No. 23-3655

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 NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae National Congress of American Indians states that it is a non-profit organization with no parent corporation (or stock), and hence no publicly traded corporation owns more than 10% of its stock.

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INTEREST OF AMICUS CURIAE[1]

The National Congress of American Indians ("NCAI") is the oldest and largest organization of American Indian and Alaska Native tribal governments and their members. Founded in 1944, NCAI works to educate the public as well as tribal, federal, state, and local governments, about tribal self-government, treaty rights, and policy issues affecting Indian tribes and their members.

NCAI has a substantial interest in ensuring that section 2 of the Voting Rights Act, 52 U.S.C. §10301 (formerly cited as 42 U.S.C. §1973) ("VRA"), remains enforceable by private parties through actions brought under 42 U.S.C. §1983 to address racial discrimination that dilutes Native American votes and diminishes their political power. NCAI is a member of the Native American Voting Rights Coalition, which produced a landmark 2020 report, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, that drew on nine field hearings and testimony from over 125 witnesses to document the widespread, present-day discrimination and impediments to registration and voting that Native Americans face. Tucker et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*

[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no person other than amicus and its members and counsel made a monetary contribution to the preparation or submission of the brief.

(2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf ("*Obstacles Report*").

SUMMARY OF ARGUMENT

Plaintiffs' brief explains why the VRA's text, structure, history, as well as relevant case law, confirm that section 2 is enforceable by private parties through actions brought under section 1983. NCAI—which endorses plaintiffs' arguments—submits this brief to highlight two additional (and interrelated) arguments that support affirmance.

First, substantial legislative history evinces Congress's intent to authorize private enforcement of section 2. The reports of the Senate and House Judiciary Committees that accompanied the 1982 amendments to the VRA—reports that the Supreme Court recognizes as the authoritative source on the meaning of section 2—unambiguously state Congress's intent for private enforcement.

Second, the current state of Native American voting rights and the landscape of enforcement litigation underscore the eminent sense of Congress's legislative intent. While Native plaintiffs have brought nearly 100 voting rights cases and obtained a successful result in over 90% of those cases—illustrating the significant obstacles they continue to face—NCAI is aware of only one section 2 case brought by the U.S. attorney general on behalf of Native American voters in the last two decades.

Congress rightly foresaw that private enforcement of section 2 would be an essential complement to public enforcement if the protections of the VRA were not to be all but meaningless. And the fact that Native American tribes, bands, nations, and individuals must rely on private enforcement to remedy the present-day obstacles they face in the pursuit of equal participation in the political process vindicates Congress's foresight. It is not the courts' role to second-guess Congress's choices. The district court's judgment should be affirmed.

ARGUMENT

I. CONGRESS INTENDED SECTION 2 TO BE ENFORCED BY PRIVATE PARTIES

The VRA's legislative history confirms that Congress intended section 2 to be enforced not only by the attorney general by also by private parties.

A. The Supreme Court has "repeatedly recognized" that the reports of the Senate and House Judiciary Committees that accompanied the 1982 amendments to the VRA are the "authoritative source for legislative intent" with respect to section 2, as amended. *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986); *accord Allen v. Milligan*, 599 U.S. 1, 10, 30 (2023); *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321, 2332 (2021); *Reno v. Bossier Parish School Board*, 520 U.S. 471, 476-477, 479 (1997); *Holder v. Hall*, 512 U.S. 874, 884 (1994). These reports (hereafter "House Report" and "Senate Report") leave no doubt that

Congress expected and intended that section 2 would be enforceable by private parties under section 1983.

Indeed, the reports could not be clearer on this point. For example, the Senate Report states: "The Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965." S. Rep. No. 97-417, at 30 (1982) (citing *Allen v. Board of Elections*, 393 U.S. 544 (1969)). The House Report likewise states: "It is intended that citizens have a private cause of action to enforce their rights under Section 2." H.R. Rep. No. 97-227, at 32 (1981).

The Senate Report's reference to *Allen v. Board of Elections* further underscores Congress's intent for private enforcement. In *Allen*, the Supreme Court held that another section of the VRA (section 5) can be enforced by private parties even though the VRA "does not explicitly grant … private parties authorization" to enforce the Act. 393 U.S. at 554. The Court explained that the VRA's "laudable goal" of preventing states from discriminating on the basis of race in voting "could be severely hampered … if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Id.* at 556. That is partly because "[t]he Attorney General has a limited staff," and thus, for example, "often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government[s]" all around the

country. *Id.* The Court accordingly reasoned that section 5 "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement." *Id.* at 557. The Senate Report's reliance on *Allen* indicates that Congress understood the same to be true of section 2.

