No. 25-

IN THE

Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Petitioners,

v.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, is enforceable by private plaintiffs through 42 U.S.C. § 1983, an implied right of action, or both?

PARTIES TO THE PROCEEDING

The Petitioners in this Court are Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown.

The Respondent in this Court is Michael Howe, in his official capacity as Secretary of State of North Dakota.

The North Dakota Legislative Assembly was a movant in the Eighth Circuit but is not a party in this Court.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Turtle Mountain Band of Chippewa Indians v. Howe, Case No. 3:22-cv-22, 2023 WL 8004576 (D. N.D. Nov. 17, 2023).

Turtle Mountain Band of Chippewa Indians v. Howe, Case No. 3:22-cv-22, 2023 WL 8602898 (D. N.D. Dec. 12, 2023) (denying stay pending appeal).

Turtle Mountain Band of Chippewa Indians v. Howe, No. 23-3655, 2023 WL 9116675 (D. N.D. Dec. 15, 2023) (denying stay pending appeal).

Turtle Mountain Band of Chippewa Indians v. Howe, Case No. 3:22-cv-22, 2024 WL 493275 (D. N.D. Jan. 8, 2024) (entering remedial map).

Turtle Mountain Band of Chippewa Indians v. Howe, No. 23-3655, 137 F.4th 710 (8th Cir. May 14, 2025).

Turtle Mountain Band of Chippewa Indians v. Howe, No. 23-3655, 2025 WL 1833993 (8th Cir. July 3, 2025) (denying rehearing en banc)

Turtle Mountain Band of Chippewa Indians v. Howe, No. 24A62, 2025 WL 1943858 (U.S. July 16, 2025) (staying issuance of the mandate)

The following proceedings are also directly related to this case under Rule 14.1(b)(iii) of this Court:

In re North Dakota Legislative Assembly, No. 23-1600, 70 F.4th 460 (8th Cir. June 6, 2023).

Turtle Mountain Band of Chippewa Indians v. North Dakota Legislative Assembly, No. 23-847, 144 S.Ct. 2709 (Mem) (U.S. July 2, 2024) (vacating and dismissing judgment as moot).

Turtle Mountain Band of Chippewa Indians v. Howe, Nos. 23-3697, 24-1171, 137 F.4th 709 (8th Cir. May 14, 2025) (dismissing appeals as moot).

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The district court's decision after trial was entered on November 17, 2023. It is reproduced at App. 61a and is available at 2023 WL 8004576. The Eighth Circuit's opinion was entered on May 14, 2025. It is reproduced at App. 8a and is reported at 137 F.4th 710.

JURISDICTION

The Eighth Circuit denied rehearing en banc on July 3, 2025. App.3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Voting Rights Act provides that "[n]o 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 of the United States to vote on account of race or color. . . ." Section 2(b) provides that a violation is established if "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C § 10301(a)-(b).

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983.

INTRODUCTION

Until 1922, the State of North Dakota denied Native Americans the right to vote unless they "severed their tribal relations" and adopted the dress, religion, and customs of white people. N.D. Const. art V, § 121 (1889). North Dakotans did not elect a Native American to the state legislature until 1970. Today, North Dakota is home to five federally recognized Indian Tribes. In 2021, the State redrew the boundaries of its legislative districts and reduced the number of majority-Indian seats in the northeastern part of the state from three to one.

The Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe and three Native American voters sued the Secretary of State, alleging that the new boundaries violated Section 2 of the Voting Rights Act of 1965—a provision that bans voting discrimination on the basis of race, color, or language-minority membership. After a four-day bench trial, the district court ruled for plaintiffs.

The Secretary appealed, and the Eighth Circuit reversed without reaching the merits. In a split decision, the court held that Section 2 is not enforceable by private plaintiffs suing under Section 1983. In an earlier decision, the Eighth Circuit had already held—contrary to this Court's precedents and the holdings of every other court of appeals to decide the question—that Section 2 is not privately enforceable through an implied right of action.

Certiorari is warranted because the Eighth Circuit's conclusions are impossible to square with this Court's recent Section 1983 precedents, including *Health & Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023). The Eighth Circuit's holdings also conflict with this Court's decision in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), and with decisions of the Fifth, Sixth, and Eleventh circuits. It also conflicts with the decisions of several three-judge district courts and with decades of practice across the country in hundreds of Section 2 cases brought by private litigants.

