No. 23-3655

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Turtle Mountain Band of Chippewa Indians, et al.,

Plaintiffs-Appellees,

vs.

Michael Howe,

Defendant-Appellant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH DAKOTA

Brief of Amici Curiae Minnesota, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont and Washington in Support of Appellees and Rehearing

---

KEITH ELLISON
Attorney General
State of Minnesota

LIZ KRAMER #0325089
Solicitor General
PETER J. FARRELL #0393071
Deputy Solicitor General

ANGELA BEHRENS #0351076
KATHERINE BIES #0401675
Assistant Attorneys General

445 Minnesota Street, Suite 600
St. Paul, MN 55101-2127
Telephone: (651) 757-1424

Attorneys for Amici Curiae State of Minnesota, et al.

(Additional Counsel on Signature Page)

STATEMENT UNDER FED. R. APP. P. 29(a)(4)(D)

Minnesota, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, and Washington submit this brief supporting the appellees. The 19 amici states have a strong interest in ensuring that all voters have a full and fair opportunity to vote and elect representatives of their choice. Equally important to having the right to vote is the ability to protect that right. This includes voters having legal avenues to independently prevent unlawful interference with their voting rights.

For nearly 60 years, Section 2 of the Voting Rights Act has been enforceable by individuals, whether through a private right of action or 42 U.S.C. § 1983. Recently, however, two panels of the Eighth Circuit have stripped individuals of their ability to enforce their Section 2 rights. The states have strong interests in this issue because Section 2 implicates state and local redistricting processes, and states have a strong interest in the proper interpretation of Section 2 to protect the voting rights of their citizens. While federal statutes often do not create rights enforceable through Section 1983, Section 2 does. And in the amici states' experience, enforcement by private litigants is an essential tool to ensure that government remains "collectively responsive to the popular will." *Reynolds v. Sims*, 377 U.S.

533, 565 (1964). If the panel decision stands, voters in the Eighth Circuit will lack any mechanism for enforcing their Section 2 rights.[1]

The states file this brief under Fed. R. App. P. 29(b)(2).

[1] No other party or person wrote or funded this brief. Fed. R. App. P. 29(a)(4)(E).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes and Laws

Other Authorities

ARGUMENT

The Court should grant the petition to address exceptionally important legal questions and to avoid conflicts with precedent. Fed. R. App. P. 35(a).

I. ELIMINATING PRIVATE ENFORCEMENT OF THE VOTING RIGHTS ACT PRESENTS EXCEPTIONALLY IMPORTANT QUESTIONS.

The panel stripped millions of Eighth Circuit voters of any meaningful way to enforce their rights under Section 2 of the Voting Rights Act (VRA). The case therefore presents exceptionally important questions meriting the full Court's consideration.

The right to vote is a fundamental right that preserves all other rights. *Reynolds*, 377 U.S. at 561-62. The VRA—"the most successful civil rights statute" in this nation's history—ensures that voting rights are meaningful and enforceable. S. Rep. No. 97-417, at 111 (1982). Congress enacted the VRA after states and local governments undermined the Fifteenth Amendment's promise by continuing to infect the electoral process with racial discrimination. *E.g.*, *Allen v. Milligan*, 599 U.S. 1, 10 (2023); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 prohibits standards, practices, or procedures that deny or abridge the right to vote based on race or color. 52 U.S.C. § 10301(a)-(b). The VRA prohibits both discriminatory intent and impact. *Id.*

The VRA thus protects voters' opportunity to participate in the political process "in a reliable and meaningful manner." *Allen*, 599 U.S. at 25 (citation

omitted). Yet two divided panels of this Court have suddenly dismantled Section 2 by effectively stripping voters of the ability to enforce their rights. First, a panel held that Section 2 creates no private right of action. *Ark. State Conf. NAACP v. State Bd. of Apportionment*, 86 F.4th 1204, 1210-17 (8th Cir. 2023), *reh'g denied* 91 F.4th 967 (8th Cir. 2024). And now a panel held that voters also cannot enforce Section 2 through 42 U.S.C. § 1983. Op. 7-14. Combined, the decisions leave Eighth Circuit voters dependent solely on the U.S. Attorney General to enforce Section 2.

This seismic shift in voting rights warrants the full Court's attention. For the reasons identified below and in the appellees' petition, the panel's reasoning contradicts precedent and makes the Eighth Circuit an outlier. The impact of the panel's holding further underscores its exceptional importance. Vesting Section 2 enforcement in a single federal officer is inadequate. A private cause of action—whether through Section 1983 or directly under the VRA—is critical to the VRA's purpose because it balances enforcement between public and private parties and it ensures the accountability and transparency that the VRA intended.

