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' PETITION FOR REHEARING EN BANC

Deuel Ross
NAACP Legal Defense & Educational Fund, Inc.
700 14th Street NW, Suite 600
Washington, DC 20005

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Janai S. Nelson
President and Director-Counsel
Brenda Wright
Counsel of Record
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
bwright@naacpldf.org
T: (332) 271-0242
F: (212) 226-7592

Counsel for Amicus Curiae

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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 ("VRA") cases before the Supreme Court, Eighth Circuit, and other federal courts. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1 (2023); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Allen v. State Bd. of Elections.*, 393 U.S. 544 (1969); *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023); *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 AND SUMMARY OF ARGUMENT

The VRA is "the most successful civil rights statute in the history of the Nation." *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (quoting S. Rep. No. 97-417, at 11). In enacting the VRA, Congress attempted to "banish the blight of racial discrimination in voting" by creating "stringent new remedies for voting discrimination" and "strengthening existing remedies[.]" *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). As one of the core VRA remedies, Section 2 is a "nationwide ban on racial discrimination in voting." *Shelby Cnty v. Holder*, 570 U.S. 529, 557 (2013).

The history of Section 2 of the VRA, 52 U.S.C. § 10301, 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. In response, Congress has repeatedly amended and reinvigorated the VRA to make clear its intent to permit and promote private enforcement. Despite Section 2's successes, "racial discrimination . . . [is] not ancient history," *Barlett v. Strickland*, 556 U.S. 1, 25 (2009), and "voting discrimination still exists; no one doubts that." *Shelby Cnty*, 570 U.S. at 536.

This case presents a question of exceptional importance: namely, whether the protections of Section 2 will no longer be available to any persons residing within the jurisdiction of this Circuit. The majority's decision imposing that result

represents a stark break from controlling Supreme Court precedent, as well as the holdings of all other circuits that have considered whether private litigants may enforce their rights under Section 2 of the VRA through an action under 42 U.S.C. § 1983. This Court should grant rehearing en banc to confirm that private litigants in this Circuit, like private litigants in all other circuits, may continue to enforce their rights under Section 2 of the VRA through an action under 42 U.S.C. § 1983.

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, a panel of this Court held that Section 2 does not contain a private right of action. 86 F.4th 1204 (8th Cir. 2023) ("*Arkansas NAACP*"), *reh'g en banc denied*, 91 F.4th 967 (2024).[2] But *Arkansas NAACP* did not close the courthouse doors on plaintiffs bringing Section 2 claims. A separate analytical framework applies to determine whether Section 1983 provides a private right of action to enforce Section 2 of the VRA. 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

[2] *Amicus* agrees with Appellees that this Court should reconsider that ruling *en banc*, at the same time it considers whether Section 1983 may be used to enforce Section 2. Pet. Reh'g En Banc at 15. Every other court of appeals to consider this issue has held that Section 2 has a private right of action. *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)*; see also Singleton v. Allen*, Nos. 21-1291, 21-1530, 2025 WL 1342947 at *171-81 (N.D. Ala. May 8, 2025) (three-judge court).

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). Courts therefore examine 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.* This presumption of enforceability is overcome only if evidence in the statute reveals that Congress intended to foreclose the Section 1983 remedy. *Id.* at 186 & n.13. The majority did not reach that second question because it decided that Section 2 does not confer individual rights. Slip Op. at 11 & n.4. This brief explains why the majority was incorrect, even accepting the reasoning of *Arkansas NAACP*.

ARGUMENT

I. Section 2 of the VRA unambiguously confers individual rights of the type enforceable under Section 1983.

The first and most critical question for determining whether Section 1983 is available to enforce Section 2 is whether Section 2 unambiguously confers individual rights. *See Talevski*, 599 U.S. at 183-84.[3] The statutory text and precedent

[3] *Talevski* was a Spendings Clause case, and therefore applied the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), for determining whether private litigants may use Section 1983 to enforce legislation enacted under Congress' spending power. The Court thus far has not applied *Gonzaga*'s test outside of the Spending Clause context, and, as the dissent observes, it is questionable whether that test even applies here. Slip Op. at 15-16 (Colloton, C.J., dissenting). Nevertheless, Section 1983 is available to enforce Section 2 of the VRA even under the test applied in *Talevski*.

interpreting similar provisions confirm the common-sense conclusion that Section 2 confers individual rights.