Certiorari is also warranted because of the exceptional importance of this issue. This Court assured the nation that Section 2 would remain an essential and effective backstop against discrimination in voting. *See Shelby County v. Holder*, 570 U.S. 529, 557 (2013). But Section 2 has always been enforced primarily by private litigants. The Eighth Circuit's decision thus deprives voters in seven states of the ability to protect their own rights under Section 2.

And, finally, certiorari is warranted because this case is an excellent vehicle for review. The issue is perfectly preserved and squarely presented in this case.

STATEMENT OF THE CASE

I. Statutory Framework

A. Section 2 of the Voting Rights Act

The Voting Rights Act is "the most successful civil rights statute in the history of the Nation." *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (quoting S. Rep. No. 97-417, at 111 (1982)). Enacted in 1965 "[t]o enforce the fifteenth amendment to the Constitution of the United States," Pub. L. No. 89-110, 79 Stat. 437, 437 (1965), the Voting Rights Act was passed to "address an extraordinary problem," *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 534 (2013).

"The first century of congressional enforcement" of the Fifteenth Amendment "can only be regarded as a failure." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). "Early enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow," and "[a]nother series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice." *Id.* In response to these failures, and spurred on by the civil rights movement, Congress enacted the Voting Rights Act. *See id.*

Section 2 of the Voting Rights Act imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.*, 570 U.S. at 557. Section 2

prohibits practices that "result[] in a denial or abridgement of the right of any citizen of the United States to vote . . . on account of race or color." 52 U.S.C. § 10301(a). Section 2 is violated when the "totality of circumstances" show that the electoral conditions in a State or political subdivision "are not equally open to participation by members of a class of citizens protected by" the Act. 52 U.S.C. § 10301(b).

For more than 40 years, "[b]oth the Federal Government and individuals have sued to enforce § 2." *Shelby Cnty.*, 570 U.S. at 537. Over these decades, this Court has "heard a steady stream of § 2 vote-dilution cases" against states and localities, brought mainly by private plaintiffs. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 660 & n.5 (2021) (listing cases).

B. Section 1983

Section 1983 is another one of the "most well-known civil rights statutes." *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020). Enacted pursuant to Congress's Fourteenth Amendment enforcement powers, Section 1983 "was designed 'to enforce the Provisions of the Fourteenth Amendment' 'in response to an ongoing pattern of violence and intimidation' against former slaves." *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025) (Thomas, J., concurring) (citations omitted). As enacted in 1871, Section 1983 originally allowed only for enforcement of the Constitution itself, but in 1874, Congress extended Section 1983's reach to include both the Constitution "and laws." *Chapman v. Houston Welfare Rights*

Organization, 441 U.S. 600, 608 (1979). Thus, in its current form, Section 1983 "allows private parties to sue state actors who violate their 'rights' under 'the Constitution and laws' of the United States." *Medina*, 145 S. Ct. at 2229.

When Section 1983 was amended to allow enforcement of "laws," the principal purpose was to provide a cause of action for statutes enacted pursuant to Congress's Reconstruction Amendment enforcement powers. *See Chapman*, 441 U.S. at 611. Over time, however, Section 1983 has been recognized as providing a cause of action for certain Spending and Commerce Clause statutes that create individual rights. To account for Section 1983's extended reach, this Court in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), adopted a test for determining when Commerce and Spending Clause legislation is enforceable under Section 1983. Under that test, a court asks whether a provision "unambiguously conferred federal individual rights." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 172 (2023).

II. The 2021 redistricting process

From 1990 to 2022, Native American voters in northeastern North Dakota were able to elect their candidates of choice from state legislative district 9—one state senator and two state representatives.[1] PX

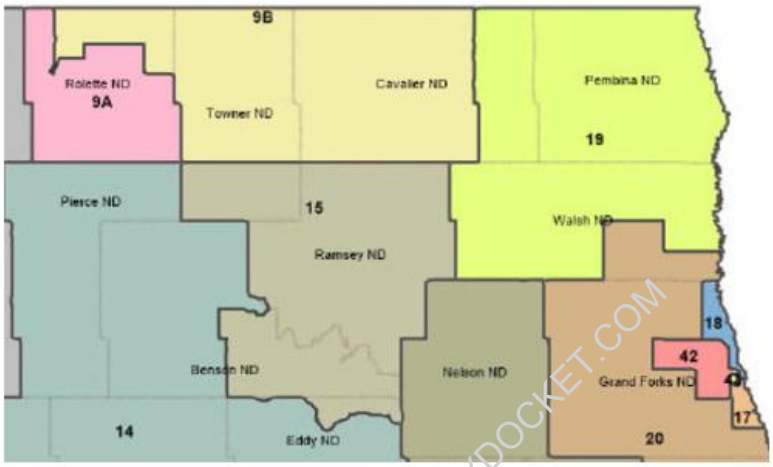
[1] Most North Dakota legislative districts elect one state senator and two state representatives. App. 65a.

