No. 23-3655

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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.

On Appeal from the United States District Court for the District of North Dakota, No. 3:22-CV-00022

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Founded in 1940 under the leadership of Thurgood Marshall, LDF's mission is to achieve racial justice and to ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other people of color. LDF has worked for over 80 years to combat threats to Black people's voting rights and political representation.

LDF has represented Black voters as private parties in numerous precedent-setting Voting Rights Act cases before the Supreme Court, Eighth Circuit, and other federal courts. *See, e.g., Allen v. Milligan*, 599 U.S. 1 (2023); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Allen v. State Bd. of Elecs.*, 393 U.S. 544 (1969); *Whitfield v. Democratic Party*, 902 F.2d 15 (8th Cir. 1990) (en banc); *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990) (three-judge court), *aff'd*, 498 U.S. 1019 (1991).

[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4), LDF is a 501(c)(3) non-profit corporation with no parent corporations and no publicly held corporations that own ten percent or more of its stock. No party's counsel authored this brief either in whole or in part, and no person or entity other than LDF contributed money intended to fund preparing and submitting this brief.

INTRODUCTION

The history of Section 2 of the Voting Rights Act since its enactment has been written largely through private enforcement. Courts have entertained hundreds of private Section 2 lawsuits, including every Section 2 case that has come before the Supreme Court, with transformative results. In response, Congress has repeatedly amended and reinvigorated the Voting Rights Act to make clear its intent to permit and promote private enforcement.

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, a panel of this Court nonetheless held that Section 2 does not contain a private right of action. 86 F.4th 1206 (8th Cir. 2023) ("*Arkansas NAACP*"), *reh'g en banc denied*, 91 F.4th 967 (2024). Although holding put this Court at odds with the Supreme Court and every other court of appeals to address the issue,[2] *amicus* recognizes that *Arkansas NAACP* is binding on this panel and does not seek to re-litigate whether Section 2 provides a private right of action here.[3]

But *Arkansas NAACP* does not close the courthouse doors on plaintiffs bringing Section 2 claims. As Judge Stras, the author of that decision, explained

[2] *Robinson v. Ardoin*, 86 F.4th 574, 587-91 (5th Cir. 2023), *reh'g en banc denied* (Dec. 15, 2023); *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999); *Ala. State Conf. NAACP v. Alabama*, 949 F.3d 647, 651-54 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021).

[3] Nothing in this brief, however, should be read to suggest that Section 2 does not itself provide a private right of action.

when concurring in the denial of en banc review: "It may well turn out that private plaintiffs can sue to enforce § 2 of the Voting Rights Act under § 1983." 91 F.4th at 968 (Stras, J., concurring in the denial of rehearing en banc).

This case presents the Section 1983 issue directly. As this brief will explain, Section 2 of the Voting Rights Act is clearly enforceable under Section 1983 because Section 2 confers individual rights of the sort that Section 1983 is presumptively available to enforce, and nothing in the Voting Rights Act evinces Congressional intent to foreclose private enforcement through Section 1983. To the contrary, Section 2's long and prominent track record of private enforcement, combined with Congress's repeated action over the years to preserve and promote private Section 2 litigation, make it clear that Congress wants individual voters to be able to enforce the Voting Rights Act.

ARGUMENT

I. Section 1983 grants private parties a right of action to enforce Section 2 of the Voting Rights Act.

Section 1983 grants private individuals a right of action to enforce "rights . . . secured by the Constitution and [federal] laws." 42 U.S.C. § 1983. A "major purpose" of Section 1983's enactment was to "benefit those claiming deprivations of constitutional and civil rights." *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980); *accord Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 175-76 (2023).

That mandate applies with special force with respect to the Voting Rights Act. *See Schwier v. Cox*, 340 F.3d 1284, 1294-97 (11th Cir. 2003) (holding that "the Voting Rights Act may be enforced by a private right of action under § 1983"); *Vote.Org v. Callanen*, 89 F.4th 459, 473-79 (5th Cir. 2023) (same).

Because the Voting Rights Act was enacted pursuant to Congress's authority under the Reconstruction Amendments, it does not implicate the special concerns the Supreme Court has discussed with respect to inferring enforceable rights in Spending Clause statutes. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 281 (2002) (noting the Court's reluctance to "infer enforceable rights from Spending Clause statutes"). The Court has explained that Spending Clause legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (citation omitted). Congress then must "speak[] with a clear voice," when attaching conditions to its grants to the States. *Gonzaga*, 536 U.S. at 280.

