(10)

No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS S. MORSE, *et al.*,
Appellants,

v.

THE REPUBLICAN PARTY OF VIRGINIA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Virginia

---

BRIEF AMICUS CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

MICHAEL A. COOPER
HERBERT J. HANSELL
NORMAN REDLICH
BARBARA R. ARNWINE
THOMAS J. HENDERSON
BRENDA WRIGHT
TODD A. COX
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W.
Washington, D.C. 20005
(202) 662-8320

LAUGHLIN MCDONALD
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
44 Forsyth Street
Atlanta, GA 30303

DONALD B. VERRILLI, JR.*
STUART M. RENNERT
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Counsel for Amici

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE EXISTENCE OF PRIVATE CAUSES OF ACTION UNDER THE VOTING RIGHTS ACT IS WELL-ESTABLISHED AND CRITICAL TO ACHIEVING THE ACT'S PURPOSES	4
II. A PRIVATE RIGHT OF ACTION EXISTS TO ENFORCE SECTION 10 OF THE VOTING RIGHTS ACT	14
A. The Text Of The Voting Rights Act Of 1965 Is Properly Read As Creating A Private Right Of Action For Enforcement Of Section 10	14
B. Any Doubt As To The Existence Of A Private Right Of Action Was Removed By The 1975 Amendments To The Act	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page

Abrams v. Johnson, No. 94-797, *prob. juris. noted*, 63 U.S.L.W. 3499 (Jan. 6, 1995) 2
Allen v. State Board of Elections, 393 U.S. 544 (1969) ..... *passim*
Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) 15
Cannon v. University of Chicago, 441 U.S. 677 (1979) ..... *passim*
Central Bank of Denver v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439 (1994) 15
Chisom v. Roemer, 501 U.S. 380 (1991) 13
City of Mobile v. Bolden, 446 U.S. 55 (1980) 1
City of Richmond v. United States, 422 U.S. 358 (1975) 16
Clark v. Roemer, 500 U.S. 646 (1991) 1, 13
Clinton v. Smith, 488 U.S. 988 (1988) 1
Connor v. Finch, 431 U.S. 407 (1977) 1
Davis v. Bandemer, 478 U.S. 109 (1986) 2
Dougherty County Board of Education v. White, 439 U.S. 32 (1978) 8, 13
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 7, 14
Harman v. Forsennius, 380 U.S. 528 (1965) 4
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 4, 16, 17, 20
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 7
Holder v. Hall, 114 S. Ct. 2581 (1994) 2
Houston v. Haley, 859 F.2d 341 (5th Cir. 1988) 16
Hunter v. Underwood, 471 U.S. 222 (1985) 2
J. I. Case Co. v. Borak, 377 U.S. 426 (1964) 15
Johnson v. De Grandy, 114 S. Ct. 2647 (1994) 1, 4, 6
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 15
Lorillard v. Pons, 434 U.S. 575 (1978) 7
McCain v. Lybrand, 465 U.S. 236 (1984) 2
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 7

TABLE OF AUTHORITIES—Continued

	Page
Powell v. Power, 436 F.2d 84 (2d Cir. 1970)	16
Rogers v. Lodge, 458 U.S. 613 (1982)	1, 2
Thornburg v. Gingles, 478 U.S. 30 (1986)	1, 6, 10, 13
United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966)	20
United States v. Mississippi, 11 Race Relations L. Rep. 837 (S.D. Miss. Mar. 31, 1966)	20
United States v. Texas, 252 F. Supp. 234 (W.D. Tex.), *aff'd per curiam*, 384 U.S. 155 (1966)	20
Wesberry v. Sanders, 376 U.S. 1 (1964)	3
CONSTITUTION AND STATUTES	
U.S. Const. amend. XIV	4, 17, 20
U.S. Const. amend. XV	17
U.S. Const. amend. XXIV	4, 17, 18
20 U.S.C. §§ 1681-1688	15
42 U.S.C. § 1973	*passim*
42 U.S.C. § 1973b(a)	18
42 U.S.C. § 1973c	*passim*
42 U.S.C. § 1973h	*passim*
42 U.S.C. § 1973i	21
42 U.S.C. § 1973j	4, 5, 15-16, 21
42 U.S.C. § 1982	15
42 U.S.C. § 2000d	15
Pub. L. No. 94-73, Title IV, § 402, 89 Stat. 404 (1975) (codified at 42 U.S.C. § 1973*l*(e))	7
MISCELLANEOUS	
11 Weekly Comp. Pres. Doc. 837 (Aug. 6, 1975)	9
111 Cong. Rec., 89 Cong., 1st Sess. (1965)	16, 17
121 Cong. Rec., 94th Cong., 1st Sess. (1975)	*passim*
Annual Reports of the Director of the Administrative Office of the United States Courts (1978-1994)	10-11
Conf. Rep. No. 711, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News	17
Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994)	11-13