P001 at 44; PX P042 at 6.[2] As of the 2020 Census, district 9 was wholly contained within Rolette County and had a Native American voting age population ("NVAP") of roughly 74%. App.66a. The 2020 census showed that district 9 was underpopulated and needed to be expanded to satisfy population equality requirements. App.71a. Given the Canadian border to the north, the district could be expanded to the south, west, or east. App.71a. In September 2021, the North Dakota legislative management redistricting committee ("redistricting committee") released a proposed map adding parts of two counties to the east. App.68a. The added territory was almost entirely composed of white residents. App.69a, 71a; PX P042 at 3.

The redistricting committee also proposed subdividing district 9 into two single-member house districts. App.68a. With an NVAP of roughly 80%, district 9A was overwhelmingly packed with Native Americans and contained the Turtle Mountain Band of Chippewa Indians ("Turtle Mountain") reservation and part of its off-reservation trust lands. App.71a. District 9B had an NVAP of 32.2% and extended east. App.71a.

Meanwhile, just to the south in Benson County is the Spirit Lake Tribe ("Spirit Lake"). It was assigned to district 15, which has an NVAP of 23.1%. App.71a. The configuration is shown below:

[2] "PX" refers to Plaintiffs' trial exhibits.



App.71a.

Following release of this proposed plan, Turtle Mountain and Spirit Lake chairmen requested that the redistricting committee unify Turtle Mountain and Spirit Lake in district 9 to account for shared representational interests and to avoid a Voting Rights Act violation. App.68a-69a. The committee rejected that proposal and enacted the original plan. App.69a-70a.

The results of the November 2022 election played out as the Tribal Chairmen had warned. For the first time since 1990, there were no Native Americans serving in the North Dakota Senate. Native American voters were only able to elect their preferred candidate in district 9A, while their preferred candidates lost in districts 9, 9B, and 15. PX001 at 21,

27.[3] The number of districts in the region providing Native Americans an opportunity to elect candidates of their choice shrunk from three seats to just one.

III. District Court proceedings

In February 2022, Plaintiffs filed suit against the North Dakota Secretary of State ("the Secretary") under 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act ("VRA"). ECF No. 1 at 1. The Secretary moved to dismiss, arguing, *inter alia*, that there is no implied right of action to enforce Section 2 of the VRA. App.123a-124a. The district court did not reach this question because Plaintiffs also pleaded their claim under 42 U.S.C. § 1983, which the court held provided a cause of action to enforce Section 2. App.123a-124a. Applying the framework from *Gonzaga*, the district court first concluded that Section 2 creates individual rights, observing that "[i]t is difficult to imagine more explicit or clear rights creating language" than the text of Section 2. App.129a-130a (referencing 52 U.S.C. § 10301(a)). Second, the district court concluded that "nothing in [Section 2's enforcement provisions are] incompatible with private enforcement[.]" App.131a.

Following a four-day bench trial, the district court ruled for Plaintiffs. The court ruled that Plaintiffs had proved each of the three *Gingles* preconditions. Regarding the first, the court reasoned that Plaintiffs