In contrast, Section 1983's historical context and purpose make its right of action a particularly good fit for the Voting Rights Act, which was enacted to help realize the unfulfilled promises of the Fourteenth and Fifteenth Amendments. *Amicus* therefore agrees with Appellees that the *Gonzaga* test is inapposite, because

the Voting Rights Act is much more clearly in the heartland of rights Section 1983 was intended to enforce than the kinds of statutes to which that test has generally been applied. *See* Appellees' Br. 23-30.

However, this Court need not reach the question of whether the *Gonzaga* test applies here because, even assuming it does, Section 2 easily satisfies that test.

Under *Gonzaga*, courts first ask whether "Congress has unambiguously conferred individual rights upon a class of beneficiaries." *Talevski*, 599 U.S. at 183 (cleaned up). If so, those rights are "presumptively enforceable" through Section 1983. *Id.* at 183. This presumption of enforceability is overcome only if evidence in the rights-conferring statute reveals that Congress intended to foreclose the Section 1983 remedy. *Id.* at 186 & n.13. Application of that test is straightforward here: with Section 2, Congress unambiguously conferred individual rights on voters, and nothing in the Voting Rights Act suggests that Congress intended to foreclose Section 1983 as a remedy.

A. Section 2 clearly confers individual rights.

The first and most critical question is whether a statutory provision unambiguously confers individual rights. *See Talevski*, 599 U.S. at 183-84. Text, history, and precedent interpreting similar provisions confirm the common-sense conclusion that Section 2 clearly confers individual rights, and *Arkansas NAACP* does not suggest otherwise.

1. Section 2's text contains classic rights-conferring language.

Beginning with the text, a federal statute confers individual rights when it is "phrased in terms of the persons benefitted," when it "contains rights-creating, individual-centric language," and when it has "an unmistakable focus on the benefited class." *Talevski*, 599 U.S. at 183 (cleaned up).

Section 2 fits the bill. Its text uses prototypical individual-focused, rights-conferring language, expressly stating that it secures "the right of any citizen" to be free from discrimination in voting. 52 U.S.C. § 10301(a). It is difficult to imagine clearer rights-conferring language than that.

Indeed, that language is strikingly similar to the language that eight Justices very recently found sufficient to unambiguously confer rights in *Talevski*. That case concerned provisions of the Federal Nursing Home Reform Act that required nursing homes to honor residents' "'right to be free from'" restraints and prohibited nursing homes from discharging residents without meeting certain preconditions. 599 U.S. at 181-82 (quoting the statute). Emphasizing the specific reference to "rights" of an identified class, the Court held that these provisions contained sufficient rights-conferring language. *See Talevski*, 599 U.S. at 184. *Talevski*'s reasoning applies with full force to Section 2, which similarly requires states and localities to honor citizens' "right . . . to vote" free from discrimination. 52 U.S.C. § 10301(a).

Section 2 also has a clear and remarkably explicit focus on a "benefitted class," described in "individual-centric" terms. *See Talevski*, 599 U.S. at 183. Subsection (a) says that the individual "right . . . to vote" that it protects belongs to an individual "citizen." 52 U.S.C. § 10301(a). And in subsection (b) it is the individual "*members of* a class of citizens" whose rights are—in Congress's words—"protected by" the statute. 52 U.S.C. § 10301(b) (emphasis added). This unmistakable focus on the individual beneficiaries of Section 2 continues throughout subsection (b), which defines a violation of the Section 2 right in terms of whether "political processes . . . are not equally open to participation by *members of* a class of citizens," and whether those "*members* have less opportunity than other *members* of the electorate" to exercise electoral power. *Id.* (emphasis added). Taken as a whole, Section 2 guarantees the "right" of individual "citizens" who are "members" of a benefitted class to equal participation in the political process. This is precisely what *Talevski* and other precedents require. *See, e.g.*, *Coca v. City of Dodge City*, No. 6:22-cv-01274, 2023 WL 2987708, at *6 (D. Kan. Apr. 18, 2023).

Unable to deny the plain text, even Appellant acknowledges that Section 2 "may appear to contain rights-creating language." Appellant's Br. 26. Appellant nevertheless attempts to cast doubt on whether Section 2's apparent rights-conferring language means what it says, but those arguments do not withstand scrutiny.

Appellant's primary argument is that the rights conferred by Section 2 are not "individual," at least in vote dilution cases. *See* Appellant's Br. 27-30. The Supreme Court has rejected this exact argument. In *Shaw v. Hunt*, 517 U.S. 899, 917 (1996), the Supreme Court emphasized that Section 2's text makes clear that the "right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" *League of United Latin Am. Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 437 (2006) (quoting *Shaw*, 517 U.S. at 917); *accord* Appellees' Br. 40 (also highlighting *Shaw*'s rejection of this theory). "[T]he fact that the statute confers rights on a 'group' of people does not suggest that the group, rather than the persons, enjoy the right the statute confers." *Ga. State Conf. NAACP v. Georgia*, No. 121-5338, 2022 WL 18780945, at *3 (N.D. Ga. Sept. 26, 2022) (three-judge court).

