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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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INTRODUCTION AND INTEREST OF THE UNITED STATES

This case presents the critical question whether *any* mechanism exists in this circuit for private enforcement of Section 2, 52 U.S.C. 10301, the cornerstone provision of the Voting Rights Act of 1965 (VRA). In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023) (*Arkansas NAACP*), this Court became the first court of appeals to hold that Section 2 lacks a private right of action. *Id.* at 1216. But this Court expressly left open the question whether Section 2 can be enforced under 42 U.S.C. 1983, the omnibus private right of action that Congress created to redress violations of federal rights. *Id.* at 1218.

If this Court were to resolve that question in the negative, it would strike a grievous blow to voting rights by extinguishing the remaining pathway for private enforcement of Section 2 in the seven states and thousands of political subdivisions within this circuit. Fortunately, the answer here is clear: Section 2 protects the right of individuals to be free from racial discrimination in voting, and its remedial scheme is perfectly compatible with Section 1983 enforcement.

To illustrate the crossroads at which this Court finds itself, consider the history of Section 2 enforcement. Since 1982, private plaintiffs have brought more than 400 cases alleging violations of Section 2 that have resulted in judicial decisions. *See* Ellen D. Katz et al., *To Participate and Elect: Section 2 of the*

Voting Rights Act at 40, Univ. Mich. L. Sch. Voting Rts. Initiative (2024), https://voting.law.umich.edu (providing data that are the basis for this estimate). Over that same period, the United States brought just 44 Section 2 cases. *See Voting Section Litigation*, U.S. Dep't of Just. (2024), https://perma.cc/V5XK-Z7L8. A decision holding that Section 2 is not privately enforceable would significantly undercut enforcement of this landmark statute—one that protects a right that is "preservative of all rights." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (citation omitted); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 556-557 (1969) (acknowledging the Attorney General's limited resources and the need for private enforcement when implying a private right of action to enforce Section 5 of the VRA).

The gravity of the question presented here also is magnified by the Supreme Court's 2013 effective nullification of Section 5 of the VRA. In *Shelby County v. Holder*, 570 U.S. 529 (2013), the Court reassured the public that Section 2 remained unscathed as a bulwark against voting discrimination. *Id.* at 557 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."). A decision here holding that Section 2 is not privately enforceable after all would recast *Shelby*'s reassurance as a bait and switch of historic proportions. Given both the importance of this issue to the effective enforcement of the VRA and the major upheaval in voting-rights law that a

reversal of the district court's decision would produce, the United States has a substantial interest in the proper resolution of this appeal.

STATEMENT OF THE ISSUE AND APPOSITE CASES

Whether Section 2 of the VRA is privately enforceable under Section 1983.

Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166 (2023)

Vote.org v. Callanen, 89 F.4th 459 (5th Cir. 2023)

Migliori v. Cohen, 36 F.4th 153 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022)

Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003)

STATEMENT OF THE CASE

Following the 2020 decennial census, the North Dakota Legislative Council Redistricting Committee developed a legislative redistricting plan that was approved by the North Dakota legislature and signed into law. App.459-461;Add.31-33;R.Doc.125, at 5-7.[1] Plaintiffs-appellees Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, and three Turtle Mountain members filed suit, alleging that the adopted plan has a discriminatory result in violation of Section 2 of the VRA, because it dilutes the voting power of Native American

[1] "App.__" and "Add.__" respectively refer to the relevant pages of the appendix and addendum filed by the State on appeal. "R.Doc.__, at __" refers to the docket entry number and relevant pages of documents filed in the district court. "C.A. ____" refers to entries on this Court's docket in this case. "Br. __" refers to the State's opening brief.

voters. App.455-457;Add.27-29;R.Doc.125, at 1-3. In bringing their claims, plaintiffs invoked not only an implied private right of action under Section 2, but also Section 1983's express right of action. App.34;Add.2;R.Doc.30, at 2.