B. NCAI recognizes that a panel of this Court recently cast doubt on the value of this legislative history, in holding that section 2 does not itself (i.e., apart from section 1983) create an implied private right of action. *See Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204, 1214 (8th Cir. 2023). But that holding does not preclude the Court from relying on these seminal sources for purposes of answering the distinct question of whether section 2 may be enforced via section 1983. *See Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 91 F.4th 967, 968 (8th Cir. 2024) (Straus, J., concurring in the denial of rehearing en banc) (highlighting that the panel did not reach the question whether section 2 may be privately enforced under section 1983). And such reliance would be consistent with very recent Supreme Court precedent: Although some members of the Supreme Court have in recent years expressed doubts about the value of legislative history, the Court itself has notably continued to discuss and rely on the legislative history of section 2, and on the Senate Report in particular. For example, in *Allen v. Milligan*, the Court discussed the Senate Report, and more generally described at length the legislative

history of the 1982 amendments to section 2. *See* 599 U.S. at 10, 30. Likewise, in *Brnovich*, the Court referred to the Senate Report as an "oft-cited Report." 141 S.Ct. at 2332. Given this recent precedent, and the clarity of the House and Senate Reports, the Court's reliance on them in resolving this appeal is amply warranted.

II. THE ATTORNEY GENERAL'S UNDER-ENFORCEMENT OF SECTION 2 WITH RESPECT TO NATIVE AMERICAN VOTING RIGHTS UNDERSCORES THE PRACTICAL NEED FOR PRIVATE ENFORCEMENT

Over half a century after the enactment of the VRA, Native Americans continue to face substantial obstacles to voting. Native plaintiffs have brought nearly 100 voting rights cases, obtaining victories or favorable settlements in the vast majority. Despite that strong evidence of continued state and local efforts to dilute Native Americans' voting power, NCAI is aware of only one section 2 suit brought by the U.S. attorney general on behalf of Native American voters in the last 20 years. Moreover, even when the attorney general does successfully bring such claims, Native voters must scrupulously monitor the state of play and, at times, step in to defend the attorney general's victories when he will not. These circumstances confirm Congress's view that private enforcement of section 2 is necessary to achieve the VRA's important goals.

A. Native Americans today encounter substantial barriers in voting—as they have throughout U.S. history. *See Obstacles Report* at 1. Native Americans were not even formally recognized as U.S. citizens (and hence eligible to vote)

until the enactment of the Indian Citizenship Act in 1924, almost 150 years after the United States' creation. And even after that, states have continued to prevent Native Americans from voting, "arguing that they (1) did not pay taxes, (2) were under guardianship of the U.S. and therefore were incompetent to vote, (3) were not literate in English, and (4) were more citizens of the tribes and too closely tied to tribal culture to be citizens of the states in which they lived." *Id.*; *see also* 1 *Cohen's Handbook of Federal Indian Law* §14.02 (2023) (discussing "[s]everal grounds [that] have been used to deny rights to Indians").

Although enactment of the VRA in 1965 created an important mechanism for enforcing Native American voting rights, Native Americans continue to face significant hurdles at all stages of the voting process, from registration and casting a ballot to having that ballot counted and being capable of electing candidates of their choice. *Obstacles Report* at 2-3. Indeed, as the *Obstacles Report* found, "every barrier imaginable is deployed against Native American voters." *Id.* at 3. In particular, Native Americans are frequently the target of "second generation barriers" to participation in the electoral process—including redistricting efforts like "cracking," "packing," and relying on at-large voting—that result in the dilution of Native American votes, in violation of section 2 of the VRA. *Id.* at 115; *see also id.* at 115-119.