A. Private Enforcement Properly Balances Public and Private Roles.

While federal enforcement authority is important, private enforcement ensures that the VRA's protections are not toothless. Voting links citizens to their laws and government, and voting rights are endangered when voters cannot enforce

them. *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *see also*, *e.g.*, *Gill v. Whitford*, 585 U.S. 48, 74-75 (2018) (Kagan, J., concurring) (outlining broader democratic concerns when politicians "entrench themselves in power against the people's will").

Private enforcement has been the primary method of enforcing the VRA: nationally, approximately 400 private cases have been pursued, compared to about 40 by the U.S. Attorney General since 1982. Univ. Mich. L. Sch., *The Evolution of Section 2: Numbers and Trends* (2025), https://perma.cc/UY2P-W56H; U.S. Dep't of Just., *Cases Raising Claims Under Section 2 of the Voting Rights Act*, https://perma.cc/X3FJ-75YW. The Eighth Circuit reflects these national trends, with private plaintiffs bringing about 40 cases and the U.S. Attorney General only a handful. Unsurprisingly, many pathbreaking VRA cases have been brought by private plaintiffs. *E.g.*, *Allen*, 599 U.S. at 16; *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986); *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980). Private enforcement has been particularly important in challenging redistricting maps that dilute votes, as happened here when private plaintiffs sued and proved their claim. Op. 4.

Even in the best circumstances, the U.S. Attorney General lacks the resources to monitor, investigate, and prosecute voting-rights violations in every federal, state, and local voting district. The Supreme Court and the federal government therefore expect private parties to assist. *E.g.*, *NAACP v. New York*, 413 U.S. 345, 367 (1973) (explaining that it was "incumbent" upon NAACP to assist U.S. Department of

Justice with investigating literacy-test action); Br. Amicus Curiae United States at 1-2, 6-7, 19-20 (recognizing importance of private enforcement).

Limiting private enforcement authority is particularly problematic in the election context. Elections occur on regular schedules—at least every two years in each amici state. Election-related claims often require fast resolution to provide certainty. Because prompt resolution is essential, it is not feasible to report violations to the federal government and wait. And violations that the U.S. Attorney General does not address will go unchecked and leave voters without redress. Private enforcement ensures that those with the truest stake—voters—can protect their rights.

In the amici states' experience, this cooperative enforcement regime is critical. Just as various demands may pull the U.S. Attorney General in multiple directions, state officials face limited resources and authority to combat unlawful practices. Private parties are instrumental in identifying voting-related issues, and for decades, private actions have been a welcome and necessary supplement to state efforts to ensure legal compliance. *See* Justin Weinstein-Tull, *Abdication and Federalism*, 117 Colum. L. Rev. 839, 860 (2017) (discussing difficulties of securing local officials' compliance with election law).

Because of these practical realities, private parties have rightly emerged as leaders in enforcing Section 2. *See* Christopher Elmendorf & Douglas M. Spencer,

Administering Section 2 of the Voting Rights Act After Shelby County, 115 Colum. L. Rev. 2143, 2158 (2017). Private parties are typically best equipped to identify and pursue violations. They have extensive on-the-ground knowledge and develop the necessary connections with stakeholders and community members to build cases.

B. Private Enforcement Ensures Accountability and Transparency.

Private enforcement is also critical in holding government officials accountable. Section 2 claims inherently involve alleged interference with voting rights *by* government officials, leaving individuals with little other recourse. Private parties' ability to enforce Section 2 has also likely deterred violations. Leaving little risk of enforcement may lessen incentives to comply with Section 2. For example, after the Supreme Court rendered the VRA's preclearance requirement inoperable, many states previously subject to preclearance promptly enacted restrictive voting laws. *Shelby Cnty. v. Holder*, 570 U.S. 529, 556-57 (2013); Elmendorf & Spencer, *supra*, at 2145-46. Eliminating private enforcement of Section 2 risks similar harms and leaves millions without recourse.

For these reasons, this case presents exceptionally important questions. Voters in the Eighth Circuit have relied on being able to independently enforce their VRA rights. The panel's removal of this right deserves rehearing en banc.