The State moved to dismiss, arguing among other things that Section 2 is not privately enforceable. App.33-35;Add.1-3;R.Doc.30, at 1-3. Applying the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), to determine whether Section 2 is enforceable via Section 1983, the district court denied the State's motion. App.40-44;Add.8-12;R.Doc.30, at 8-12. Under the *Gonzaga* test, a federal statute is "presumptively enforceable" under Section 1983 if it "unambiguously confer[s]" individual federal rights. *Gonzaga*, 536 U.S. at 283-284.[2]

The district court held that Section 2 confers an individual right because "[i]t is difficult to imagine more explicit or clear rights creating language" than that which Section 2 contains. App.42;Add.10;R.Doc.30, at 10. In addition, the court found that nothing in Section 2 or elsewhere in the VRA rebuts the presumption that the statute is privately enforceable via Section 1983. Specifically, although Section 12 of the VRA authorizes the Attorney General to enforce the statute's

[2] The United States filed a statement of interest below arguing that Section 2 both contains a private right of action and is privately enforceable under Section 1983. R.Doc.25.

provisions and does not include an express private right of action, the court observed that Section 12 is not "incompatible with private enforcement." App.43;Add.11;R.Doc.30, at 11. On the contrary, the court noted that private enforcement of Section 2 has "co-existed with collective enforcement brought by the United States for decades." App.44;Add.12;R.Doc.30, at 12.

The case proceeded to a four-day bench trial, after which the district court found a Section 2 violation. App.456;Add.54;R.Doc.125, at 28. After entry of judgment for plaintiffs (App.494-495;Add.66-67;R.Doc.126, at 1-2), the State filed a timely notice of appeal (R.Doc.130).

SUMMARY OF ARGUMENT

The district court correctly held that Section 2 is privately enforceable under Section 1983. Section 2 easily satisfies the test for presumptive enforceability under Section 1983 set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). The statute contains unambiguously clear rights-conferring language. *See* 52 U.S.C. 10301(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of *the right of any citizen* . . . to vote on account of race or color." (emphasis added)). And neighboring VRA provisions expressly refer to Section 2 as "secur[ing] rights." 52 U.S.C. 10308(a) and (c). That is unsurprising given Section 2 is part of the Voting

Rights Act of 1965, which Congress enacted and amended pursuant to its power to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments.

The State's arguments to the contrary are not persuasive. As the reasoning of a recent Supreme Court decision makes clear, Section 2's references to the regulated entities (*i.e.*, states and political subdivisions) are "not a material diversion" from the provision's focus on individual rights. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 185 (2023). And Congress's 1982 amendments to Section 2 to prohibit laws with a racially discriminatory result did not "de-individualize" the law. C.A. Stay Mot. 18. Instead, like disparate-impact provisions in other statutes, the results test provides a mechanism to uncover discrimination that operates on the individual level but may not always be readily apparent until considered in light of the challenged provision's effect on a minority group relative to other voters. Moreover, the State's understanding of the 1982 amendments imputes to Congress an intent to narrow Section 2 by eliminating private enforcement while it was simultaneously rectifying what it deemed to be an undesired narrowing of the statute in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). That makes little sense and is refuted by the legislative record.

Private enforcement of Section 2 under Section 1983 also is perfectly compatible with public enforcement of Section 2, as the overwhelmingly dominant role that private plaintiffs have played in enforcing the statute since its inception

shows. And, indeed, numerous VRA provisions that can be understood only as referring to private plaintiffs confirm that Congress understood Section 2 to be privately enforceable.

ARGUMENT

The district court correctly held that Section 2 is privately enforceable under Section 1983.

A. Section 2 unambiguously confers individual federal rights.

1. A federal statute is "presumptively enforceable" under Section 1983 if it "unambiguously confer[s]" individual federal rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-284 (2002). That standard is met if the statute in question "is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga*, 536 U.S. at 284, 287). The district court correctly held that Section 2 satisfies that standard. App.42;Add.10;R.Doc.30, at 10.

Section 2 easily passes *Gonzaga*'s test for presumptive enforceability under Section 1983. After all, Section 2 is the cornerstone provision of the Voting *Rights* Act of 1965, *see Shelby Cnty. v. Holder*, 570 U.S. 529, 536-537 (2013), legislation that Congress enacted and amended pursuant its power to enforce the voting

guarantees of the Fourteenth and Fifteenth Amendments.[3] Section 2 provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results 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); *see also* 52 U.S.C. 10303(f)(2) (extending rights to language minority groups). As the district court aptly stated, "[i]t is difficult to imagine more explicit or clear rights creating language." App.42;Add.10;R.Doc.30, at 10; *see also Georgia State Conf. of NAACP v. Georgia*, No. 1:21-cv-5338, 2022 WL 18780945, at *4 (N.D. Ga. Sept. 26, 2022) (three-judge court) ("If that is not rights-creating language, we are not sure what is.").