B. The continued roadblocks faced by Native voters is starkly illustrated by the volume and success rate of voting rights cases brought by Native American plaintiffs. As of June 2020, Native American plaintiffs had filed 94 voting-rights cases under section 2 and other constitutional and statutory provisions, with victories or successful settlements in 86 cases and partial victories in another two cases—a success rate of over 90 percent. *See Obstacles Report* at 23. Three cases help illustrate the stakes and importance of this private enforcement for Native American voters:

1. In *Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976 (D.S.D. 2004), *aff'd*, 461 F.3d 1011 (8th Cir. 2006), four Native American voters sued after the South Dakota legislature approved a statewide redistricting plan that diluted the power of Native American voters. In particular, the challenged plan packed Native American voters into a single district that encompassed both the Pine Ridge and Rosebud Indian reservations, resulting in a district population that was 90 percent Native American. Plaintiffs argued that this packing disenfranchised Native voters in violation of section 2, because, had the districts been drawn more fairly, Native Americans would have been a majority in two districts instead of a supermajority in one.

The district court agreed, holding in a lengthy opinion that the plan "result[ed] in unequal electoral opportunity for Indian voters," "impermissibly

dilute[d] the Indian vote," and accordingly violated section 2. 336 F.Supp.2d at 1052. The court gave the state defendants an opportunity to file remedial proposals that would "afford Indians … a realistic and fair opportunity to elect their preferred candidates." *Id.* at 1052. When they refused, the court adopted one of the Native American plaintiffs' proposed districting plans. *See* 461 F.3d at 1017. Defendants appealed, and this Court affirmed both the district court's findings of a section 2 violation and its order imposing the plaintiffs' proposed remedial plan. *Id.* at 1024.

2. *Lower Brule Sioux Tribe v. Lyman County*, 625 F.Supp.3d 891 (D.S.D. 2022), challenged an at-large voting system that ensured that voters living on the Lower Brule Reservation in Lyman County, South Dakota—who make up 40% of the county—could never elect a candidate of their choice to the county's board of commissioners. In 2022, the county finally agreed that it had to establish two commissioner positions chosen by majority Native American electorates, but it delayed implementation of the redistricting plan to 2026. The Lower Brule Sioux Tribe and three of its members sued the board of commissioners, alleging that its delay diluted Native American voting strength in the county in violation of section 2 and seeking a preliminary injunction to require the county to implement the new map for the 2022 election. The district court held that the plaintiffs were likely to succeed on their section 2 claim and issued a preliminary injunction that

ordered the county to work with the tribe to propose a remedial plan that would protect Native American voting rights in the 2022 election. *See id.* at 900-901. The court subsequently modified its order, concluding that the county lacked time to implement the plan for the 2022 elections and ordering it to commit to fair elections for 2024. *Id.* at 931-935.

The plaintiffs did not give up on achieving an earlier remedy, leveraging their section 2 litigation success into a landmark settlement agreement. Under that agreement (which the court approved as a consent decree), one county commissioner agreed to resign his position, and the board agreed to appoint an enrolled Lower Brule member to complete the commissioner's term of office. The development "mark[ed] the first time in Lyman County's history that a tribal member [would] vote on county decisions that impact the Lower Brule community." Native American Rights Fund, *Lyman County (SD) Redistricting (Lower Brule Sioux Tribe v. Lyman County)*, https://narf.org/cases/lower-brule-sioux-tribe-lyman-county-redistricting (visited Mar. 21, 2024).

3. In *Winnebago Tribe of Nebraska v. Thurston County*, 2024 WL 302390 (D. Neb. Jan. 26, 2024), the Winnebago and Omaha Tribes of Nebraska, as well as individual tribal members, sued Thurston County and its elected officials for violating section 2 by adopting county supervisor districts that intentionally diluted the Native vote. Because Native Americans make up nearly 60% of

Thurston County, the plaintiffs argued, the county had to create election districts that allow Native voters a chance to elect representatives of their choice in a minimum of four of the seven districts, but the county had created only three. *See* Complaint, *Winnebago Tribe of Nebraska v. Thurston County*, No. 8:23-cv-20 (D. Neb. Jan. 19, 2023), ECF No. 1, https://www.narf.org/nill/documents/20230119winnebago-thurston-nebraska-complaint.pdf. This lawsuit reflected a distressing pattern of VRA violations in Thurston County, which was also sued under the VRA over redistricting plans in 1997 and in 1979. *Id.* at 2. In the latest case, the district court approved a consent decree that requires the county to adopt a new map for next year's elections (and going forward) that complies with section 2. *See Winnebago Tribe of Nebraska*, 2024 WL 302390, *2 (D. Neb. Jan. 26, 2024); *see* Native American Rights Fund, *Native Voters and Tribal Nations Negotiate Fair Districts in Nebraska* (Jan. 26, 2024), https://narf.org/fair-districts-in-nebraska. As Omaha Tribe Chairman Jason Sheridan explained, "[t]his case shows that we will keep fighting for our right to vote.… The Omaha Tribe is dedicated to fight any legal battles Thurston County throws at us." *Id.*