A. 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). 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). Even the majority acknowledges that "certain language in § 2 'unmistakably focuses on the benefited class'". Slip Op. at 9.

The Supreme Court has also held that Section 2's closest statutory comparators, Sections 5 and 10, are privately enforceable. *Morse v. Republican Party of Va.*, 517 U.S. 186, 230-35 (1996) (plurality)); *id.* at 240 (Breyer, J., concurring, with two other justices); *Allen v. State Bd. of Elections*, 393 U.S. at 554-57. 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.

The majority nevertheless points to a statement in *Arkansas NAACP* that "it is unclear whether § 2 creates an individual right", Slip Op. at 10 (citing *Arkansas NAACP*, 86 F. 4th at 1210), as holding that Congress did not unambiguously confer an individual right. *Arkansas NAACP*, however, did not resolve that question. As Chief Judge Colloton rightly points out, the panel in *Arkansas NAACP* "declin[ed] to decide whether § 2 confers an individual right" and simply noted the arguments on both sides. Slip Op. at 18. The *Arkansas NAACP* panel then decided that the VRA did not provide its own private remedy, thus deciding the case on a different ground. *Ark. State Conf.* 86 F.4th at 1210. Even Judge Stras, the author of that decision, explained: "It may well turn out that private plaintiffs can sue to enforce § 2 of the

VRA under § 1983." 91 F.4th at 968 (Stras, J., concurring in the denial of rehearing en banc).

The majority also asserts that Section 1983 is unavailable because "the subject of § 2's prohibition is 'any State or political subdivision' rather than on the conferral of a right to 'any citizen.'" Slip Op. at 12 (quoting 52 U.S.C. § 10301(a)). But 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. 599 U.S. at 184. 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." *Id.* at 185.

The panel attempts to sidestep *Talevski's* clear import by insisting that Section 2 "'focuses' on the States and political subdivisions" rather than merely "mention[ing]" them. Slip Op. at 12. But that cannot be squared with the rights-centric language of Section 2 which *amicus* has quoted above. *See also id.* at 16 (Colloton, C.J., dissenting) ("As a three-judge district court explained last year after comprehensive analysis, 'every sentence of Section Two either refers to rights of the benefited class, contains rights-creating language that creates new rights for that specific class, or expressly focuses on the benefited class.'" (quoting *Singleton v. Allen*, 740 F. Supp. 3d 1138, 1158 (N.D. Ala. 2024)). Thus, 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 also Vote.Org v. Callanen*, 89 F.4th 459, 474-75 (5th Cir. 2023) (citing *Talevski* to reject a similar argument).

II. Statutory stare decisis counsels against banning private enforcement of Section 2.

Statutory stare decisis carries "special force" in this context. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014). "[U]nlike in a constitutional case, . . . Congress can correct any mistake it sees." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). An opinion interpreting a statute is a "ball[] tossed into Congress's court, for acceptance or not as that branch elects." *Id*. Where Congress "acquiesce[s]" to the Court's interpretation by leaving a holding undisturbed, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008), its action "enhance[s] even the usual precedential force" of stare decisis, *Shepard v. United States*, 544 U.S. 13, 23 (2005). Congress is "undoubtedly aware" of the long history of private enforcement of Section 2, *Milligan*, 599 U.S. at 39, and has repeatedly declined to curtail it—even "as they have made other changes to the VRA," *id.* at 42 (Kavanaugh, J., concurring). This unusually clear track record of congressional acquiescence counsels strongly against reinterpreting the statute to foreclose private enforcement.