TABLE OF AUTHORITIES—Continued

Page

Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501, 94th Cong., 1st Sess. (1975) 7-8

H.R. Rep. No. 196, 94th Cong., 1st Sess. (1975) 19, 20

H.R. Rep. No. 397, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 6

H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 16

Peyton McCrary, Jerome A. Gray, Edward Still & Huey L. Perry, *Alabama, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Chandler Davidson & Bernard Grofman eds., 1994) 10

Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (1990) .. 9-10

Frank R. Parker, *Voting Rights Enforcement in the Reagan Administration, in One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (Reginald C. Govan & William L. Taylor eds., 1989) 10

S. Rep. No. 295, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 9, 19, 20

S. Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 6

U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (1975) Appendix 2 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 7-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-203

FORTIS S. MORSE, *et al.*,
Appellants,

v.

THE REPUBLICAN PARTY OF VIRGINIA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Virginia

BRIEF AMICUS CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 30 years, including cases before this Court, *see, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647 (1994); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); *Connor v. Finch*, 431 U.S. 407 (1977). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal rights of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Holder v. Hall*, 114 S. Ct. 2581 (1994); *McCain v. Lybrand*, 465 U.S. 236 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Hunter v. Underwood*, 471 U.S. 222 (1985), and as *amicus curiae*, *see, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986). The ACLU is providing representation to the appellants in *Abrams v. Johnson*, No. 94-797, *prob. juris. noted*, 63 U.S.L.W. 3499 (Jan. 6, 1995).

The issues presented in this appeal are of great importance to the *amici*'s work on behalf of minority voters throughout the nation. *Amici* believe that the three-judge court below erred fundamentally in refusing to apply Section 5 to the voting practices at issue here, and thereby invited manipulation that will threaten the preclearance process and the fundamental rights it protects. *Amici* are also particularly concerned about the three-judge court's overly restrictive approach to private enforcement under the Voting Rights Act. In refusing to recognize a private right of action to enforce Section 10 of the Act, the court below employed an analysis with dangerous implications for the Voting Rights Act generally.

Affirmance of the three-judge court's approach to the issue of private rights of action would seriously impair the ability of the Lawyers' Committee and the ACLU to vindicate the rights of the minority citizens they represent throughout the nation. *Amici* therefore have a substantial interest in the outcome of this case, and this brief will address the issue of private rights of action under the

Voting Rights Act generally and Section 10 of the Act in particular.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents two important questions under the Voting Rights Act: whether the decision of a political party to require voters to pay a fee to participate in a convention for nominating a candidate for United States Senate is a "change with respect to voting" within the meaning of Section 5 of the Act, 42 U.S.C. § 1973c, and whether a voter may bring a private action under Section 10 of the Act, the anti-poll tax provision, 42 U.S.C. § 1973h.

The three-judge district court's ruling on both questions should be reversed. The court's cursory analysis reflected no grasp of our nation's long and difficult history of disenfranchisement of minority voters, and showed scant regard for the practical demands of effective administration of the Act. *Amici* fully agree with the conclusion of appellants on the Section 5 issue. This brief will focus on the district court's erroneous interpretation of Section 10 —the poll tax provision. Although Section 10 is not frequently invoked by private litigants, the three-judge court's analysis of whether a private cause of action exists under that provision threatens private enforcement of the Act generally, and must be rejected.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), and no mechanism is more important for securing that right than private enforcement of the Voting Rights Act. Indeed, the availability of private causes of action to enforce the Act is well established. Private litigants have instituted the overwhelming majority of Voting Rights Act lawsuits, and have achieved the overwhelming majority of the judg-

---

[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court.

ments and decrees reforming discriminatory voting practices. This Court has expressly held that Section 5 of the Act provides a private cause of action, *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and has repeatedly adjudicated private causes of action under Section 2 of the Act—without ever intimating the slightest doubt as to the propriety of private enforcement. *See, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647 (1994).

Against this backdrop, the three-judge court's refusal to recognize a private cause of action under Section 10 of the Act stands out as aberrant. Section 10 enforces the fundamental right of citizens to be free from the illegal exaction of payment as a condition for participating in the democratic process—a right guaranteed by both the Equal Protection Clause of the Fourteenth Amendment and the Twenty-fourth Amendment. *See Harman v. Forsennius*, 380 U.S. 528 (1965); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Denying individual citizens the ability to vindicate under Section 10 what is, at its core, a private individual right, *Allen*, 393 U.S. at 555, n.18, is antithetical to the statutory structure, the prevailing practice, and the high purposes of the Voting Rights Act.

ARGUMENT

I. THE EXISTENCE OF PRIVATE CAUSES OF ACTION UNDER THE VOTING RIGHTS ACT IS WELL-ESTABLISHED AND CRITICAL TO ACHIEVING THE ACT'S PURPOSES.