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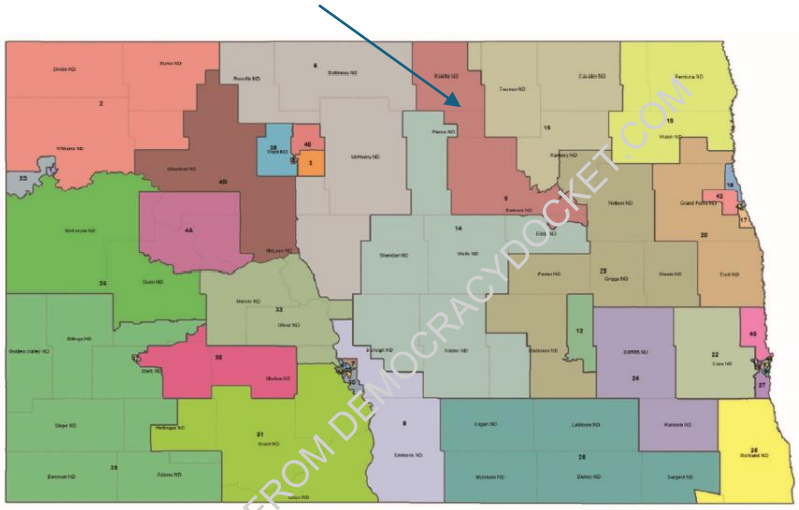
[3] *See* N.D. Sec'y of State, Districts 9 and 15 2022 Election Results, https://results.sos.nd.gov/ResultsSW.aspx?text=Race&type=LG&map=DIST&eid=vxUYQ0lrpP4. [https://perma.cc/4DLM-A3WD].

proffered two demonstrative districts in which Native Americans would be a majority of eligible voters. App.84a. Plaintiffs' demonstrative plan 1 is shown below, with district 9 identified by an arrow.

Plaintiffs' Demonstrative Plan 1



App.72a.

The court determined that "[t]he evidence at trial shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest." App.85a. The court observed that the demonstrative districts "did not appear more oddly shaped than other districts" and were "reasonably compact." App.85a. Indeed, the Secretary's expert conceded as much, and agreed that Plaintiffs'

demonstrative plans better respected communities of interest than the enacted plan. ECF No. 117 at 130.

The district court also found, based on the testimony of the Tribal Nations' current and former Chairmen, that nonracial interests motivated the unification of Benson and Rolette Counties (and thus the two Tribal Nations), including "shared representational interests, socioeconomic statuses, and cultural values." App.86a.

Although the Secretary's counsel attempted to suggest that including two Tribal Nations in the same legislative district was *per se* a racial gerrymander, his own expert testified to the contrary. He agreed that "Native American [T]ribes can have shared interests other than the race," and conceded that he "ha[d] no evidence that plaintiffs' demonstrative plans are a racial gerrymander." ECF No. 117 at 167-68.

The district court likewise found that the second and third *Gingles* preconditions were satisfied, App.87a-109a, and held that, under the totality of circumstances, Plaintiffs had proved a Section 2 violation. App.114a-116a.

When the legislative assembly failed to adopt a remedial map, the district court imposed one. App.115a-116a. Pursuant to its local rules, the district court determined that the Secretary viewed the motion for entry of a remedial plan to be well-taken because the Secretary filed no opposition. App.50a. The district court granted the motion and imposed Plaintiffs' Plan 2 as the remedial map. App.50a.

IV. Eighth Circuit proceedings

The Secretary appealed the district court's liability order, but not the order imposing the remedial map. After the district court denied the Secretary's motion for a stay of the liability order, the Secretary renewed the motion in the Eighth Circuit, contending, *inter alia*, that private plaintiffs cannot enforce Section 2 using Section 1983's cause of action. *See* Sec'y's Mot. for Stay at 4, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Dec. 13, 2023) (Doc. 5344314). On December 15, 2023, the Eighth Circuit denied the Secretary's motion. App.51a. As a result, the 2024 elections were held under the district court's remedial map. Native American-preferred candidates won all three legislative positions for district 9, with Senator Marcellais returning to office, Representative Davis winning reelection, and Plaintiff Collette Brown winning the second state house seat.[4]

A. The Eighth Circuit holds that Section 2 is not enforceable through an implied private right of action in *Arkansas NAACP*.

Shortly after the district court issued its liability determination, the Eighth Circuit issued a decision upending Section 2 case law. In *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment*, a divided panel of the Eighth Circuit held that Section

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[4] N.D. Sec'y of State, District 9 2024 Election Results, https://results.sos.nd.gov/resultsSW.aspx?text=Race&type=LG&map=DIST [https://perma.cc/9U8C-22HD].