Appellant relies on subsection (b)'s references to a "class of citizens" to support this argument. Appellant's Br. 27. However, a focus on a "class of beneficiaries" is textual evidence that a statute *does* confer individual rights. *Talevski*, 599 U.S. at 183. And that is particularly true here, because Section 2's text makes very clear that it confers rights on individual "members of" the class. 52 U.S.C. § 10301(b).

Appellant also argues that a statute cannot confer rights if, grammatically, it is phrased as a "prohibition" of conduct directed to "regulated parties." Appellant's Br. 30-31 (emphasis omitted). But the Supreme Court has rejected this argument,

too. *See* Appellees' Br. 38-39. In *Talevski*, the Court deemed it irrelevant that the regulated nursing homes were the grammatical subjects of the statutory text, rather than the residents who were granted a "right to be free from" improper restraints. The Court explained that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Talevski*, 599 U.S. at 185. So too here. The fact that Section 2 describes the obligations of states and political subdivisions does not alter its focus on the "right of any citizen . . . to vote." 52 U.S.C. § 10301(a); *see Vote.Org*, 89 F.4th at 474-75 (citing *Talevski* to reject a similar argument).

2. Closely analogous provisions confer individual rights.

Consistent with the straightforward conclusion that Section 2 confers individual rights, its closest statutory comparators have all been held to be privately enforceable.

To begin with, the Supreme Court has held that both Sections 5 and 10 of the Voting Rights Act are privately enforceable. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 230-35 (1996) (Stevens, J., announcing the judgment, with one other justice); *id.* at 240 (Breyer, J., concurring in the judgment, with two other justices); *Allen v. State Bd. of Elecs.*, 393 U.S. 544, 554-57 (1969). Those holdings necessarily mean that both provisions unambiguously confer individual rights of the sort that Section 1983 encompasses. *See Gonzaga*, 536 U.S. at 283.

Because those other Voting Rights Act provisions confer individual rights, so must Section 2. The core operative text of all three provisions is strikingly similar, each referring to the individual rights of a "person" or "citizen." Section 5's rights-conferring text states that in jurisdictions subject to preclearance, "no person shall be denied the *right to vote*" because of un-precleared voting changes. 52 U.S.C. § 10304(a) (emphasis added); *see Allen*, 393 U.S. at 555. And Section 10's rights-conferring text appears in a provision stating that poll taxes have "the purpose or effect of denying persons the *right to vote*" and that when a poll tax is imposed "the constitutional *right of citizens to vote* is denied or abridged." 52 U.S.C. § 10306(a) (emphases added); *see Morse*, 517 U.S. at 232 n.42 (plurality). Both echo Section 2's operative text prohibiting "denial or abridgement of *the right of any citizen . . . to vote*." 52 U.S.C. § 10301(a) (emphasis added).

In fact, Section 2's rights-conferring language is even clearer than Section 10's, as Justice Thomas's dissent in *Morse* illustrates. Justice Thomas, joined by three other justices, recognized that Section 5 confers individual rights under *Allen*, but contended that Section 10 does not. His analysis turned on his understanding that Section 5 expressly "guaranteed" individual protection from voting changes that were not precleared, while Section 10 made no such express guarantee about poll taxes. *Morse*, 517 U.S. at 287-88 (Thomas, J., dissenting). Section 2 is like Section 5 in this regard, so Section 2 clears even the high bar set by

Justice Thomas's *Morse* dissent. The text states categorically that "[n]o" voting rule that violates Section 2 "shall be imposed or applied." 52 U.S.C. § 10301(a). That is just as much a "guarantee" to individual voters as Section 5's assurance that "no person shall be denied the right to vote" by a rule that was not precleared. So even if the standard applied in Justice Thomas's *Morse* dissent were the law (which it is not), it *still* would be clear that Section 2 confers enforceable individual rights.[4]

There is also ample case law holding that comparable federal civil rights provisions confer enforceable individual rights. For example, Section 2 is very similar to Section 601 of Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by federal funding recipients. Section 601 confers on any "person in the United States" a right not to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally funded programs. 42 U.S.C. § 2000d. This language plainly confers individual rights. *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001); *Arkansas NAACP*, 86 F.4th at 1209-10. And in both wording and substance, the rights it confers are very similar