What Section 2's text makes clear, other VRA provisions confirm. Section 12 authorizes the Attorney General to initiate criminal proceedings against those who "deprive . . . *any person of any right secured by*" Section 2. 52 U.S.C. 10308(a) (emphasis added); *see also* 52 U.S.C. 10308(c) (same with regard to those who "interfere[] with *any right secured by*" Section 2 (emphasis added)). That language would make little sense if Section 2 did not create individual rights.

[3] *See* Pub. L. No. 89-110, 79 Stat. 437 (1965); S. Rep. No. 417, 97th Cong., 2d Sess. 40 (1982); H.R. Rep. No. 227, 97th Cong., 1st Sess. 31 (1981).

Lending further credence to this straightforward analysis, courts have found a voting provision of the Civil Rights Act of 1964, the Materiality Provision, 52 U.S.C. 10101(a)(2)(B), presumptively enforceable under Section 1983 based on language strikingly similar to Section 2's. *See Vote.org v. Callanen*, 89 F.4th 459, 473-475 (5th Cir. 2023); *Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); *Schwier v. Cox*, 340 F.3d 1284, 1296-1297 (11th Cir. 2003); *see also* 52 U.S.C. 10101(a)(2)(B) ("No person acting under color of law shall . . . deny the *right of any individual to vote* in any election because of an error or omission on any record or paper relating to . . . voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." (emphasis added)).[4]

Accordingly, Section 2 is presumptively enforceable under Section 1983.

2. The State's arguments to the contrary are not persuasive. Section 2's reference to states and political subdivisions "is not a material diversion" from the statute's rights-creating focus. *Talevski*, 599 U.S at 185. Congress's 1982 amendments to Section 2 did not transform it into something other than a rights-

[4] The only circuit-level authority going the other way provides little, if any, analysis and did not specifically consider whether the Materiality Provision is enforceable under Section 1983. *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000).

conferring statute. And Section 2 does far more than parrot the Fifteenth Amendment.

Reference to states and political subdivisions. The State (Br. 24) seizes upon nonbinding dicta from *Arkansas NAACP*, where the panel majority found it "unclear whether § 2 creates an individual right." *Arkansas NAACP*, 86 F.4th 1204, 1209 (8th Cir. 2023).[5] On the one hand, the panel majority correctly recognized that Section 2's plain text "'unmistakabl[y] focus[es] on the benefited class': those subject to discrimination in voting." *Id.* at 1210 (alterations in original) (quoting *Gonzaga*, 536 U.S. at 284). But the panel majority also interpreted the statute as focusing on the regulated entities by phrasing its prohibition in terms of "what states and political subdivisions cannot do." *Id.* at 1209; *see also* Br. 31. The panel majority was wrong to question whether

[5] The only portion of *Arkansas NAACP*'s reasoning that is essential to its holding is that, in the panel majority's view, Section 2 manifests no intent by Congress to create a private remedy separate and apart from Section 1983. *See* 86 F.4th at 1210-1211. Nevertheless, the State attempts to argue (Br. 24-25) that the panel majority effectively *held* that Section 2 is not enforceable under Section 1983 because "unclear" statutory language, *Arkansas NAACP*, 86 F.4th at 1209, cannot "unambiguously confer" individual federal rights, *Gonzaga*, 536 U.S. at 274. That argument is foreclosed by *Arkansas NAACP*'s express reservation of the Section 1983 question. 86 F.4th at 1218; *see also* Order Den. Reh'g En Banc at 3, *Arkansas NAACP*, *supra* (No. 22-1395) (Stras, J., concurring) ("It may well turn out that private plaintiffs can sue to enforce § 2 of the Voting Rights Act under § 1983. . . . [W]e did [in *Arkansas NAACP*] what we usually do—address the case the parties brought—and considered whether the *Voting Rights Act* allows for private enforcement of § 2." (emphasis in original)).

Section 2's reference to states and political subdivisions makes it something other than a rights-conferring statute.