2 does not contain an implied private right of action.[5] 86 F.4th 1204, 1207 (8th Cir. 2023) ("*Arkansas NAACP I*"). The *Arkansas NAACP I* majority concluded that it is "unclear whether § 2 creates an individual right." *Id.* at 1209. On the one hand, the majority reasoned, Section 2 "unmistakably focuses on the benefited class." *Id.* (citation modified) (quoting 52 U.S.C. § 10301(a)'s "right of any citizen . . . to vote" language). On the other hand, the majority noted that the text of Section 2 also identifies those prohibited from violating those rights: "states and political subdivisions." *Id.* The majority claimed that "[i]t is unclear what to do when a statute focuses on both." *Id.* at 1210. Notably, the majority did not cite or discuss this Court's decision in *Health & Hospital Corp. of Marion County v. Talevski*, in which this Court expressly answered that question. 599 U.S. 166, 185 (2023) ("[I]t 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 (and we have never so held).").

Unsure of how to decide the first step of the implied-private-right analysis, the *Arkansas NAACP I* majority held at the second step that Congress had intended only the Attorney General, and not private plaintiffs, to enforce Section 2, notwithstanding

[5] The court did not decide whether 42 U.S.C. § 1983 would allow for private enforcement of Section 2 because the *Arkansas NAACP* plaintiffs did not plead that cause of action. *Arkansas State Conference of NAACP v. Arkansas Bd. of Apportionment*, 91 F.4th 967, 967 (8th Cir. 2024) (Stras, J. concurring).

Supreme Court precedent, decades of practice, and statutory references to suits brought by "aggrieved person[s]" other than the U.S. Attorney General. *Arkansas NAACP I*, 86 F.4th at 1211. Then-Chief Judge Smith dissented, explaining that five Justices in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), had already recognized that Section 2 is enforceable through an implied private right of action. 86 F.4th at 1223 ("[T]he simple fact is that a majority of the justices explicitly recognized a private right of action under Section 2 in *Morse*." (citation modified)).

The Eighth Circuit denied en banc review, with Judge Smith, now-Chief Judge Colloton, and Judge Kelly voting to grant rehearing. Dissenting from the denial of rehearing, Chief Judge Colloton wrote that the panel majority "rendered an . . . unprecedented ruling" that contravened "controlling precedent" from the Supreme Court in *Morse*, and that the court as a whole "regrettably miss[ed] an opportunity to reaffirm its role as a dispassionate arbiter." *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment*, 91 F.4th 967, 969-70, 974 (8th Cir. 2024) ("*Arkansas NAACP II*") (Colloton, C.J., dissenting).

B. The Eighth Circuit forecloses Section 1983 enforcement of Section 2 in *Turtle Mountain.*

After the Eighth Circuit denied the Secretary's motion for a stay in this case, a different panel (Colloton, C.J, Gruender, J., and Kobes, J.) heard the merits. The merits panel held that Section 2 is not privately enforceable under Section 1983, with Chief

Judge Colloton dissenting. *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710 (8th Cir. 2025).[6]

The majority concluded that its prior decision in *Arkansas NAACP I* (which did not present a Section 1983 claim) controlled the outcome in this case (which does include a Section 1983 claim). The majority concluded that because the *Arkansas NAACP I* panel was uncertain whether Section 2 conferred individual rights, the *Gonzaga* test could not be satisfied. "It is thus unnecessary to undertake an independent analysis of *Gonzaga*'s first step given that *Arkansas* [*NAACP*] has already decided the issue." *Id.* at 718.

The majority stated that, as *Arkansas NAACP I* had previously reasoned, Section 2 "focuses on both the individuals protected and the entities regulated." *Id.* at 719 (citation modified). Because Section 2 refers to both, the majority stated that Congress did not "speak with a 'clear voice' that manifests an 'unambiguous' intent to confer individual rights." *Id.* (quoting *Gonzaga*, 536 U.S. at 280). "Accordingly, we conclude that the plaintiffs are within the general zone of interest that the statute is intended to protect, without the statute having unambiguously conferred an individual right." *Id.*

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[6] Given *Arkansas NAACP*, Plaintiffs focused on their Section 1983 argument while preserving for further appellate proceedings their argument that Section 2 also creates an implied private right of action. *See* Brief of Plaintiffs-Appellees at 21 n.2, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Mar. 18, 2024) (Doc: 5374180).

The majority rejected Plaintiffs' contention that *Talevski* compelled a contrary conclusion given this Court's instruction that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Id.* at 720 (quoting *Talevski*, 599 U.S. at 185).