[4] The same is true of Justice Thomas's solo dissent in *Talevski*, which contended that a federal statute confers enforceable rights only if it "imposes a binding obligation on the defendant to respect a corresponding substantive right that belongs to the plaintiff." 599 U.S. at 201 (Thomas, J., dissenting). That formulation, too, describes Section 2 precisely. An individual voter bringing a Section 2 claim is asserting a substantive "right . . . to vote" that is explicitly protected by the statute. 52 U.S.C. § 10301(a). And Section 2 imposes a binding obligation to respect that right; it categorically prohibits states and localities from enforcing policies that would deny or abridge it. *Id.*

to the rights conferred by Section 2. Just as Section 2 is expansively worded to protect "any citizen" from racially discriminatory "denial or abridgement" of their voting rights, Section 601 is expansively worded to protect any person from both outright exclusion and more insidious forms of racial discrimination. That is why courts have observed that Section 2's language "closely resembles" Section 601. *Ga. NAACP*, 2022 WL 18780945, at *4; *accord LULAC v. Abbott*, No. 21-cv-259, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court) (Section 2 "seems to mirror" Section 601).

Section 2 is also very similarly worded to the "Materiality Provision" of the Civil Rights Act of 1964, a precursor to the Voting Rights Act that multiple circuit courts have held is privately enforceable through Section 1983. *See Vote.Org*, 89 F.4th at 474; *Schwier*, 340 F.3d at 1297; *Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir. 2022), *vacated as moot*, 143 S. Ct. 297 (2022).[5] In terms very similar to Section 2's, the Materiality Provision forbids "deny[ing] the right of any individual to vote" based on immaterial errors in the voting process. 52 U.S.C. § 10101(a)(2)(B). This provision's reference to "the right of any individual" makes unmistakably clear that it confers individual rights. *Vote.Org*, 89 F.4th at 474.

[5] The only contrary circuit authority, *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), arose in the context of a Materiality Provision claim litigated by a *pro se* plaintiff; that decision contains almost no reasoning and does not apply the now-established test for Section 1983 enforceability.

3. *Arkansas NAACP* is not to the contrary.

One final point: Appellant contends that this issue was already "resolved" by *Arkansas NAACP*. *See* Appellant's Br. 24-25. That is incorrect. *Arkansas NAACP* specifically declined to reach the Section 1983 question. 84 F.4th at 1218. Moreover, as noted above, the author of that opinion specifically recognized when concurring in the denial of en banc review that Section 2 "may well" be enforceable through Section 1983, and that this issue was neither raised nor addressed in *Arkansas NAACP*. 91 F.4th at 968 (Stras, J., concurring in the denial of rehearing en banc).

Sandoval articulated, and *Arkansas NAACP* applied, a two-part test for determining whether a statute contains an implied private right of action. First, the statute must confer individual rights, which is the same question courts ask when determining whether a statute is enforceable through Section 1983. *Arkansas NAACP*, 86 F.4th at 1209; *Gonzaga*, 536 U.S. at 284–85 (discussing the overlap). And second, to find an implied private right of action there must be evidence that Congress intended, in the statute itself, to *create* a private remedy—a more demanding standard than applies when Section 1983's preexisting remedy is invoked. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Arkansas NAACP*, 86 F.4th at 1209; *Gonzaga*, 536 U.S. at 284 (contrasting the standards). The *Arkansas NAACP* majority rested its holding on the second step of the *Sandoval* test only, and "assum[ed] the existence of a 'private right'" under the first step without

deciding the issue. 86 F.4th at 1216. In other words, it specifically chose *not* to resolve whether Section 2 confers individual rights.

The panel decision did volunteer a brief explanation of considerations relevant to that question. That part of the opinion was "unnecessary to the decision," and therefore nonbinding dicta. *Sanzone v. Mercy Health*, 954 F.3d 1031, 1039 (8th Cir. 2020). Still, what it does say further confirms that Section 2 is enforceable through Section 1983. The *Arkansas NAACP* panel specifically acknowledged that Section 2 "unmistakably focuses on the benefited class: those subject to discrimination in voting." 86 F.4th at 1210 (cleaned up). That focus is key to conferring an individual right. *See Talevski*, 599 U.S. at 183. And, although the *Arkansas NAACP* panel suggested that the language in Section 2 that "focuses on what states and political subdivisions cannot do" might point in the opposite direction, 86 F.4th at 1209, Supreme Court precedent is clearly to the contrary. *See supra* Part I.A.1 (explaining that *Talevski* rejected a similar argument); Appellees' Br. 38-39 (same).