The Supreme Court in *Talevski* recently held that similarly phrased statutory provisions are enforceable under Section 1983. Like Section 2, both provisions at issue in *Talevski* expressly refer to "rights" of the benefited class (nursing-home residents) but direct their requirements at the regulated entities (nursing homes). The Court held that the provisions' rights-creating focus was not undermined by their references to "who it is that must respect and honor the[] statutory rights." *Talevski*, 599 U.S. at 185. Such language, the Court explained, "is not a material diversion" from the provisions' focus on individual rights. *Ibid.*; *see also Vote.org*, 89 F.4th at 474-475 (holding that similar language in the Materiality Provision did not render it something other than a rights-conferring statute); *Schwier*, 340 F.3d at 1296 (same).

"Indeed, 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. As *Talevski* notes, even the Fourteenth Amendment—which indisputably is enforceable under Section 1983 and is among the sources of congressional power through which Congress enacted and amended Section 2—"directs state actors not to deny equal protection." *Id.* at 185 n.12. That the Fourteenth Amendment is enforceable under

Section 1983 also defeats the State's related argument (Br. 30) that Section 2 does not confer individual rights because it is phrased as a ban. So is the Fourteenth Amendment, and that has never counseled against its private enforceability. U.S. Const. Amend. XIV, § 1, Cl. 2 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

Talevski therefore instructs that Section 2's reference to states and political subdivisions "is not a material diversion" from the statute's rights-creating focus. 599 U.S at 185. The *Arkansas NAACP* nonbinding dicta about "unclear" rights-creating language, which did not cite *Talevski* (possibly because it issued after oral argument), did not appreciate that that case speaks directly to this issue and compels a contrary conclusion.

Section 2 protects individual voting rights. The State argues that Section 2 does not unambiguously confer individual federal rights because the results test set forth in Subsection (b) of the statute has a "*collective* impact on 'class[es] of citizens.'" Br. 27-30 (alteration in original) (quoting 52 U.S.C. 10301(b)). That argument nods toward *Gonzaga*'s rationale that a Spending Clause statute was not enforceable under Section 1983 due in part to its "aggregate focus." 536 U.S. at 388 (internal quotation marks and citation omitted). In the

State's view, Congress "de-individualize[d] Section 2" by adding Subsection (b) to the statute in 1982. C.A. Stay Mot. 18. Not so.

The State misunderstands the role of Section 2's results test in the statute's overall enforcement scheme. As originally enacted, Section 2 stated: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race of color." Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965). Lower courts had interpreted that provision to mean that plaintiffs did not have to show discriminatory intent and could instead prove a Section 2 claim by establishing, under the totality of circumstances, that a voting practice results in discrimination. *See, e.g.*, *Zimmer v. McKeithen*, 485 F.2d 1297, 1304-1307 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam). In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), however, a plurality of the Supreme Court held that Section 2 was co-extensive with the Constitution and required proof of discriminatory intent. *Id.* at 60-61.

Congress responded two years later by adding the results test to Section 2 to make clear that, consistent with the evidentiary standard developed in earlier cases, a plaintiff need not prove discriminatory intent to establish a statutory violation. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27-28 (1982) (1982 Senate Report).

Congress's 1982 amendments to Section 2 therefore did not create a "*new* guarantee" (Br. 27) but instead *restored* an aspect of Congress's original understanding of the Section 2 framework that *Bolden* invalidated.

Thus, contrary to the State's understanding, the results test is but one way of establishing a "denial or abridgement of the right of any citizen . . . to vote." 52 U.S.C. 10301(a). To bring a Section 2 claim, a plaintiff can "*either* prove [discriminatory] intent, *or, alternatively*, [can] show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." *Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991) (emphases added) (quoting 1982 Senate Report 27). Simply because Section 2 liability under the results test rests on a determination that minority voters, as a group, are disproportionately harmed relative to other voters under a challenged practice does not diminish the individual nature of the voting rights at issue that the statute seeks to protect and restore. After all, groups do not vote; individuals do.[6]

[6] And, in any event, *Alexander v. Sandoval*, 532 U.S. 275 (2001), expressly identified statutes that "confer rights on a particular *class of persons*" as satisfying the first step of its test for implied private rights of action, *id.* at 289 (emphasis added; citation omitted), which is "no different" from the test for presumptive enforceability under Section 1983, *Gonzaga*, 536 U.S. at 284.