II. THE PANEL DECISION CONFLICTS WITH PRECEDENT.

Amici states join the appellees' merits arguments, and write separately to emphasize the most glaring errors in the panel's decision. The panel charts a new path, completely foreclosing private enforcement of Section 2 despite controlling precedent and longstanding practice to the contrary. Rehearing en banc is necessary.

A. The Panel Decision Contradicts Section 1983 Precedent.

In *Arkansas*, this Court left open whether private plaintiffs can enforce Section 2 under Section 1983. But the Court noted that it was "unclear" whether Section 2 creates an individual right because the text focuses on the benefited class and regulated entities. 86 F.4th at 1209. The Supreme Court addressed this question in *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023). The panel ignored the Court's directives.

Congress unambiguously confers individual rights when a statute is "'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Talevski*, 599 U.S. at 183 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 287 (2002)). Statutes with rights-creating language can be enforceable under Section 1983 when they also direct requirements at regulated entities. *Id.* at 185.

In *Talevski*, the Court applied this test to hold that the Federal Nursing Home Reform Act (FNHRA) unambiguously conferred individual rights enforceable under

Section 1983. *Id.* at 184-86. The relevant provisions expressly referred to the "rights" of the benefited class (nursing-home residents) but directed requirements at the regulated entities (nursing homes). *Id.* The Court explained that references to who must comply with the law did not undermine the rights-creating language because they were "not a material diversion from the necessary focus on the nursing-home residents." *Id.* at 185.

Applying *Talevski*, Section 2 rights are presumptively enforceable under Section 1983. First, Section 2 unquestionably uses rights-creating language. It prohibits practices that "result[] in a denial or abridgement of *the right of any citizen . . . to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). And Section 2 is violated if political processes "*are not equally open to participation by members of a class of citizens protected by subsection (a)*." *Id.* § 10301(b) (emphasis added). What Section 2's text makes clear, other VRA provisions confirm. *See, e.g.*, 52 U.S.C. § 10308(a), (c) (referring to the "right secured" by Section 2); *see also Ga. State Conf. of NAACP v. Georgia*, No. 1:21-CV-533-ELB-SCJ-SDG, 2022 WL 18780945, at *4 (N.D. Ga. Sept. 26, 2022) (panel) ("If that is not rights-creating language, we are not sure what is.").

Second, Section 2's references to the regulated entities do not materially divert from the necessary focus on the benefited class. *See Talevski*, 599 U.S. at 185; *see also, e.g.*, *Vote.Org v. Callenen*, 89 F.4th 459, 474-75 (5th Cir. 2023) (holding

that similar language did not render materiality provision something other than a rights-conferring statute). The panel reasoned that Section 2 does not unambiguously confer an individual right because of its dual focus on protected individuals and regulated entities. Op. 10-11. But this conclusion ignores *Talevski*'s clear directive that a statutory provision does not fail to secure rights "simply because it considers, alongside the rights bearers, the actors that might threaten those rights." 599 U.S. at 185.

Because the panel decision contravenes *Talevski*—to the detriment of millions of voters—the case warrants rehearing en banc.

B. The Panel Decision Contradicts Section 2 Precedent.

The panel cited *Arkansas*'s conclusion that Section 2 does not permit an implied right of action. Op. 7. This conclusion contradicts precedent and should also be revisited en banc.[2] *See Cottier v. City of Martin*, 604 F.3d 553, 556 (8th Cir. 2010) (en banc) (recognizing en banc court can overrule prior panel opinions from other cases).

Precedent establishes that Section 2 provides a private right of action, even without Section 1983. In *Morse v. Republican Party of Virginia*, a plurality recognized that, since the VRA's inception, Congress intended a private right of

[2] Appellees preserved the implied-right-of-action issue for further appellate review. Appellees' Br. 21, n.2.

action under Section 2. 517 U.S. 186, 232 (1996); *accord id.* at 240 (Breyer, J., concurring, joined by O'Connor & Souter, JJ.). Similarly, in *Roberts v. Wamser*, this Court explained that aggrieved voters—not candidates—may enforce Section 2, relying on the Supreme Court's recognition that private litigants protecting their right to vote were proper parties to effectuate the VRA's goals. 883 F.2d 617, 621 (8th Cir. 1989).

No court has adopted this Court's contrary reasoning in *Arkansas*. Instead, courts have followed controlling precedent and longstanding practice. *See, e.g.*, *Singleton v. Allen*, No. 2:21-CV-01291-AMM, 2025 WL 1342947, at *171 (N.D. Ala. May 8, 2025) (panel); *Miss. State Conf. of NAACP v. State Bd. of Election Comm'rs*, 739 F. Supp. 3d 383, 410-12 (S.D. Miss. 2024) (panel); *Ga. State Conf.*, 2022 WL 18780945, at *7. The Eighth Circuit's Section 2 approach thus stands alone.