The availability of private causes of action to enforce the Voting Rights Act is well-established, as is the practical need for private enforcement.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court squarely held that a private cause of action exists to enforce the preclearance requirements of Section 5. As the Court noted, Section 12 of the Act, 42 U.S.C. § 1973j, grants the Attorney General express statutory authority to enforce Section 5's substantive and procedural requirements respecting changes in voting practices, and "does not explicitly grant or deny private par-

ties" a cause of action. *Id.* at 554. Nevertheless, interpreting Section 5 "in light of the major purpose of the Act," the *Allen* Court had no difficulty concluding that Congress intended to create a private enforcement mechanism. *Id.* at 555. The Court recognized that Section 5 specifically created a private right in every citizen—providing that "no person" should be denied the right to vote by a procedure that had not been precleared. *Id.* at 555, 557.

According to the Court, "the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." *Id.* at 555, n.18. As the Court noted, the jurisdictional provision of the Act, 42 U.S.C. § 1973j(f), quite clearly contemplated private enforcement by vesting jurisdiction in the district courts " 'without regard to whether *a person* asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.' " 393 U.S. at 555, n.18 (emphasis in original). Indeed, as *Allen* suggested, the express authorization for enforcement by the Attorney General might have been necessary to confer an enforcement authority that this jurisdictional provision did not expressly recognize.

Allen recognized that Congress enacted the Voting Rights Act because "existing remedies were inadequate to accomplish" the purpose of preventing discrimination by the States in the administration of voting laws. *Id.* at 556. However, whether the Act was viewed as creating new remedies for existing rights or creating new rights, the "inquiry remains whether the right or remedy has been conferred upon the private litigant." *Id.* at 556, n.20. The Court also recognized that vesting sole enforcement authority in the Attorney General would perpetuate the very problem of inadequate enforcement the Act was designed to ameliorate. As the Court noted, "achievement of the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."

Id. at 556. Indeed, *Allen* observed that "[t]he guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.* at 557.

That observation is unassailable. The sheer numbers of federal, state, county and local offices, as well as the boundless ingenuity of those seeking to forestall the transformations sought by the Voting Rights Act, mandate private enforcement. *Allen* was plainly correct in concluding that the Act's purposes are best advanced by recognizing the right of those most directly affected to challenge unlawful voting practices.

Nor is there any serious question that Section 2 of the Act authorizes private enforcement, even though the statutory text of Section 2—like that of Sections 5 and 10—does not expressly create a private cause of action. Since *Allen*, thousands of private plaintiffs have filed Section 2 actions. No court has ever held that Section 2 does not confer a private cause of action. This Court has repeatedly adjudicated Section 2 cases without ever suggesting that private persons lacked the ability to enforce that provision. *See, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

That the routine availability of private causes of action accords with congressional intent is not open to doubt. Indeed, a present challenge to private causes of action comes far too late. Congress has repeatedly amended the Voting Rights Act in the wake of *Allen*, without ever intimating any disagreement with *Allen*'s endorsement of private enforcement. To the contrary, the legislative history of the 1970 and the 1982 amendments to the Act expressly endorse private enforcement. *See* H.R. Rep. No. 397, 91st Cong., 2d Sess. at 8, *reprinted in* 1970 U.S. Code Cong. & Admin. News 3277, 3284 (endorsing *Allen* regarding "the need for private policing"); S. Rep. No. 417, 97th Cong., 2d Sess., pt. 1, at 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 208 ("reiterat[ing]

the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965"). *See generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982) ("When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, . . . the question is whether Congress intended to preserve the pre-existing remedy."); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Lorillard v. Pons*, 434 U.S. 575, 579-81 (1978).

Other provisions of the Act presuppose the existence of private enforcement. For example, Title IV of the 1975 amendments to the Act authorized federal courts to award attorney's fees to "the prevailing party, other than the United States," in any action brought under the Voting Rights Act. Pub. L. No. 94-73, Title IV, § 402, 89 Stat. 404 (1975) (codified at 42 U.S.C. § 1973*l*(e)). That provision obviously presupposes and ratifies private rights of action. *See generally Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 112 S. Ct. 1028, 1035-36 (1992) (Congress may ratify judicially inferred private rights of action by subsequent legislation premised on existence of private action); *id.* at 1039 (Scalia, J., concurring in the judgment) (same).