Although Section 2 is unique in how it operates, it resembles in certain ways other antidiscrimination statutes that allow individual plaintiffs to establish a statutory violation either through proof of intentional discrimination or through evidence of a disparate impact. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557 (2009) ("Title VII [of the Civil Rights Act of 1964] prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."). Like disparate-impact provisions in other statutes, Section 2's results test augments the statute's prohibition against intentional discrimination by providing a mechanism to "uncover[] discriminatory intent" and "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2015). The State's narrow focus on Subsection (b) therefore fails to read that provision "in [its] context and with a view to [its] place in the overall statutory scheme." *Talevski*, 599 U.S. at 184 (citation omitted).[7]

[7] The State's hypothetical (Br. 28-29) does not move the needle. Accepting that Section 2 is privately enforceable, only "aggrieved persons" can sue under the statute. *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989) (quoting 52 U.S.C. 10302(a)). A minority voter who merely supports a different candidate than the one preferred by other minority voters has not been injured in any relevant sense. "[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral

Section 2's history also defeats the State's argument. In the State's telling, the 1982 amendments to Section 2 "de-individualize[d]" what had previously been a statute that presumptively was enforceable under Section 1983. C.A. Stay Mot. 18. But the 1982 amendments were a response to *Bolden*'s narrow interpretation of Section 2's protections. 1982 Senate Report 15. The State therefore imputes to Congress a dubious intent to snuff out private enforcement of Section 2 *sub silentio* through its revival of the results test. *Cf. Chisom*, 501 U.S. at 404 ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, [judicial] elections from that protection."). That argument, however, directly conflicts with the legislative record and especially the Senate Report accompanying the 1982 amendments, which the Supreme Court has deemed "the authoritative source" for interpreting Section 2, as amended. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *see also* 1982 Senate Report 30 ("[T]he existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965.").

Stepping back from the particulars of Section 2, the State's argument is misplaced at a more general level. *Gonzaga*'s discussion of "aggregate focus"

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success for minority-preferred candidates." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994).

pertained to a statute that, unlike the VRA, was enacted under Congress's Spending Clause power. The Court explained that it has found Spending Clause statutes unenforceable under Section 1983 where they charge funding recipients with the obligation to "substantially" comply or make "reasonable efforts" to comply with statutory requirements. *Gonzaga*, 536 U.S. at 281-282 (citations omitted). Such substantial-compliance language, the Court held, makes federal funding contingent on "the aggregate services provided by the State, not [on] whether the needs of any particular person have been satisfied." *Id.* at 282 (citation omitted).

Thus, unsurprisingly, *all* the cases that the State cites in support of its "collective rights" argument concern Spending Clause statutes. Br. 29-30 (citing *Gonzaga*, 536 U.S. at 288; *Blessing v. Freestone*, 520 U.S. 329, 343-344 (1997); *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1200-1201 (8th Cir. 2013)). So too with each of this Court's cases that have considered whether a statute is unenforceable under Section 1983 due to an "aggregate focus."[8] Section 2 was enacted and amended under Congress's power to enforce

[8] *Does v. Gillespie*, 867 F.3d 1034, 1040-1042 (8th Cir. 2017) (Section 1396a(a)(23)(A) of the Medicaid Act); *Midwest Foster Care*, 712 F.3d at 1200-1202 (Adoption Assistance and Child Welfare Act of 1980); *Colbert v. Roling*, 233 F. App'x 587, 589 (8th Cir. 2007) (Title IV-D of the Social Security Act); *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) (Sections 1396a(a)(10)(B) and (a)(17) of the Medicaid Act).

the voting guarantees of the Fourteenth and Fifteenth Amendments, not under the Spending Clause. *See* note 3, *supra.* And it provides no substantial-compliance defense. *See* 52 U.S.C. 10301. Section 2 is therefore materially different from statutes that have been deemed unenforceable under Section 1983 based on their aggregate focus.

Section 2 created new voting rights. Having attempted to sever Subsection (b) from the rest of Section 2, the State argues (Br. 26-27) that, apart from the results test, Section 2 does not create "any *new* rights," but "merely repeats the very same protection secured by the Fifteenth Amendment." As discussed above, the results test is an integral part of Section 2's framework for protecting individual voting rights. *See* pp. 13-15, *supra*. Regardless, the statute's disparate-treatment component also is broader than the Fifteenth Amendment because it protects language minorities, and not just racial minorities. 52 U.S.C. 10301(a) (incorporating by reference 52 U.S.C. 10303(f)(2)'s prohibition against discrimination against language-minority voters). But even if Congress, contrary to fact, did no more in Section 2 than codify the Fifteenth Amendment in the U.S. Code, it would still would have created a new individual *statutory* right.