C. The Panel's Decision is an Outlier That Warrants En Banc Review.

The Eighth Circuit's outlier status warrants full circuit consideration. For decades, courts across the country have held—either expressly or implicitly—that private plaintiffs can enforce Section 2. *See, e.g.*, *Robinson v. Ardoin*, 86 F.4th 574, 588 (5th Cir. 2023); *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 651-52 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021); *Mixon v. Ohio*, 193 F.3d 389, 406 n.12 (6th Cir. 1999); *Stone v. Allen*, 717 F. Supp. 3d 1161, 1172-73 (N.D.

Ala. 2024); *Aquino v. Hazleton Area Sch. Dist.*, No. 3:24-CV-00206, 2024 WL 4592346, at *6 (M.D. Pa. Oct. 28, 2024); *Coca v. City of Dodge City*, 669 F. Supp. 3d 1131, 1138-40 (D. Kan. 2023); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1243 n.10 (N.D. Ga. 2022). Indeed, as recently as 2023, the Supreme Court considered a private cause of action under Section 2 in *Allen*. The panel's decision thus departs from the many other courts to consider the issue.

The panel's decisions in this case and *Arkansas* are not only outliers; they also defy Congress's will. Courts, Congress, states, local governments, and private parties have all acted for decades with the understanding that Section 2 is privately enforceable. Congress has repeatedly reenacted the VRA without substantive changes, thus ratifying the consensus that Section 2 is privately enforceable. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (presuming Congress knows of administrative and judicial interpretations of statutes and that it adopts those interpretations when re-enacting statutes without change); *see also* Pub. L. No. 91-285, 84 Stat. 14 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982); Pub. L. No. 109-246, 120 Stat. 577 (2006). If federal courts across the country—for decades—have misinterpreted Section 2, Congress surely would have corrected this mistake by now.

CONCLUSION

The Court should grant rehearing en banc. Eliminating private enforcement of voting rights presents exceptionally important questions and conflicts with precedent.

Dated: June 4, 2025

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ **Pete Farrell**
LIZ KRAMER #0325089
Solicitor General
PETER J. FARRELL # 0393071
Deputy Solicitor General

ANGELA BEHRENS, # 0351076
KATHERINE BIES #0401675
Assistant Attorneys General

445 Minnesota Street, Suite 600
St. Paul, MN 55101
(651) 757-1424 (Voice)
liz.kramer@ag.state.mn.us
peter.farrell@ag.state.mn.us
angela.behrens@ag.state.mn.us
katherine.bies@ag.state.mn.us

(*Additional Counsel Listed on Following Page*)

ADDITIONAL COUNSEL

ROB BONTA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

PHILIP J. WEISER
Attorney General, State of Colorado
Office of the Attorney General
Colorado Law Department
1300 Broadway, 10th Floor
Denver, CO 80203

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General of the
State Of Delaware
820 N. French Street
Wilmington, DE 19801

BRIAN L. SCHWALB
Attorney General for the
District of Columbia
400 Sixth Street, NW, Suite 8100
Washington, D.C. 20001

ANNE E. LOPEZ
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909

AARON D. FORD
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

MATTHEW J. PLATKIN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

RAÚL TORREZ
New Mexico Attorney General
408 Galisteo Street
Santa Fe, NM 87501

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

DAN RAYFIELD
Attorney General of Oregon
1162 Court Street NE
Salem, OR 97301

KWAME RAOUL
Illinois Attorney General
Office of the Attorney General
115 South LaSalle Street
Chicago, IL 60603

AARON M. FREY
Attorney General of Maine
6 State House Station
Augusta, ME 04333-0006

ANTHONY G. BROWN
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

CHARITY R. CLARK
Attorney General
State of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609

NICHOLAS W. BROWN
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4). The brief contains 2,544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman font.

/s/ **Pete Farrell**
Peter J. Farrell

CERTIFICATE OF COMPLIANCE
WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this brief, certifies that he caused the foregoing brief to be been scanned for viruses and that the brief is virus-free.

/s/ **Pete Farrell**
Peter J. Farrell

CERTIFICATE OF SERVICE

I certify that I caused this document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on June 4, 2025. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ **Pete Farrell**
Peter J. Farrell