The legislative history of the 1975 amendments is suffused with references to the importance of private enforcement, and to the need to afford private parties the same remedies the Act already afforded to the Attorney General. *See, e.g.*, 121 Cong. Rec. 16268 (statement of Rep. Drinan) (speaking of the necessity to "provide a dual enforcement mechanism in the voting field"). The House Judiciary Subcommittee relied upon a report of the United States Commission on Civil Rights, which recommended:

> *Congress should provide for the awarding of attorneys' fees where appropriate in private litigation to enforce the Voting Rights Act or rights guaranteed by the Fifteenth Amendment.*

> Much of the burden of voting rights litigation has fallen on private parties. The litigation is expensive and the individuals and organizations who are parties to it often cannot bear the sustained financial strain. Some Federal courts award attorneys' fees in this type of litigation, but others do not. A provision for attorneys' fees similar to that in Titles II and VII of the Civil Rights Act of 1964 should be enacted.

Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 969, 1336 (1975) (Appendix 2—U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, p. 353 (1975) (emphasis in original); *see also Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 40, n.9 (1978) (House and Senate Judiciary Committees "relied heavily" on the Commission's report).

On the floor of the House, the bill's manager explained that "[t]he awarding of such fees is important in the area of voting rights because of the significant role which private citizens must play in their enforcement." 121 Cong. Rec. 16254 (1975) (statement of Rep. Edwards of Cal.). Similarly, the author of the attorney's fee section of the bill called that provision "extremely important" to "the dual enforcement scheme" envisioned by the Act. *Id.* at 16268 (statement of Rep. Drinan); *see also id.* at 16268-69 (statement of Rep. Drinan) ("We cannot expect private litigants, especially minorities, to bear the tremendous costs of instituting suit to remedy unlawful voting practices."); *id.* at 16915 (statement of Rep. Rangel) (noting that fee-shifting provision " 'will assist private litigants in vindicating their rights [and] will be of particular benefit to poor black voters and candidates in the south and elsewhere who often cannot afford the cost of fulfilling their rights under the law' " (quoting a letter from the president of the National Bar Association)).

The Senate Report on the 1975 amendments explained that in voting rights cases

> Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights.
>
> . . . "[P]rivate attorneys general" should not be deterred from bringing meritorious actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.

S. Rep. No. 295, 94th Cong., 1st Sess., at 39-41, *reprinted in* 1975 U.S. Code Cong. & Admin. News 807-08 (footnote omitted).

When President Ford signed the 1975 amendments into law, he highlighted the importance of private rights of action:

> [T]his bill will permit private citizens, as well as the Attorney General, to initiate suits to protect the voting rights of citizens in any State where discrimination occurs. There must be no question whatsoever about the right of each eligible American, each eligible citizen to participate in our elective process. The extension of this act will help to ensure that right.

President's Remarks Upon Signing the Voting Rights Act Extension Into Law, 11 Weekly Comp. Pres. Doc. 837 (Aug. 6, 1975).

Congress's creation and ratification of private rights of action under the Voting Rights Act has a firm foundation in practical necessity. Private enforcement has proved indispensable to the effective implementation of the Act since its inception. Passage of the Act in 1965 inspired a wave of private litigation seeking to vindicate minority citizens' fundamental constitutional right to vote. *See* Frank R. Parker, *Black Votes Count: Political Em-*

powerment in Mississippi after 1965, at 81-82 (1990);[2] Peyton McCrary, Jerome A. Gray, Edward Still & Huey L. Perry, *Alabama, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*, at 38, 49-50 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *Quiet Revolution*].

According to the Administrative Office of the United States Courts, a total of 3,656 voting cases were filed in federal district court from July 1, 1976, to September 30, 1993.[3] Of those, the United States was the plaintiff in 174—a mere 4.8%. Remarkably, the United States was the *defendant* in federal voting cases almost as often as it was the plaintiff.[4] Private plaintiffs filed nineteen voting rights cases for every one filed by the Department of Justice. In 1992—the first post-census year of redistricting in the aftermath of the 1982 amendments and *Thornburg v. Gingles, supra* (interpreting the 1982 amendments to Section 2 of the Act)—that ratio climbed to *53 to 1*.

---

[2] Now black plaintiffs had their own lawyers who resided in the state and who developed alliances with their clients; who were familiar with local conditions; who developed a certain level of credibility even with hostile local federal judges by repeatedly getting their decisions reversed on appeal; and who, by repeatedly filing the same kinds of cases and exchanging information and litigation techniques among themselves, developed a high level of expertise in civil rights litigation that gave their clients an advantage.

Id.

[3] The category of "voting cases" encompasses some actions brought under other provisions of law, but the large majority were brought under the Act. *See* Frank R. Parker, *Voting Rights Enforcement in the Reagan Administration, in One Nation, Indivisible: The Civil Rights Challenge for the 1990s*, at 362, 368 (Reginald C. Govan & William L. Taylor eds., 1989).

[4] The United States may be named as a defendant in Section 5 preclearance cases, bailout cases, and the like. *See* Parker, *supra* note 3, at 368.

