No. 22-1395

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Arkansas State Conference NAACP et al.,

Plaintiffs-Appellants,

vs.

Arkansas Board of Apportionment et al.,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

BRIEF OF AMICUS CURIAE MINNESOTA SECRETARY OF STATE STEVE SIMON IN SUPPORT OF APPELLANTS AND REHEARING

KEITH ELLISON
Attorney General
State of Minnesota

ANGELA BEHRENS # 0351076
PETER J. FARRELL #0393071
MADELEINE DEMEULES #0402648
Assistant Attorneys General
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2127
Telephone: 651-757-1204

ATTORNEYS FOR AMICUS CURIAE
SECRETARY OF STATE SIMON

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

Minnesota Secretary of State Steve Simon submits this brief supporting the appellants. As Minnesota's chief elections officer, the Secretary has a strong interest in ensuring that people have a full and fair opportunity to vote and to elect representatives of their choice. Minnesotans do not take these rights for granted, often leading the nation in voter turnout. For example, in the last presidential election, nearly 80% of eligible Minnesotans voted. Minn. Sec'y of State, *Historical Voter Turnout Statistics*, https://perma.cc/HJK5-WJ3N.

Equally important to having the right to vote is having remedies and the ability to independently prevent unlawful interference with voting rights. For nearly 60 years, the Voting Rights Act has both prohibited interference with voting rights and provided a private right of action. If the panel decision stands, voters in the Eighth Circuit—including Minnesota's approximately 4.35 million eligible voters—will lose this vital enforcement right.[1]

The Secretary files this brief under Fed. R. App. P. 29(b)(2)-(3) and contemporaneously moves to participate as an amicus curiae.[2]

[1] U.S. Census Bureau, *Citizen Voting Age Population by Race and Ethnicity*, https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.html (Feb. 1, 2023).

[2] No party, party's counsel, or other person authored any part of this brief or funded its preparation or submission. Fed. R. App. P. 29(a)(4)(E).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

OTHER AUTHORITIES

ARGUMENT

The Court should grant the petition to avoid conflicts with precedent and address a question of exceptional importance. Fed. R. App. P. 35(a). Because the petitioners adeptly summarized the conflicts created by the panel, the Secretary focuses first on the case's exceptional importance and then briefly highlights the conflicts with precedent.

I. ELIMINATING A LONGSTANDING PRIVATE RIGHT OF ACTION PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

In a rejection of precedent, historical practice, and democratic principles that can only be described as exceptional, the panel stripped millions of a fair and meaningful avenue to protect their voting rights. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). The right to vote is fundamental and foundational because it preserves all rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The panel imperiled this right, construing the Voting Rights Act (VRA) to undermine individual rights and democracy, rather than protect them. The validity of that decision is of "exceptional importance" and demands rehearing.

The right to vote enshrines a sacred individual liberty interest, linking citizens to their laws and government. *Evans v. Cornman*, 398 U.S. 419, 422 (1970). This right is inextricably linked to broader, structural concerns about our democracy. *E.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1934-35 (2018) (discussing systemic degradation of democracy flowing from large-scale harm to voting rights). But the right to vote

is also fragile, rendering paramount the ability to prospectively protect one's vote. By excising Section 2's private right of action, the panel vested this ability in a single federal officer. This result is contrary to the VRA and creates an inadequate enforcement regime. The private right of action is critical to the VRA's purpose because it (1) balances enforcement between public and private parties, (2) gives a direct right to those best suited to develop cases, and (3) keeps election officials accountable.

First, while the U.S. Attorney General's enforcement authority is important, private enforcement ensures that the VRA's protections are not toothless. Even in the best circumstances, the Attorney General does not have bandwidth to monitor, investigate, and prosecute all cases of voter suppression. The Supreme Court therefore expects private parties to assist. *Cf. 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).

Saddling the Attorney General with sole enforcement authority is particularly problematic in the election context. Election-related claims often arise on the cusp of, or amidst, an election and require fast resolution. In these situations, it is not feasible to report suspected violations to the federal government and simply wait. Voters whom the Attorney General cannot or will not represent will be stranded, lacking both pre-election relief and post-election remedies. *Cf. Fed. Election*

Comm'n v. Wisc. Right to Life, 551 U.S. 449, 462-63 (2007) (describing post-election relief as an "empty gesture"). In the worst circumstances, this enforcement regime creates a catch-22 for voters by conditioning protection of their voting rights on access to a political official they cannot choose except through voting. *See NAACP*, 413 U.S. at 372 (Douglas, J., dissenting) (describing Attorney General's hasty settlement of VRA case as "a cozy agreement" between "political allies" that "foreclose[d] inquiry into barriers to minority voting").

These examples are the tip of the proverbial iceberg. By allowing plaintiffs prompt access to courts, the private right of action under Section 2 serves as a release valve for the Attorney General in time-sensitive and demanding circumstances. The continued viability of this right of action ensures that those with the truest stake in the right to vote—voters themselves—retain a full and fair opportunity to protect and realize that right.