In sum, *Arkansas NAACP* does not resolve this case. But, by recognizing that Section 2 includes specific language that unmistakably focuses on a class of benefitted persons, it confirms that Section 2 has the kind of rights-conferring language that makes it enforceable under Section 1983.

B. Congress did not intend to foreclose Section 1983's presumptively available private right of action.

Because Section 2 clearly confers individual rights, Section 1983 presumptively provides a right of action to enforce it. *See Talevski,* 599 U.S. at 186. This presumption holds unless Appellant can demonstrate that Congress intended to *foreclose* private enforcement through Section 1983. *Id.*

Importantly, this step of the analysis departs from the stricter *Sandoval* approach to determining whether Congress implied a private right of action in the statute itself. The *Sandoval* test begins from a presumption that statutes are *not* privately enforceable if Congress has not said so explicitly, and looks for affirmative evidence that Congress intended to *create* a private right of action by implication. 532 U.S. at 286, 293 n.8. But Section 1983 contains an *express* private right of action that is presumptively *available* to enforce rights conferred by federal law. *See Talevski*, 599 U.S. at 184. So, if a statute confers individual rights, courts require evidence that Congress specifically intended to *override* Section 1983's plain text and *foreclose* its generally available remedy. *Id*. at 186.

These differences between the two inquiries are why *Arkansas NAACP* does not resolve the distinct question whether there is evidence that Congress intended to foreclose private enforcement through Section 1983. *See* 86 F.4th at 1218; 91 F.4th at 968 (Stras, J., concurring in the denial of rehearing en banc).

1. Nothing in the Voting Rights Act suggests that Congress intended to override Section 1983.

Congress may demonstrate an intent to override Section 1983 in two ways: either "expressly," or else by necessary implication of "a comprehensive enforcement scheme." *Talevski* 599 U.S. at 186. Neither applies here.

First, Congress can always state an intent to foreclose the Section 1983 remedy expressly, either by explicitly "forbid[ding] § 1983's use" or by including an "express private judicial right of action" that supersedes Section 1983. *Talevski*, 599 U.S. at 186, 188. Appellant has not argued that Congress foreclosed Section 1983 through either of these means. With good reason. Nothing in the Voting Rights Act forbids enforcement through Section 1983, and, under this Court's precedent in *Arkansas NAACP*, there is no private right of action in Section 2 that could supersede Section 1983.

Alternatively, in rare cases, a defendant can overcome the presumption in favor of Section 1983 enforcement by pointing to a "comprehensive enforcement scheme *that is incompatible with* individual enforcement under § 1983." *Talevski*, 599 U.S. at 188 (cleaned up) (emphasis in original). Nothing like that is present here either. The rare case for implicit preclusion arises where a statute provides remedies subject to specific limitations that Section 1983 enforcement would negate—such as, for example, requiring exhaustion of administrative remedies or other bespoke

procedural hurdles. *See Talevski*, 599 U.S. at 189 (citing *Fitzgerald*, 555 U.S. at 254 & n.1). The Voting Rights Act imposes no such limitations.

Unable to point to any express or implicit intent to displace Section 1983 in the Voting Right Act, Appellant insists that the Voting Rights Act's provision for civil enforcement by the Attorney General in Section 12 counts as such a comprehensive remedial scheme. In Appellant's view, "[w]hen Congress created a disparate-impact-theory for vote dilution claims in Section 2 of the Voting Rights Act, it struck a careful balance in Section 12, matching a centralized enforcement mechanism with the collective nature of Section 2 prohibitions." Appellant's Br. 35.

As an initial matter, that is an incoherent way of reading the statute, because it rests on the incorrect premise that Congress added Section 12's Attorney General enforcement provisions in 1982, at the same time it amended Section 2 to cover discriminatory results. In fact, the provision for civil enforcement by the Attorney General was enacted much earlier, as part of the original Voting Rights Act. So the decision to vest some enforcement authority with the Attorney General had nothing to do with Congress's later decision to broaden the rights conferred by Section 2 in 1982. *See infra*, Part I.B.2.