VOTING CASES FILED IN FEDERAL COURT, BY YEAR AND PARTY[5]

Year	Total	Private Pl.	U.S. As Pl.	U.S. As Def.
1993	213	188	14	11
1992	494	473	9	12
1991	197	180	10	7
1990	130	114	10	6
1989	183	167	11	5
1988	347	327	11	9
1987	214	195	12	7
1986	194	178	12	4
1985	281	259	17	5
1984	259	240	10	9
1983	175	168	1	6
1982	170	155	4	11
1981	152	135	8	9
1980	160	147	6	7
1979	145	125	13	7
1978	139	123	11	5
1977	203	179	15	9
Total	3656	3353	174	129

Moreover, the suits filed by private plaintiffs were every bit as successful as those filed by the Government, as demonstrated by a recent empirical study of the impact of the Act in eight southern states. *See Quiet Revolution, supra.*[6] A team of twenty-five attorneys, social

[5] The statistics contained in this table and in the preceding paragraph come from Table C-2 of the Annual Reports of the Director of the Administrative Office of the United States Courts, for 1977 to 1993. Prior to 1977, the reports did not separate voting cases from other civil rights actions. Data for 1994 is not yet available. Beginning with the 1992 report, the Administrative Office tabulated its statistics for the year ending September 30, rather than the year ending June 30. Thus, the 1992 figures appear somewhat inflated because they cover fifteen months.

[6] The study encompassed the eight southern states covered entirely or in substantial part by the Act's Section 5 preclearance provision: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.

scientists, and historians funded by the National Science Foundation conducted a comprehensive survey of all lawsuits that challenged at-large district systems in towns,[7] cities, and counties,[8] in the 1970s and 1980s. The survey found 250 municipalities and counties that had changed their electoral systems in response to voting rights litigation, typically by replacing at-large elections with single-member district systems or with mixed plans that were hybrids of at-large and single-member. Of those 250 changes, only 5.2% resulted from suits initially filed by the Department of Justice. The remainder—almost 95%—resulted from private enforcement actions.[9] Thus, private plaintiffs not only file the overwhelming majority of all voting rights cases—they bring the very suits that succeed in eliminating the discriminatory electoral practices the Act sought to eradicate.

---

[7] In all eight states covered by the survey, towns with 1980 populations of 10,000 or more were studied. In addition, smaller towns were studied in Alabama (6,000 or more population), Louisiana (2,500 or more), and Mississippi (1,000 or more). *See Quiet Revolution, supra,* at 61 Table 2.8 (Alabama), 133 Table 4.8A (Louisiana), 151 Table 5.8 (Mississippi).

[8] The survey covered counties in Georgia, North Carolina, and South Carolina, but not in the other five states. *See Quiet Revolution, supra,* at 389, n.6.

[9] CHANGES FROM AT-LARGE TO DISTRICT OR MIXED PLANS ATTRIBUTABLE TO VOTING RIGHTS ACT LITIGATION

	Successful Private Plaintiff Cases	Successful Cases With U.S. As Plaintiff
Municipalities	157	6
Counties	80	7

See Quiet Revolution, supra, at 61-64 Table 2.8 (Alabama), 99-100 Table 3.8 (Georgia), 133 Table 4.8A (Louisiana), 151-52 Table 5.8 (Mississippi), 188-89 Tables 6.8 & 6.8A (North Carolina), 226-30 Tables 7.8 & 7.8A (South Carolina), 264-68 Table 8.8 (Texas), 297 Table 9.8 (Virginia); Tables Z, Chapters 2-9 (supplementary unpublished database, archived at the International Consortium for Political and Social Research, University of Michigan).

The two social scientists who coordinated the study concluded that, in the 1980s,

> [t]he vast bulk of section 2 actions were brought by minority plaintiffs, often acting through civil rights or civil liberties organizations. Within the eight states covered by our survey, section 2 litigation brought solely by the Department of Justice played only a minor role in effecting changes in local election systems. One of the most remarkable results of amended section 2, therefore, is its encouragement of the private bar to take a major role in enforcing public voting rights law. This fact cannot be emphasized too strongly.

Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction, in Quiet Revolution, supra*, at 378, 385 (footnote omitted).

These conclusions should come as no surprise to the Court. Many advances in voting rights jurisprudence, and many significant steps on the path toward equal opportunity for effective political participation, have resulted from cases originally brought by private plaintiffs and ultimately decided by this Court. *See, e.g., Chisom v. Roemer*, 501 U.S. 380 (1991); *Clark v. Roemer*, 500 U.S. 646 (1991); *Thornburg v. Gingles, supra*; *Dougherty County Bd. of Educ. v. White, supra.*

In light of the long and consistent history of express recognition of private rights of action under the Voting Rights Act, as well as the primary role of private enforcement in effectuating the Act's high purposes—a history utterly ignored by the three-judge court below—the proper question in this case is whether any persuasive reason exists for treating Section 10 differently from the other key provisions of the Act. As we will show, the answer to that question is no.