In 1975, Congress amended the VRA, leaving Section 2 unaltered while adding new remedies for 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 [F]ourteenth or [F]ifteenth [A]mendment." 52 U.S.C. § 10302(a), (b), & (c) (emphasis added). 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 VRA." *Ala. NAACP*, 949 F.3d at 651, 652 n.5; *accord Morse*, 517 U.S. at 233 (plurality) (explaining that the 1975 amendments to Section 3 recognized private rights of action); *see also id*. at 289 (Thomas, J., dissenting) ("As appellants accurately state, § 3 explicitly recognizes that private individuals can sue under the [Act]." (internal quotation marks omitted)).

Like Section 3, Section 14(e) also indicates Congress's intent to authorize "the prevailing party, other than the United States" to seek attorneys' fees in any "proceeding to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth [A]mendment." 52 U.S.C. § 10310(e). That language demonstrates that Congress intended private plaintiffs to enforce substantive provisions of the VRA. *Morse*, 517 U.S. at 234 (plurality).

In 1982, Congress rejected the Supreme Court's restricted interpretation of Section 2 in *Mobile v. Bolden*, 446 U.S. 55 (1980), a private Section 2 lawsuit, by

amending the VRA. *See Milligan*, 599 U.S. at 11-14, 40. The 1982 committee reports are the "authoritative source" for interpreting Section 2. *Gingles*, 478 U.S. at 43 n.7. Both the Senate and House reports from 1982 expressly recognize that the "the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965." S. Rep. No. 97-417, at 30; *see* H. R. Rep. No. 97-227, at 32 (1981).

This long record of private enforcement, and the judicial consensus that it reflected, did not escape Congress's notice when it reauthorized the VRA in 2006. At that time, Congress acknowledged that the present-day evidence of discrimination included both "continued filing of section 2 cases" and "litigation filed to prevent dilutive techniques from adversely affecting minority voters" based on the extensive record compiled by Congress, which largely addressed private litigation. Pub. L. No. 109–246, §2, 120 Stat. 577 (July 27, 2006). Indeed, in 2006, Congress again made it easier for private litigants to sue by amending Section 14(e) to permit the recovery of "reasonable expert fees and other reasonable litigation expenses." 52 U.S.C. § 10310(e); *see* Pub. L. No. 109-246, §§ 3(e)(3), 6, 120 Stat. 580, 581 (July 27, 2006).

As a three-judge panel recently found: "It is difficult in the extreme for us to believe that for nearly sixty years, federal courts have consistently misunderstood one of the most important sections of one of the most important civil rights statutes

in American history, and that Congress has steadfastly refused to correct our apparent error." *Singleton*, 2025 WL 1342947, at *181. Where, as here, "Congress has spurned multiple opportunities to reverse" a statutory decision, the Supreme Court demands a "superspecial justification" to change course. *Kimble*, 576 U.S. at 456, 458. None exists here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing en banc and hold that Section 2 claims are enforceable through Section 1983's private right of action.

June 4, 2025

Respectfully submitted,

/s/ Brenda Wright

Deuel Ross
NAACP Legal Defense & Educational Fund, Inc.
700 14th Street, Suite 600
Washington, DC 20005

Brenda Wright
Counsel of Record
Janai S. Nelson
President & Director-Counsel
NAACP Legal Defense & Educational Fund, Inc.
40 Rector Street, 5th Floor
New York, NY 10006
bwright@naacpldf.org
T: (332) 271-0242
F: (212) 226-7592

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that I electronically filed this Motion for Leave to File Brief Amicus Curiae and Accompanying 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.

/s/Brenda Wright
Brenda Wright
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this motion complies with the typeface, type style, and length requirements of Federal Rules of Appellate Procedure 29(a)(5), 29(b)(4) 32(a)(5), and 32(a)(6). According to the word-count function of Microsoft Word, this brief totals 2,597 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)(2), I further certify that this brief has been scanned for viruses and is virus-free.

/s/Brenda Wright
Brenda Wright
Counsel for Amicus Curiae