And Congress included the Attorney General enforcement provisions from the very start in order to *increase* the potential avenues for civil enforcement, not restrict them. Enacted as part of the original Voting Rights Act, Section 12(d)

permits the Attorney General to seek an injunction under the Voting Rights Act. 52 U.S.C. § 10308(d). Before Section 12(d)'s enactment, states had argued that the Attorney General lacked authority to bring actions under federal civil rights laws, without explicit congressional authorization. *See, e.g.*, *United States v. Mississippi*, 380 U.S. 128, 137 (1965); *United States v. Raines*, 362 U.S. 17, 27 (1960). By contrast, the federal statutory protections for voting rights that existed at that time were understood to be enforceable by private plaintiffs. *See Vote.Org*, 89 F.4th at 477 (discussing this history as it pertained to the Materiality Provision); *Schwier*, 340 F.3d at 1295-96 (same). The Attorney General enforcement provisions therefore supplemented an "implied but established private right to sue" by adding "an explicit right in the Attorney General." *Vote.Org*, 89 F.4th at 476.

There is therefore no tension between Congress intending to permit private enforcement through Section 1983 and Congress including express Attorney General enforcement provisions in the statute itself. To the contrary, that choice makes good sense. Section 1983's express right of action is for private parties, not sovereign governments. *See Breard v. Greene*, 523 U.S. 371, 378 (1998). So if Congress wants to ensure both private parties *and* the Attorney General have express authorization to sue *somewhere*, only the Attorney General's right of action would need to be spelled out in the rights-conferring statute itself.

Nor is the enforcement role of the Attorney General in the Voting Rights Act otherwise "incompatible with" private enforcement. *Talevski*, 599 U.S. at 188 (emphasis omitted). On the contrary, the Supreme Court has recognized that the Attorney General alone lacks sufficient resources to fulfill the purposes of the Voting Rights Act, and that the contributions of private litigants are essential to realize its purpose. *See Allen*, 393 U.S. at 556-57 & n.23 (noting that the Voting Rights Act would be "severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General," and finding it "significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits").

Appellant would have this Court hold that whenever the Attorney General may enforce a statutory provision, private parties necessarily may not. But that is not the law. In fact, courts have concluded that a variety of statutes enforceable by the Attorney General may also be enforced by private parties—including the closely analogous voting rights and antidiscrimination provisions cataloged above. *See supra*, Part I.A.2; *see also, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (Title IX).

Absent supporting text, precedent, or history, Appellant resorts to policy argument, speculating that Congress might have preferred only someone "politically accountable" and familiar with the "realities of conducting state-wide elections" to

enforce Section 2—at least when the statute is invoked to challenge "a State's election maps for a 'vote dilution' claim." Appellant's Br. 34. Beyond being purely speculative, this argument fails to account for the fact that Section 2 applies to much more than just dilutive state-wide electoral maps. Section 2 applies to any "voting qualification or prerequisite to voting or standard, practice, or procedure," not just redistricting, and covers all manner of "political subdivision[s]," not just states. 52 U.S.C. § 10301(a). In other words, there will be many Section 2 claims to which Appellant's rationale does not apply. And there is certainly nothing in the statute to suggest that Congress wanted the Attorney General's enforcement authority to be exclusive as to some kinds of Section 2 claims but not others.

Appellant's argument also ignores the decades of experience that federal courts have developed in adjudicating claims by private parties while respecting traditional federalism concerns and the efficient administration of elections. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (allowing individual voters to challenge legislative districts as racially discriminatory, while acknowledging that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions"); *Baker v. Carr*, 369 U.S. 186, 226-31 (1962) (holding that statewide districting plans are "amenable to judicial correction" in private lawsuits even though they affect "matters of the administration of the affairs of the State"). In fact, the Supreme Court just last term decided *Allen v. Milligan*, where

private parties successfully enforced their Section 2 rights without Chief Justice Roberts' opinion for the Court expressing any concern that the private plaintiffs threatened federalism or the sound administration of elections. *See* 599 U.S. 1 (2023). Just because Section 2 cases can sometimes raise delicate questions, that is no reason to toss aside decades of precedent permitting private parties to bring those claims to court.

2. Congress has clearly recognized and approved private enforcement of Section 2.

Beyond the fatal lack of evidence that Congress intended to foreclose Section 1983, Section 2's history also thoroughly *refutes* the notion that Congress did not intend private enforcement.

It is well documented that individual voters suing to enforce their Section 2 rights have long played a central role in advancing the core purpose of the Voting Rights Act. Private litigants have brought at least 167 successful Section 2 claims in the last four decades, including numerous cases decided on the merits by the Supreme Court. *See Arkansas NAACP*, 86 F.4th at 1219 n.8 (Smith, C.J., dissenting).

Moreover, Congress is "undoubtedly aware" of that long history of private enforcement, *Milligan*, 599 U.S. at 39, and has repeatedly declined to curtail it—even "as they have made other changes to the Voting Rights Act," *id.* at 42 (Kavanaugh, J., concurring). That unusually clear track record of Congressional acquiescence counsels strongly against reinterpreting the statute to foreclose private

enforcement altogether, as Appellant is asking this Court to do. *See id.* at 39 (explaining that "until and unless" Congress changes an established interpretation of Section 2, "statutory *stare decisis* counsels . . . staying the course").

