dismissal, with prejudice, of the plaintiffs' action.

Closer to home, another VRA challenge under § 2 is ongoing

On March 23, 2022, a group of Michigan voters filed a lawsuit in federal court against Michigan's Secretary of State and the Independent Citizens Redistricting Commission (the “ICRC”) and its Commissioners. In *Agee v. Benson*, No. 1:22-cv-272, the plaintiffs challenged the maps for the Michigan House and Senate prepared by the ICRC as violative of the Constitution and the VRA. The case was assigned to a special three-judge panel, which is required under federal law for redistricting cases, 28 U.S.C. § 2284. Trial ended November 8, 2023, and the case is under advisement awaiting the panel's decision.

These plaintiffs' claims center around various legislative districts in and around Detroit.^[1] Among other claims, the plaintiffs assert that the new maps violate § 2 of the VRA because they either eliminate or greatly diminish the majority-minority districts in those areas, thereby diluting the voting strength of black voters. The *Agee* plaintiffs seek a ruling that the maps violate the VRA and a court order requiring either that the maps be redrawn or that the plaintiffs' proposed remedial maps be adopted.

The *Agee* Court expressly permitted the *Agee* plaintiffs to bring some of their § 2 claims, accepting, unlike the Eighth Circuit, plaintiffs' standing to pursue those claims. This apparent disagreement as to whether § 2 authorizes private suits makes the VRA fertile ground for continued litigation. Undoubtedly, this issue will be closely scrutinized by the United States Supreme Court—and perhaps even taken up by the Court.

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This is a developing area of law, and how it will crystalize is unclear. But what is clear is that Butzel often litigates election-law and constitutional-law matters successfully, vindicating voting rights under the Constitution. If you have a legal problem related to elections, or you want to plan ahead so that legal challenges can be met successfully, you can contact any attorney in Butzel's Election Law practice group.

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[1] Namely state Senate districts 1, 3, 5, 6, 8, 10, and 11, and state House districts 1, 2, 7, 8, 10, 11, 12, 13, 14, and 26.