Chief Judge Colloton dissented. He observed that *Gonzaga*'s test was an ill-fit for determining whether Reconstruction Amendment enforcement statutes can be the subject of Section 1983 suits. "[T]he federalism concerns that animated the Court's decisions on § 1983 and the Spending Clause do not have the same force here, because the Reconstruction Amendments already altered the constitutional balance by limiting the power of the States and enlarging the power of Congress." *Id.* at 722 (Colloton, C.J., dissenting). "There is thus reason to question whether courts should apply a substantive canon requiring unmistakable clarity when interpreting laws enacted under the Fourteenth and Fifteenth Amendments. Why not simply implement the statute as written based on traditional tools of statutory interpretation?" *Id.*

But Chief Judge Colloton noted that it was unnecessary to decide that question, because under *Gonzaga* "it is clear that Congress in § 2 of the Voting Rights Act intended to confer a voting right." *Id.* He reasoned that *Talevski* foreclosed the Secretary's argument that Section 2's consideration of both rights-bearers and potential rights-violators was relevant. *Id.* at 723. And he highlighted the uniform

view (in favor of Plaintiffs) of every circuit court to consider the question. *Id.* at 723. Chief Judge Colloton rejected the majority's view that it was bound by *Arkansas NAACP I*, characterizing that case's discussion of the issue as "indeterminate dicta . . . and ill-considered dicta at that." *Id.* at 724.

Next, Chief Judge Colloton concluded that the Secretary could not overcome the presumption that Section 1983 applied because there is no "indicia of congressional intent to preclude [private] enforcement of the Voting Rights Act under § 1983." *Id.* at 725.

On the merits, Chief Judge Colloton explained that "[t]he district court's decision is adequately supported by the record and should be affirmed." *Id.*

Plaintiffs timely filed a petition for rehearing en banc on May 28, 2025. On July 3, 2025, the court denied Plaintiffs' petition, with Chief Judge Colloton, Judge Smith, and Judge Kelly noting that they would have granted it, and with Judge Erickson not participating. App.3a-4a.

Plaintiffs moved to stay the issuance of the mandate on July 9, 2025, but the panel denied that motion the next day, with Chief Judge Colloton noting he would have granted the stay motion. App.1a-2a. This Court granted Plaintiffs' application for a stay of the mandate.

REASONS TO GRANT THE PETITION

I. The Eight Circuit's decision warrants this Court's review.

The decision below merits this Court's review. Everywhere else in the nation, private plaintiffs can rely on an unbroken line of Supreme Court and circuit precedent to enforce the individual rights given to them by Congress in the Voting Rights Act. But not in the Eighth Circuit. In *Arkansas NAACP I*, the Eighth Circuit became the first and only court of appeals to hold that Section 2 is not privately enforceable through an implied right of action. And in the decision below, the Eighth Circuit doubled down on that error by holding that Section 2 is also not enforceable through Section 1983. The Eighth Circuit thus extinguished the remaining pathway for private enforcement of Section 2 of the VRA within its bounds—entrenching the circuit split and contravening this Court's precedents. This issue is exceedingly important and warrants this Court's review.

A. The Eighth Circuit has created a sharp circuit split.

The Eighth Circuit has generated a stark conflict. By rejecting private enforcement of Section 2, the Eight Circuit's decisions in *Arkansas NAACP I* and in this case conflict with the holdings of three other circuits, with the decisions of multiple three-judge district courts, and with the unbroken practice in all other courts throughout the nation, including this Court.

Start with the circuit courts. In contrast to the Eighth Circuit, the Fifth, Sixth, and Eleventh Circuits have each held that Section 2 is privately enforceable. In *Robinson v. Ardoin*, for example, the Fifth Circuit squarely held that "Section 2 provides for a private right of action." 86 F.4th 574, 587-88 (5th Cir. 2023). *Robinson* explained that another section of the VRA—Section 3—explicitly anticipates private enforcement of the Act. *See id.* at 588. It states—three times over—that proceedings to enforce the voting guarantees provided under the Act can be brought by the Attorney General *or* by an "aggrieved person." 52 U.S.C. § 10302(a), (b), and (c). In light of Section 3, *Robinson* concluded that private plaintiffs are "aggrieved person[s]" under the text of the VRA, and that Congress intended private enforcement of Section 2. 86 F.4th at 588. Recently, the Fifth Circuit relied on *Robinson* to again reject the argument that Section 2 does not provide a right of action. *Nairne v. Landry*, No. 24-30115, 2025 WL 2355524, at *22 n.26 (5th Cir. Aug. 14, 2025) (per curiam).