Section 2's long history of private enforcement dates back to the statute's earliest days. LDF filed multiple lawsuits raising Section 2 claims on behalf of individual Black voters within a year after the Voting Rights Act's enactment, including bringing Section 2 claims alongside others under Section 1983. *See* Complaint, *Gilmore v. Green Cnty. Democratic Party*, No. 66-341 (N.D. Ala. May 27, 1966) (on file with LDF Archives, Thurgood Marshall Inst.); Complaint, *Gray v. Main*, No. 2430-N (M.D. Ala. June 29, 1966) (on file with LDF Archives, Thurgood Marshall Inst.). The court in *Gray* specifically held that Section 1983's right of action "permit[s] individuals such as [private] plaintiffs to bring an action" under Section 2. *Gray v. Main*, 291 F. Supp. 998, 999-1000 (M.D. Ala. 1966).

In 1975, Congress reenacted and amended the Voting Rights Act, leaving Section 2 unaltered while amending Sections 3 and 14 of the Act to explicitly refer to private enforcement. As amended in 1975, the text of Section 3 specifically contemplates certain remedies in "proceeding[s]" brought by "*an aggrieved person* . . . under any statute to enforce the voting guarantees of the Fourteenth or

Fifteenth Amendment." 52 U.S.C. § 10302(a), (b), & (c) (emphasis added).[6] As the entire Court recognized in *Morse*, the evident effect of this amendment was "to make what was once implied now explicit: private parties can sue to enforce the Voting Rights Act." *Ala. NAACP*, 949 F.3d at 651, 652 n.5.[7] Even the dissenters in *Morse* acknowledged that Section 3 "explicitly recognizes that private individuals can sue under the Act." 517 U.S. at 289 (Thomas, J., dissenting).[8]

The same is true of the fee-shifting provision, Section 14(e), which Congress added in 1975. Like Section 3, Section 14(e) applies in any "proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment." 52 U.S.C. § 10310(e). It authorizes "the prevailing party, other than the United States" to seek attorneys' fees. *Id.* As *Morse* recognized, that language demonstrates that Congress

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[6] That language clearly encompasses Section 2 because the Voting Rights Act is "a statute" expressly "designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments." *Morse*, 517 U.S. at 233-34; *see Milligan*, 599 U.S. at 41.

[7] *See* 517 U.S. at 233-34 (Stevens, J., announcing the judgment, with one other); *id.* at 240 (Breyer, J., concurring in the judgment, with two others); *id.* at 289 (Thomas, J., dissenting, with three others).

[8] Applying the more demanding *Sandoval* standard, the *Arkansas NAACP* majority concluded that Section 3 could not support an inference that Congress intended to "create[]" a "new" private remedy to enforce Section 2. 86 F.4th at 1211-12. But *Arkansas NAACP* also recognized that Section 3 *does* clearly signal Congress's awareness and approval of *existing* private rights of action. *Id.* And *Arkansas NAACP* cited Section 1983 as "the most prominent example" of an existing private right of action that fit the bill. *Id.* at 1212.

intended private plaintiffs to enforce substantive provisions of the Voting Rights Act. 517 U.S. at 234 (Stevens, J., announcing the judgment).[9]

Section 14(e)'s clear purpose is to incentivize Voting Rights Act enforcement by private plaintiffs: "Congress intended for courts to award fees under the VRA . . . when prevailing parties helped secure compliance with the statute." *Shelby Cnty. v. Lynch*, 799 F.3d 1173, 1185 (D.C. Cir. 2015). As Congress explained when adding this provision: "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." S. Rep. 94-295, 40 (1975).

Then, in 1982, Congress rejected a decision of the Supreme Court that would have hampered private enforcement by making Section 2 vote dilution claims more difficult to prove. In *City of Mobile v. Bolden*, private plaintiffs brought a Section 1983 suit against Mobile, Alabama, under Section 2 and the Fourteenth and Fifteenth Amendments, contending that the city's at-large electoral system discriminated against Black voters. 446 U.S. 50, 58 n.2 (1980). The Supreme Court ruled against the voters, holding in relevant part that Section 2 prohibited only

[9] The "prevailing party, other than the United States" language was borrowed verbatim from the Civil Rights Act of 1964. *See Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 & n.1 (1968) (per curiam). By 1975, that language was understood to signal Congress's intent to "encourage individuals injured by racial discrimination to seek judicial relief." *Id.*; *see also Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 427-28 (1973) (per curiam).

intentional discrimination, not discriminatory effects. *See id.* at 61-65. That decision immediately "produced an avalanche of criticism." *Milligan*, 599 U.S. at 9 (cleaned up).