B. Nothing rebuts Section 2's presumptive enforceability under Section 1983.

Once a court determines that a statute confers an individual right, that "right is presumptively enforceable by § 1983," and a plaintiff "do[es] not have the

burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Gonzaga*, 536 U.S. at 284.

Defendants can rebut the presumption that a federal right is enforceable through Section 1983 only by "demonstrat[ing] that Congress shut the door to private enforcement either [1] expressly, through specific evidence from the statute itself" or "[2] impliedly, by creating a *comprehensive enforcement scheme* that is *incompatible with individual enforcement under § 1983*." *Gonzaga*, 536 U.S. at 284 n.4 (emphases added; internal quotation marks and citations omitted). Specifically, a defendant could rebut the presumption by showing that Congress provided "a more restrictive *private remedy*" for violation of the relevant statute. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (emphasis added). That showing is rare indeed. Even an express private remedy does not "conclusively" foreclose the possibility that Congress meant such a remedy "to complement, rather than supplant, § 1983." *Id.* at 122. The district court correctly held that the State has not rebutted the presumption that Section 2 is enforceable under Section 1983.

Although the VRA permits the United States to enforce Section 2, the statute provides no express "private judicial remedy," much less a "more restrictive" one than Section 1983. *Abrams*, 544 U.S. at 121. And the outsized role of private

lawsuits in enforcing Section 2, *see* p. 1, *supra*, demonstrates that private enforcement under Section 1983 is far from "incompatible" with, *Gonzaga*, 536 U.S. at 284 n.4, and instead "complement[s]," public enforcement of the statute, *Abrams*, 544 U.S. at 122. That is particularly true post-*Shelby County*, now that challenges to voting-related enactments and changes always must be brought through affirmative litigation (as opposed to jurisdictions subject to preclearance being obligated to show that such changes are not intentionally discriminatory and do not have a retrogressive effect). *See Shelby Cnty.*, 570 U.S. at 544, 557. Indeed, even before *Shelby County*, Section 2 lawsuits were brought overwhelmingly by private plaintiffs, with the Department's efforts largely focused on Section 5 and administrative and judicial preclearance, as well as the constitutional defense of the VRA. *See* p. 1, *supra*.

Nor does Section 12's detailed framework for public enforcement of the VRA defeat the presumption of private enforcement under Section 1983. 52 U.S.C. 10308. As *Talevski* put it, a "single-minded focus on comprehensiveness" of a statutory enforcement scheme "mistakes the shadow for the substance." 599 U.S. at 188. Courts have found that the Materiality Provision's similarly comprehensive public-enforcement framework does not preclude private enforcement of that provision under Section 1983. *Vote.org*, 89 F.4th at 476; *Migliori*, 36 F.4th at 160-162; *Schwier*, 340 F.3d at 1296. So too

with regard to the public remedies in Section 12. And there is good reason for the VRA to set forth an express public right of action. Although private plaintiffs can invoke Section 1983 to vindicate their statutory rights, the United States cannot sue under that statute. Congress therefore needed to specify that the Attorney General could enforce the VRA's substantive provisions.

In addition, although *Gonzaga* does not require intrinsic textual evidence of Congress's intent that a statute be enforceable under Section 1983 (beyond its intent to confer an individual right), in this instance, such evidence exists—in spades.

Section 12(f) of the VRA provides:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to [Section 12 of the VRA] and shall exercise the same without regard to whether *a person asserting rights* under the provisions of chapters 103 to 107 of [the VRA] shall have exhausted any administrative or other remedies that may be provided by law.