II. A PRIVATE RIGHT OF ACTION EXISTS TO ENFORCE SECTION 10 OF THE VOTING RIGHTS ACT.

A. The Text Of The Voting Rights Act Of 1965 Is Properly Read As Creating A Private Right Of Action For Enforcement Of Section 10.

The three-judge court refused to recognize a private right of action under Section 10 because the text of that provision authorized enforcement by the Attorney General without mentioning private citizens. 42 U.S.C. § 1973h. Appellees defend this ruling on the different ground that Section 10 creates no statutory prohibition of poll taxes, but merely directs the Attorney General to file actions attacking poll taxes. Appellee's Supplemental Brief at 9-10. Neither analysis withstands scrutiny.

The district court's cursory analysis flies in the face of *Allen v. State Board of Elections, supra.* Indeed, Section 5 of the Act is indistinguishable from Section 10 in the respects identified by the district court, and the district court provided no reason for failing to follow *Allen* in this case. By holding the absence of express authorization dispositive, the district court made the mistake of measuring congressional intent respecting private causes of action by the standards of the present time rather than the time when Section 10 was considered.

As this Court first recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and reiterated in *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. at 1032, Congress's intent respecting private causes of action should be evaluated on the basis of the law as it existed when the statute was being considered. *Cannon*, 441 U.S. at 698-99 (decision whether a private right of action has been granted by Congress "must take into account . . . contemporary legal contest" [*sic*]); *Franklin*, 112 S. Ct. at 1036 ("same contextual approach" used to determine whether particular remedy exists for private right of action). This Court's jurisprudence respecting implied causes of action has evolved considerably over

the past 30 years. *Compare J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), *with Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994). But the Voting Rights Act was passed in the wake of this Court's ruling in *Borak*, which established a broad presumption favoring private rights of action based on the underlying "purpose" served by a statute. *Borak*, 377 U.S. at 431-32. That presumption has been repeatedly held to apply with particular force to civil rights statutes. *See, e.g., Cannon*, 441 U.S. at 717 (private right of action exists under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (private right of action exists under 42 U.S.C. § 1982); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir.) (private right of action exists under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d), *cert. denied*, 388 U.S. 911 (1967).

As *Cannon* holds, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with" such background norms when it considered a particular statute, *Cannon*, 441 U.S. at 699, and that Congress "expected its enactment to be interpreted in conformity with them." *Id.* Section 10 of the Voting Rights Act, passed fourteen months after the *Borak* decision, must be read in the same context. *Cf. Allen*, 393 U.S. at 557 (*Borak* constitutes an independent basis for finding a private right of action under Section 5).

Appellees' alternative argument—that Section 10 created no substantive rights—raises more difficult issues. On the one hand, the 1965 Act contains a number of structural indications that Congress intended Section 10 (which is codified at § 1973h) to be a substantive statutory right protecting individual voters from poll taxes. *See* 42 U.S.C. § 1973j(a) (establishing criminal sanctions for persons who "deprive or attempt to deprive any person of any *right* secured by section . . . 1973h") (emphasis added); *id.* § 1973j(c) (referencing "any *right* secured by section . . . 1973h") (emphasis added); *id.*

§ 1973j(d) (referring to persons who have engaged "in any act or practice prohibited by section . . . 1973h"). This evidence doubtless explains why courts—including this Court—have routinely assumed that Section 10 affirmatively prohibits poll taxes. *Cf. Allen*, 393 U.S. at 563 (Section 10 "prohibits the collection of poll taxes as a prerequisite to voting"); *City of Richmond v. United States*, 422 U.S. 358, 380 & n.3 (1975) (Brennan, J., joined by Douglas & Marshall, JJ., dissenting) (Congress had "banned or restricted the use of many . . . discriminatory devices," including "poll taxes."); *Houston v. Haley*, 859 F.2d 341, 343 (5th Cir. 1988) (Section 10 "prohibited" poll taxes); *Powell v. Power*, 436 F.2d 84, 86, n.4 (2d Cir. 1970) (Section 10 "abolished" poll taxes).

On the other hand, the text of Section 10 itself is ambiguous as to the existence of such a right. And the legislative history to the original 1965 Act does not manifest a clear congressional intent to create such a statutory right. Because this Court had not yet ruled on the constitutionality of poll taxes at the state level, Congress was careful not to pretermit constitutional consideration of the issue by creating a definite statutory prohibition.[10] Such an approach also had the virtue of avoiding what was perceived as a difficult constitutional question whether Congress possessed the power to forbid poll taxes on the state level in the absence of a judicial declaration of their unconstitutionality.[11] The version of Section 10 that was eventually enacted appears to be a compromise. In light of the legislative materials, the most plausible reading of the eventual text of Section 10 is that Congress in 1965 created a statutory right to be free of poll taxes to the extent that poll taxes were invalid as a mat-

---

[10] *See, e.g.*, 111 Cong. Rec. 9931 (1965) (letter from Attorney General Katzenbach to Senator Mansfield respecting pendency of *Harper v. Virginia Bd. of Elections*).