C. Despite this concrete evidence of ongoing efforts to deny Native Americans their fundamental right to vote and have their votes counted, NCAI is aware of only one case in the last two decades brought by the U.S. attorney general under section 2 to enforce Native American voting rights. In that case—which

ended with a consent decree—the United States alleged that the "at-large method of electing the Chamberlain School Board" in South Dakota "dilute[d] the voting strength of American Indian citizens." Complaint (ECF 1) ¶19, *United States v. Chamberlain School District*, No. 4:20-cv-4084 (D.S.D. May 27, 2020); *see also* Consent Decree (ECF 4), *Chamberlain School District*, (D.S.D. June 18, 2020).

The attorney general's scant efforts are dwarfed by the massive need for corrective action, as illustrated by the volume of successful suits brought by Native voters. The disparity underscores that private enforcement is necessary to ensure that the VRA is not an empty promise for tribes, bands, nations, and their members. Indeed, a similar dearth of enforcement of section 5 by the attorney general—specifically, the fact that he "had brought only one action to force" state compliance—contributed to the Supreme Court's holding that section 5 is privately enforceable. *See Allen*, 393 U.S. at 557 n.22.

D. Even in cases where the U.S. attorney general has obtained relief for Native American voters through section 2 litigation, tribes and individual voters may need to sue under section 2 to protect those hard-fought victories because the Justice Department is unwilling to do so itself. Recent litigation against Benson County, North Dakota illustrates the point. There, in response to a Native American population increase of 17%, the county abandoned its previous district-based voting system in favor of an at-large system that dilutes Native American

votes in violation of section 2—despite the fact that a 2000 consent decree prohibited the county from adopting such a system. *See* Complaint (ECF 1), *Spirit Lake Tribe v. Benson County*, No. 3:22-cv-161 (D.N.D. Oct. 7, 2022). When the Justice Department failed to take action in the face of this blatant violation of the consent decree, Spirit Lake Tribe and individual Native American voters stepped up. *Id.* They successfully negotiated a new decree that requires the county to create single-member commissioner districts rather than conducting at-large elections, thereby restoring fair elections in the county and bringing it into compliance with the 2000 consent decree. *See* Order, Consent Decree, and Judgment (ECF 37), *Spirit Lake Tribe v. Benson County*, No. 3:22-cv-161 (D.N.D. Apr. 24, 2023); Native American Rights Fund, *Benson County (ND) Redistricting (Spirit Lake Tribe v. Benson County)*, https://narf.org/cases/benson-county-nd-redistricting (visited Mar. 21, 2024). None of these court orders and judicial decisions vindicating voting rights would have happened if private enforcement of section 2 were unavailable.

* * *

The paucity of section 2 suits brought by the U.S. attorney general on behalf of Native Americans, combined with these cases illustrating the important role that tribes and their members play in protecting Native American voting rights, demonstrates that private enforcement is necessary to make the guarantee of

section 2 a reality. Congress recognized this, and this Court should respect its stated intent to authorize private enforcement of section 2.

CONCLUSION

The district court's judgment should be affirmed.

March 21, 2024

Respectfully submitted.

/s/ Daniel S. Volchok

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that, according to the word-count function of the word-processing system used to generate the brief (Microsoft Word), the brief contains 3,040 words, exclusive of the portions exempted by Rule 32(f).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word for Microsoft 365 in 14-point proportionally spaced Times New Roman font.

This brief also complies with the electronic-filing requirements of Circuit Rule 28A(h)(2) because it was scanned for viruses and is virus-free.

/s/ Daniel S. Volchok
DANIEL S. VOLCHOK

CERTIFICATE OF SERVICE

On this 21st day of March, 2024, I electronically filed the foregoing using the Court's CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Daniel S. Volchok
DANIEL S. VOLCHOK