52 U.S.C. 10308(f) (emphasis added). The statutory term "person" is broad and "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Dictionary Act, 1 U.S.C. 1. Section 12(f) therefore reflects Congress's intent that federal courts have subject-matter jurisdiction over suits to enforce the VRA's substantive provisions—including Section 2—brought by private plaintiffs, as well as by the United States, when it has been given litigating authority. *Allen v. State Bd. of Elections*, 393

U.S. 544, 555 n.18 (1969) (finding "force" to the argument that Section 12(f) "necessarily implies that private parties may bring suit under the [VRA]"); *see also Vote.org*, 89 F.4th at 475-476 (finding that a nearly identical provision in the Civil Rights Act's voting section, 52 U.S.C. 10101(d), was "unlikely to refer to the Attorney General"); *Migliori*, 36 F.4th at 160 (similar); *Schwier*, 340 F.3d at 1296 (similar).

In *Arkansas NAACP*, the panel majority briefly suggested in dicta that Section 12(f) is simply a narrow corollary to the Attorney General's power under Section 12(e) of the statute. 86 F.4th at 1210. Section 12(e) permits the Attorney General to seek a court order requiring an individual's vote to be counted if, within 48 hours of the polls closing, such individual alleges to an election observer appointed under the VRA that she was improperly prohibited from voting. 52 U.S.C. 10308(e). The *Arkansas NAACP* majority opined that Section 12(f)'s sole function is to make clear that alternative remedies need not be exhausted before such Section 12(e) lawsuits can proceed. 86 F.4th at 1210.

That strained (and nonbinding) reading of Section 12(f) is not supported by the statute's text. Section 12(f) references "chapters 103 to 107" of the VRA—*i.e.*, the full panoply of the statute's substantive provisions—and not Section 12(e) alone. 52 U.S.C. 10308(f). And whereas Subsection (e) provides specific authority to the Attorney General tailored to exigent circumstances surrounding

casting of ballots, Subsection (f) is an omnibus provision granting federal courts subject-matter jurisdiction over *all* VRA claims. *Compare* 52 U.S.C. 10308(e), *with* 52 U.S.C. 10308(f). Finally, Section 12(e) *itself* provides federal courts with subject-matter jurisdiction over claims brought by the Attorney General under that provision. 52 U.S.C. 10308(e) (providing that "the Attorney General may . . . file with *the district court* an application" under Section 12(e) and that "*[t]he district court* shall hear and determine such matters immediately after the filing of such application" (emphases added)). The panel majority's dicta concerning Subsections (e) and (f) would render superfluous the latter's broad reference to "a person asserting rights under" the VRA.

Section 3 similarly reflects Congress's understanding that private plaintiffs can enforce the VRA's substantive provisions—including Section 2—by providing specific remedies to "the Attorney General *or an aggrieved person*" in lawsuits brought "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. 10302 (emphasis added). Congress added the term "aggrieved person" to each of Section 3's remedies when it amended the VRA in 1975, knowing full well that *Allen*, 393 U.S. at 556-557, had recently construed the VRA to permit private suits to enforce Section 5. Pub. L. No. 94-73, § 401, 89 Stat. 404; *see also* S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1975)

(1975 Senate Report) (stating that an "aggrieved person" includes "an individual or an organization representing the interests of injured persons").

In *Arkansas NAACP*, the panel majority rejected the argument that the "aggrieved person" language in Section 3 reflected Congress's understanding that Section 2 *itself* contained a private right of action. 86 F.4th at 1211-1213. Instead, it found that "'[t]he most logical deduction from' [the 1975 amendments] 'is that Congress meant to address those cases brought pursuant to the private right[s] of action' that already existed or that would be created in the future." *Id.* at 1211 (third alteration in original) (quoting *Morse v. Republican Party of Va.*, 517 U.S. 186, 289 (1996) (Thomas, J., dissenting)). Consistent with that statement from *Arkansas NAACP*, then, Section 1983 must be among the existing private rights of action that this Court understood Section 3's "aggrieved person" language to reference.

The panel majority also suggested in dicta that Section 2's results test might render Section 2 something other than a statute to "enforce the voting guarantees of the fourteenth or fifteenth amendment." *Arkansas NAACP*, 86 F.4th at 1213 n.3 (quoting 52 U.S.C. 10302(a)). Yet it acknowledged that Section 3's language might refer to the fact that the VRA's substantive provisions, including Section 2, are "an effort by *Congress* 'to enforce' the Fourteenth and Fifteenth

Amendments." *Ibid.* (emphasis in original) (quoting 52 U.S.C. 10302(a)). That latter interpretation is correct.