The Secretary understands firsthand why the cooperative enforcement regime that Section 2's private right of action provides is critical. In the same way that the demands of federal government pull the Attorney General in multiple directions, state and local officials face limited resources and authority to combat unlawful practices. In his experience, private parties are instrumental in identifying voting-

related issues across Minnesota's 87 counties.[3] While the Secretary can train local officials and encourage certain practices, he lacks the legal authority to compel compliance with federal and state election laws. Nor can he remove malfeasant officials or otherwise penalize noncompliance. *See* Justine Weinstein-Tull, *Abdication and Federalism*, 117 Colum. L. Rev. 839, 860 (2017) (discussing difficulties of securing local officials' compliance with election law). And, in the Secretary's experience, county attorneys—who possess criminal investigative and prosecutorial authority for election-law violations—cannot devote substantial resources to election-related matters. Minn. Stat. §§ 201.27, .275 (2022).

Because of these practical realities, Section 2 contains a private right of action that allows private enforcement to plug these gaps. Private parties have rightly emerged as leaders in monitoring state and local governments and pursuing litigation when appropriate. Christopher Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 Colum. L. Rev. 2143, 2158 (2017); *see also* U.S. Dep't of Justice, *Cases Raising Claims Under Section 2 of the Voting Rights Act* (reflecting federal actions), https://perma.cc/U4KE-CTP3

[3] Private enforcement of the VRA is consistent with other areas of election law. For example, the primary vehicle for election-related claims in Minnesota is Minn. Stat. § 204B.44 (2022), through which parties allege election-related errors and omissions. In these cases, the Secretary is often a nominal party, lacking independent authority to correct noted errors. The implicated parties litigate the matter and the Secretary follows the court's order.

(last visited Dec. 16, 2023). Individuals and local organizations 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.

Second, and perhaps more importantly, the private right of action is critical in holding government officials accountable. Section 2 claims inherently involve alleged interference with voting rights *by* state or local government officials, leaving individuals with little recourse from malfeasant officials. *See* 52 U.S.C. § 10301(a) (prohibiting conduct by States or political subdivisions). Indeed, government efforts to undermine the Fifteenth Amendment necessitated the VRA because racial discrimination continued to infect the electoral process. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). To this day, individuals and local organizations remain watchdogs against unlawful infringements of voting rights.

Third, the long-standing existence of the private right of action under Section 2 has also likely deterred violations. Eliminating it and leaving little risk of enforcement may lessen incentives to comply with the VRA. For example, after the VRA's Section 5 preclearance requirement became inoperable, previously-covered states promptly enacted restrictive voting laws. Elmendorf & Spencer, *Administering Section 2*, 115 Colum. L. Rev. at 2145-46. The panel's decision enables similar harms that would leave millions without recourse.

For these reasons, this case is exceptionally important: the panel abruptly undid nearly 60 years of established law and removed a safeguard for a fundamental right. Minnesotans and voters across the country have relied on the right of action being available should it be needed to enforce their VRA rights. The panel's casual eradication of this longstanding right warrants rehearing.

II. THE PANEL DECISION CONFLICTS WITH PRECEDENT.

The Secretary agrees with and joins the petitioners' merits arguments, and writes separately to emphasize the most glaring errors in the panel majority's opinion. The overarching flaw is the panel's failure to apply precedent. By giving short shrift to precedent—and trying to predict future pronouncements about Section 2 by the Supreme Court—the panel undermined private-party enforcement of "the most successful civil rights statute" in the nation's history. *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (quotation omitted). Rehearing is necessary to scrutinize this departure from the correct and well-settled understanding of Section 2.

A. The Panel Decision Contradicts VRA Precedent.

The panel's most fundamental error is its failure to follow binding Supreme Court precedent. In *Morse v. Republican Party of Virginia*, a plurality of the Court held that Section 10 of the VRA—which prohibits poll taxes—creates a private right of action. 517 U.S. 186, 230-34 (1996). The Court rejected the argument that only the Attorney General can enforce Section 10, which "does not expressly mention

private actions." *Id.* at 230. The Court stressed that, while similarly lacking express private actions, Sections 2 and 5 of the VRA are enforceable through private actions. *Id.* The Court observed: "[i]t would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language." *Id.* at 232.

The panel discounted *Morse*'s Section 2 discussion as a "background assumption[]" and "mere dicta." *Ark. NAACP*, 86 F.4th at 1215-16. But the relevant portions of *Morse* are not dicta. All portions of a Supreme Court opinion that are necessary to the result are binding. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996). *Morse* held that a private right of action exists under Section 10 *because* the right existed for Sections 2 and 5. The Court's Section 10 holding was inextricably tied to the existence of a private action under Section 2; it was a necessary precondition to the result. That is not dicta.