In response, Congress promptly amended the statute to reject the rights-restrictive interpretation that *Bolden* had given to Section 2. *See id.* at 10 (describing this history). While retaining the rights-conferring language in subsection (a), Congress further defined the Section 2 right in subsection (b), using language drawn nearly verbatim from *White v. Regester*, 412 U.S. 755 (1973). *See Milligan*, 599 U.S. at 40. As Congress surely knew, *White*—the model for the reinvigorated Section 2 right—involved Section 1983 claims brought by individual voters, just as *Bolden* did. *See id.* at 39-40 (explaining that the details of *White* were "not lost on anyone when § 2 was amended"); Appellants' Br. 9, *Bullock v. Regester*, No. 72-147 (U.S. 1973) (citing Section 1983 as a basis for the district court cases that were consolidated in *White*).

By making it easier to prove claims and encouraging private enforcement, Congress's amendments *expanded* the rights conferred by Section 2. It would be bizarre to conclude, as Appellant contends, that Congress in 1982 intended to deprive individual voters of their longstanding ability to enforce Section 2 at the very same time as it reinvigorated the rights that Section 2 confers. *See, e.g.*, *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) (refusing to interpret a statute "in a way that negates its

recent revision"). The goal of Congress's amendments was to make Section 2 relief more available to individual voters like the *Bolden* plaintiffs, not less.

What Congress intended is precisely what happened: Section 2 claims proliferated after the 1982 amendments, with the vast majority brought by private plaintiffs. As Chief Judge Smith documented in *Arkansas NAACP*, more than 400 cases have been litigated under the current version Section 2 during the forty years since it took effect. 86 F.4th at 1219 n.8 (Smith, C.J., dissenting). The vast majority of these were brought by individual voters to enforce their own Section 2 rights. *See id.* (noting that private litigants brought 167 of the 182 successful Section 2 cases during that period).

This long track of private enforcement, and the judicial consensus that it reflected, could not possibly have escaped Congress's notice when it reauthorized the Voting Rights Act in 2006. Numerous high-profile Section 2 cases brought by individual voters were decided by the Supreme Court between 1982 and 2006. *See id.* (collecting cases). Among these were *Thornburg v. Gingles* itself, *see* 478 U.S. 30, 35 (1986), and a major Section 2 case decided just one month before the reauthorization, *see LULAC*, 548 U.S. 399 (2006). By 2006, the Court also had announced its understandings that Section 2 was privately enforceable, *see Morse*, 517 U.S. at 232-34, 240, and that the rights it confers are individual in character, *LULAC*, 548 U.S. at 437; *Shaw*, 517 U.S. at 917. Moreover, the extensive legislative

record compiled in support of the 2006 reenactment made clear that Congress was aware of widespread private enforcement.[10]

In contrast to its decisive response when *Bolden* curtailed Section 2 rights, Congress did nothing to countermand the overwhelming consensus in favor of private enforcement in 2006, or any time previously. "Because 'Congress has spurned multiple opportunities to reverse'" private enforcement of Section 2, "the Supreme Court itself would require 'a superspecial justification to warrant reversal.'" *Stone v. Allen*, No. 2:21-cv-1531, 2024 WL 578578, at *7 (N.D. Ala. Feb. 13, 2024) (cleaned up) (quoting *Kimbel v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015)). "No superspecial justification exists here." *Id.*

* * *

[10] For example, The House Report on the 2006 amendments noted that "African American plaintiffs filed and won the largest number of suits under Section 2, with Latino citizens close behind." H.R. Rep. 109-478, 53 (2006).

CONCLUSION

For the foregoing reasons, this Court should hold that Section 2 claims are enforceable through Section 1983's private right of action.

March 25, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF filing system. I further certify that counsel for all parties to the case are registered CM/ECF users, such that service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this motion complies with the typeface, type style, and length requirements of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B). According to the word-count function of Microsoft Word, this brief totals 6,495 words, excluding portions exempted by Federal Rule of Appellate Procedure 32(f). And this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Pursuant to 8th Circuit Rule 28A(h), I further certify that this brief has been scanned for viruses and is virus-free.

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RE: 23-3655 Turtle Mountain Band of Chippewa Indians, et al v. Michael Howe

Dear Counsel:

The amicus curiae brief of the NAACP Legal Defense & Educational Fund, Inc. has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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