Both the Fourteenth and Fifteenth Amendments give Congress authority to "enforce" the Amendments' protections, U.S. Const. Amend. XIV, § 5 and Amend. XV, § 2, through prophylactic legislation. *See Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727-728 (2003) (holding in the Fourteenth Amendment context that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct"); *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (rejecting the argument that the Fifteenth Amendment permits Congress to "do no more than to forbid violations of the Fifteenth Amendment in general terms"). Because Congress enacted and amended Section 2 pursuant to its power to enforce the Fourteenth and Fifteenth Amendments, *see* note 3, *supra*, it is among the "statute[s]" to which Section 3's private remedies apply, 52 U.S.C. 10302.

And if this Court were not yet convinced of private plaintiffs' ability to enforce Section 2 through Section 1983, **Section 14(e)** of the VRA provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney's fee.

52 U.S.C. 10310(e) (emphasis added). As the district court correctly recognized (App.43;Add.11;R.Doc.30, at 11), this provision shows that Congress

"anticipate[d] private litigation" to enforce Section 2. Congress added Section 14(e) to the VRA in 1975 for the express purpose of encouraging private litigation under the statute. Pub. L. No. 94-73, § 402, 89 Stat. 404; *see also* H.R. Rep. No. 227, 97th Cong., 1st Sess. 32 (1981) (stating that if private plaintiffs prevail under Section 2, "they are entitled to attorneys' fees under [Section 14(e)] and [42 U.S.C.] 1988"); 1975 Senate Report 40 (finding "appropriate" the award of "attorneys' fees to a prevailing party in suits to enforce the voting guarantees of the Fourteenth and Fifteenth amendments, *and statutes enacted under those amendments*" because "Congress depends heavily on private citizens to enforce the fundamental rights involved" (emphasis added)).

The State argues (Br. 37) that Section 14(e) does not reflect Congress's understanding that Section 2 is privately enforceable because lawsuits under that statute "are *not* actions to enforce the Fourteenth and Fifteenth Amendment." But that argument is no more persuasive than its analogue that Section 3's remedies are not available in Section 2 lawsuits. *See* pp. 24-25, *supra* (explaining why the State is incorrect).

Additional dicta from *Arkansas NAACP* suggests that the term "prevailing party" in Section 14(e) might refer solely to prevailing jurisdictions and therefore does not encompass private plaintiffs. 86 F.4th at 1213 n.4 (citation omitted). But "prevailing party" is a "legal term of art" with which Congress was intimately

familiar in 1975. *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 602-603 (2001) (specifically listing Section 14(e) of the VRA as an example of the term's technical use). Only a few years earlier, the Supreme Court construed a nearly identical provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b), as allowing private plaintiffs to recover attorney's fees whenever they secure a legal victory. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-402 (1968) (per curiam). As the Court explained, Title II suits are "private in form only," and when a private plaintiff sues under that statute, "he does so not for himself alone but also as a 'private attorney general.'" *Ibid.* (citations omitted). For that reason, the Court construed the term "prevailing party" broadly "to encourage individuals injured by racial discrimination to seek judicial relief" because "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Ibid.*

When Congress inserted the term "prevailing party" into Section 14, it therefore did so with the plain understanding that that term is tailored to statutes—like Section 2—that allow private plaintiffs to sue as private attorneys general. *Shelby Cnty. v. Lynch*, 799 F.3d 1173, 1185 (D.C. Cir. 2015) ("Congress intended for courts to award fees under the VRA, pursuant to the *Piggie Park* standard,

when prevailing parties help[] secure compliance with the statute."); *accord* *Donnell v. United States*, 682 F.2d 240, 245 (D.C. Cir. 1982).

Collectively, Sections 12(f), 3 and 14(e) of the VRA confirm that Section 2 is privately enforceable under Section 1983 by granting VRA-specific remedies and attorney's fees where private plaintiffs succeed in establishing Section 2 liability. At a minimum, they weigh heavily against any determination that private enforcement of Section 2 through Section 1983 is incompatible with public enforcement of the statute. Indeed, the two have complemented each other for nearly sixty years.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the State's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6495 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). In addition, this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365. This brief also complies with Eighth Circuit Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Crowdstrike Endpoint Detection and Response (Version 7.5.17706.0) and is virus-free according to that program.

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CERTIFICATE OF SERVICE

On March 25, 2024, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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