The panel not only misread *Morse*, it disregarded this Court's precedent, too. In *Roberts v. Wamser*, this Court considered whether a losing candidate had standing to bring a Section 2 claim. 883 F.2d 617 (8th Cir. 1989). This Court said no, holding that only the Attorney General and "aggrieved persons" may bring Section 2 claims. *Id.* at 624. Candidates were not "aggrieved persons" because their voting rights were not denied or impaired. *Id.* As with *Morse*, the panel discounted *Roberts*, claiming that the express holding on the scope of "aggrieved persons" was unnecessary. *Ark.*

NAACP, 86 F.4th at 1217. The panel was again wrong: *Roberts* necessarily decided who is an "aggrieved person" and made plain that aggrieved voters—not just the Attorney General—may enforce Section 2.

Stuck with the *Roberts* holding, the panel claimed that *Roberts* was only about standing—not private rights of action. *Id.* The panel conceded that standing and private rights of action are "closely related" concepts, but hedged that "who has standing to sue *can* be different from the private-right-of-action question." *Id.* (emphasis added). This analysis again misreads *Roberts*, which linked these questions.

Because the panel's decision conflicts with Supreme Court and Eighth Circuit precedent on Section 2, it warrants rehearing or en banc review.

B. The Panel Decision Contradicts Precedent on Private Rights of Action.

The panel's decision conflicts with precedent in another way. The panel concluded that decades of practice and precedent must yield to the "modern" approach to private rights of action. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). This analysis was unnecessary because *Morse* and *Roberts* control. But even if the analysis were necessary, the decision conflicts with that precedent, too.

Under *Sandoval*, the touchstone for analyzing implied rights of action is congressional intent. 532 U.S. at 288-93. Most critical is whether a statute contains "rights-creating" language from which courts can infer intent to create a private right

of action. *Id.* at 288. Courts must also consider whether the statutory scheme "manifest[s] an intent to create a private remedy." *Id.* at 289.

Section 2 meets both requirements. First, Section 2 protects "the right of any citizen . . . to vote" free from racial discrimination. 52 U.S.C. § 10301(a). Like other civil rights statutes, this "rights-creating" language is "phrased in terms of the persons benefited." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quotation omitted). It is strong evidence Congress intended to create private rights. *Id.*

Second, the VRA's text and structure reinforce that rights-creating language and underscore Congress' intent for private enforcement of Section 2. Among its provisions:

- **Section 3** authorizes "the Attorney General *or an aggrieved person*" to institute proceedings "under any statute" to enforce the Fourteenth and Fifteenth Amendments' voting guarantees.

  Section 12(f) confirms federal courts' jurisdiction regardless of "whether *a person asserting rights* under the [the VRA]" exhausted administrative or other remedies.

- **Section 14(e)** allows courts to award "the prevailing party, *other than the United States*," reasonable attorney's fees, expert fees, and other litigation expenses.

52 U.S.C. §§ 10302(a), 10308(f), 10310(e) (emphases added). Despite the textual and structural evidence of Congress' intent to create private rights, the panel interpreted every piece of evidence *against* a private remedy. *See Ark. NAACP*, 86 F.4th at 1209-13.

The panel also rejected the unusually clear legislative history of Congress' intent to allow private enforcement of Section 2—not to mention the Supreme Court's affirmation of that legislative history. *Id.* at 1211-14. For example, Section 3 did not originally include the phrase "aggrieved person." Congress added this phrase in 1975 to make clear that not only the Attorney General could enforce the VRA. The panel relied on the *Morse* dissent to limit the language to rights "that already existed or would be created in the future." *Id.* at 1211. But the *Morse* plurality—which binds this Court—expressly rejected the dissent's reasoning, emphasizing that the 1975 amendment reflected Congress's intent to broadly "provide for private remedies." *See Morse*, 517 U.S. at 233-34, 240.

The panel's treatment of Section 3 is just one example of its broader deviation from *Sandoval*, which requires careful attention to text, structure, *and* context. 532 U.S. at 287-88. While courts cannot give "dispositive weight to context shorn of text," courts should consider context—including legislative history—when it "clarifies text." *Id.* Here, context reinforces the textual and structural evidence that Congress intended for private-party enforcement of Section 2. At minimum, the panel's sweeping and broad (mis)application of *Sandoval* deserves the full Court's consideration.

CONCLUSION

The Court should grant rehearing. Removing a longstanding remedy that safeguards a fundamental right presents a question of exceptional importance, and the panel's decision conflicts with precedent.

Dated: December 18, 2023

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/**Angela Behrens**
ANGELA BEHRENS, # 0351076
PETER J. FARRELL # 0393071
MADELEINE DEMEULES # 0402648

Assistant Attorneys General
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2131
(651) 757-1204 (Voice)

angela.behrens@ag.state.mn.us
peter.farrell@ag.state.mn.us
madeleine.demeules@ag.state.mn.us

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 2,527 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/ **Angela Behrens**
ANGELA BEHRENS
Assistant Attorney General

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

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

/s/**Brenda Hanson**
BRENDA HANSON