[11] H.R. Rep. No. 439, 89th Cong., 1st Sess., at 29, 36, 43-46, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2465, 2472, 2479-82.

ter of federal constitutional law—but was unwilling to go further in advance of a final judicial determination of the question.[12]

That reading of Section 10 is relevant to the question of whether a private right of action existed as of passage of the Act in 1965 for particular challenges to poll taxes, but is hardly dispositive of the issue before this Court. To begin with, as of 1965, the Twenty-fourth Amendment had already outlawed poll taxes in federal elections. Thus, the particular private cause of action asserted here would properly have been recognized even in 1965.[13]

---

[12] In a letter to the Senate Majority Leader, the Attorney General referred to the provisions that became subsections 10(a) and 10(b) of the Act:

> "Without question, [those two provisions] *encompass* the 14th and 15th amendments as well as any other provisions of the Constitution which might be relevant to an adjudication of the constitutionality of the poll tax."

111 Cong. Rec. 11016 (statement of Sen. Mansfield (quoting from a May 19, 1965 letter from the Attorney General to the Senate Majority Leader)) (emphasis added). The conference committee endorsed that approach when it expressly amended Section 10 to "make[] clear" that Congress was exercising its full authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. Conf. Rep. No. 711, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 2578, 2580; *see* 42 U.S.C. § 1973h(b) (1965).

[13] Neither the legislative history for the 1965 Act, nor this Court's holding in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), is to the contrary. The exaction of a payment in order to vote in *state elections* was ruled unconstitutional in *Harper*, seven months after enactment of the Voting Rights Act. But the Twenty-fourth Amendment to the Constitution, which prohibits the exaction of a poll tax for voting in *federal elections*, the precise subject at issue in this case, was ratified on January 23, 1964, more than 18 months prior to enactment of the Act. While the legislative history of the 1965 Act does evidence concern about the constitutionality of a poll tax ban for state elections, the Twenty-fourth Amendment removed all doubt that Congress had the authority, which it exercised in the Voting Rights Act of 1965, to ban poll taxes for voting in federal elections.

In any event, the most appellees have established is that a private right of action did not exist as of 1965 for applications of the poll tax which had not yet been declared unconstitutional by the courts. However, because Section 10 affords a statutory protection against poll taxes coextensive with federal constitutional protection, there is no reason to think Congress intended in 1965 to preclude private enforcement of such a right once the substantive constitutional invalidity of a state poll tax had been definitively established. To the contrary, as discussed *supra*, there is every reason to think that Congress intended private enforcement of the rights protected by Section 10, just as it plainly envisioned private enforcement of the rights protected by other provisions of the Act.

B. Any Doubt As To The Existence Of A Private Right Of Action Was Removed By The 1975 Amendments To The Act.

Whatever the status of a private citizen's rights under Section 10 as originally enacted, the 1975 amendments to the Act remove any doubt as to the existence of a private cause of action to enforce the anti-poll tax provision. On August 6, 1975, several temporary provisions of the Voting Rights Act of 1965 were set to expire, *see, e.g.*, 42 U.S.C. § 1973b(a) (1970), and Congress was faced with the question whether to renew them. Although Section 10 was a permanent provision of the Act, Congress nonetheless chose to reexamine the issue of poll taxes in light of changes in the law since 1965. *See* 121 Cong. Rec. 23742 (1975) (statement of Sen. Scott of Va.). The result of that reexamination was a significant amendment of Section 10.

Specifically, Congress (i) deleted subsection 10(d), which had been enacted to cover the contingency that the Supreme Court might uphold poll taxes in state and local elections; and (ii) amended subsection 10(b) to refer to the Twenty-fourth Amendment and thereby to clarify that Section 10 covered federal as well as state elections. These changes were born in the House Judiciary Com-

mittee, when it unanimously passed an amendment "to conform the provisions of the Voting Rights Act dealing with the poll tax . . . with recent court decisions and constitutional amendments." H.R. Rep. No. 196, 94th Cong., 1st Sess. 4 (1975); *see also id.* at 71-72 (supplemental view of Reps. Hutchinson, McClory, Wiggins, Fish, Butler, Cohen, Moorhead, Hyde and Kindness); 121 Cong. Rec. 16255 (statement of Rep. Edwards of Cal.), 16260 (same), 16258 (statement of Rep. Butler), 16260 (same), 16757 (statement of Rep. Wiggins), 23742 (statement of Sen. Scott of Va.) (1975). The House Report explained:

> The amendment of the Committee to Section 10 is intended to conform that section to reflect the ratification of the 24th Amendment and the Supreme Court's decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the latter having been decided after the 1965 enactment of Section 10. The 24th Amendment prohibits the denial or abridgment of the right to vote in Federal elections because of the failure to pay any poll or other tax. In *Harper, supra,* the Court held that it is a denial of the equal protection clause of the 14th Amendment for a state to deny the right to vote in state elections because of the failure to pay a poll tax. Section 10(b) is amended by adding Section 2 of the 24th Amendment to the other enforcement provisions, pursuant to which Congress directs the Attorney General to institute actions against poll tax requirements. Section 10(d) is deleted. That provision provides for the eligibility of voters in covered jurisdictions upon payment of current year poll taxes to either Federal examiners or local election officials. The 24th Amendment to the Constitution and the Supreme Court's decision interpreting the 14th Amendment now clearly prohibit the imposition of poll taxes for all elections.

H.R. Rep. No. 196, 94th Cong., 1st Sess. 36 (1975); *see* S. Rep. No. 295, 94th Cong., 1st Sess. 10, 44, 63, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 776, 811, 818.

The authors of the amendment to Section 10 further explained that only the "[o]bsolete provisions [of Section 10] were deleted." H.R. Rep. No. 196, 94th Cong., 1st Sess. 71 (1975) (supplemental views of sponsors); *see also* 121 Cong. Rec. 24735 (1975) (same).

These changes provide clear evidence that the 94th Congress contemplated a private cause of action for any citizen whose right to vote in a federal election was abridged by a poll tax. Congress deleted subsection 10(d) as "obsolete," *see id.*, but chose to strengthen the rest of Section 10. That decision reflected Congress's awareness that the original justification for subsection 10(d) was no more, as all four states that retained a poll tax as of 1965 had subsequently been forced to abandon it. *See Harper v. Virginia Bd. of Elections, supra*; *United States v. Mississippi,* 11 Race Relations L. Rep. 837 (S.D. Mass. Mar. 31, 1966) (three-judge court); *United States v. Alabama,* 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court); *United States v. Texas*, 252 F. Supp. 234 (W.D. Tex.) (three-judge court), *aff'd per curiam*, 384 U.S. 155 (1966). Indeed, both the House and Senate Judiciary Committees expressly relied upon this Court's holding in *Harper*—a case originally filed, and appealed, by four private plaintiffs (and later joined by the United States as *amicus curiae* in this Court)—that conditioning the right to vote on the payment of a poll tax violates the Equal Protection Clause of the Fourteenth Amendment. *See* H.R. Rep. No. 196, 94th Cong., 1st Sess. 4, 36 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 10, 44, 63, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 776, 811, 818.

Although Congress rightly recognized that the decisions cited above, which by 1975 had eradicated every poll tax in the United States, made subsection 10(d) "obsolete," Congress nonetheless chose to reenact and broaden the other parts of Section 10. It simply cannot be correct that Section 10—as amended—was merely an instruction to the Attorney General to institute actions against the poll tax "forthwith," because as of 1975 there

were no such taxes to be challenged. The Attorney General had already fought and won that battle. By keeping subsections 10(a), 10(b), and 10(c) in the Voting Rights Act, the 94th Congress could only have intended to provide a statutory basis for challenging poll taxes enacted after 1975, such as the Virginia tax at issue in this case. Thus—whatever the status of the rights protected by Section 10 in 1965—as of 1975, Section 10 stood in the same position as Section 5 of the Act, and the logic of *Allen v. State Board of Elections* therefore applies with full force.

At the same time that Congress expanded the scope of Section 10, it kept intact the references to Section 10 in Sections 11(b), 12(a), 12(c), and 12(d) of the Act. *See* 42 U.S.C. §§ 1973i(b), 1973j(a), 1973j(c), 1973j (d). Those cross-references clearly indicate that Section 10 secured substantive "rights" to individual voters— specifically, the "right of citizens to vote . . . [without] the requirement of the payment of a poll tax as a precondition to voting." 42 U.S.C. § 1973h(a).

Therefore, the text, the legislative history, and the purpose of the 1975 amendments point to only one conclusion: Congress intended Section 10, as amended, to create a private right of action to challenge poll taxes in federal elections.

CONCLUSION

The decision of the three-judge court should be reversed.

Respectfully submitted,

MICHAEL A. COOPER
HERBERT J. HANSELL
NORMAN REDLICH
BARBARA R. ARNWINE
THOMAS J. HENDERSON
BRENDA WRIGHT
TODD A. COX
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1450 G Street, N.W.
Washington, D.C. 20005
(202) 662-8320

LAUGHLIN MCDONALD
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
44 Forsyth Street
Atlanta, GA 30303

DONALD B. VERRILLI, JR.*
STUART M. RENNERT
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Counsel for Amici

* Counsel of Record