The Eleventh Circuit has also held that the VRA is "enforceable by private parties." *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021). The Eleventh Circuit carefully examined the text of the VRA, and, like the Fifth Circuit, determined that the rights created under Sections 2 must be read alongside the remedies provided under Section 3. The Eleventh Circuit therefore concluded that Section "explicitly provides remedies to private parties to address violations" of the Act. *Id.* (citing 52 U.S.C.

§ 10302(a)-(c)). The Sixth Circuit too has held that "[a]n individual may bring a private cause of action under Section 2." *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999).

Well-reasoned decisions from three-judge district courts have also repeatedly and uniformly held that Section 2 is privately enforceable.[7] The decision by Judges Marcus, Moorer, and Manasco granting a permanent injunction in *Singleton v. Allen* is illustrative. No. 2:21-cv-01291-AMM, 2025 WL 1342947 (N.D. Ala. May 8, 2025) (three-judge court). Concluding that plaintiffs can use Section 1983 to press their Section 2 claims, the three-judge court explicitly addressed and rejected *Arkansas NAACP*. 2025 WL 1342947, at *172. It determined that Section 2 contains "rights-creating, individual-centric language with an unmistakable focus on the benefited class." *Id.* (citing *Talevski*, 599 U.S. at 183). And it emphasized that Section 2 is plainly a rights-creating statute: "every sentence of Section [2] either refers to rights of the benefited class, contains rights-creating language that creates new rights for that specific

[7] *See Singleton v. Allen*, No. 2:21-cv-01291-AMM, 2025 WL 1342947 (N.D. Ala. May 8, 2025) (three-judge court); *Miss. State Conf. NAACP v. State Bd. of Election Comm'rs.*, No. 3:22-cv-00734-DPJ-HSO-LHS, slip. op. at 18-23 (S.D. Miss. July 2, 2024) (three-judge court) (per curiam); *Ga. State Conf. of NAACP v. Georgia*, No. 1:21-CV-5338-ELB-SCJ-SDG, 2022 WL 18780945, at *7 (N.D. Ga. Sep. 26, 2022) (three-judge court); *League of United Latin Am. Citizens v. Abbott*, No. EP-21CV-00529-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court).

class, or expressly focuses on the benefited class." *Id.* at *173.

All other three-judge district courts to reach the issue agree. For example, a three-judge court per curiam decision issued by Judges Branch, Jones, and Grimberg explained that "[w]e think it obvious that, by its clear terms, Section 2 guarantees a particular individual right to all citizens." *Ga. State Conf. of the NAACP*, 2022 WL 18780945, at *4. Section 2, the court underscored, identifies a specific right in "explicit terms" and "expressly defines the particular class of persons that holds the right." *Id.* (citations and internal quotation omitted); *see also id.* ("If that is not rights-creating language, we are not sure what is.").

Finally, and most glaringly of all, the Eighth Circuit's decision departs from unbroken practice in all courts of appeals throughout the nation. For decades, private plaintiffs have vindicated their rights in Section 2 cases filed in every circuit,[8] litigating

[8] *See, e.g.*, *Clerveaux v. East Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282 (11th Cir. 2020); *Rural W. Tenn. African-Am. Affs. Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1233 (1996); *Cane v. Worcester Cnty.*, 35 F.3d 921 (4th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S.

many of those cases to this Court. Indeed, every case that this Court has decided under the current version of Section 2 was brought by private plaintiffs. *See, e.g.*, *Allen v. Milligan*, 599 U.S. 1 (2023); *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Holder v. Hall*, 512 U.S. 874 (1994); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Growe v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986). The conflict here is sharp and plain. The Court should grant review to resolve it.

B. This issue is recurring and important.

The Secretary concedes that "the question of whether private plaintiffs may use Section 1983 to enforce Congress's prohibition on collective vote dilution is an important one with significant implications." Stay Resp. at 34. That puts it mildly. Many consider the VRA to be "the most successful civil rights statute in the history of the Nation." *Milligan*, 599 U.S. at 10 (citation omitted). And suits brought by private plaintiffs are the leading reason for that success.

Section 2 is, and always has been, enforced primarily by private litigants. One study found that from 1982 through August 2024, "private plaintiffs have been party to 96.4% of Section 2 claims that produced published opinions . . . and the sole litigants

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1080 (1989); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

in 86.7% of these decisions." *See* Ellen D. Katz, *Curbing Private Enforcement of the Voting Rights Act: Thoughts on Recent Developments*, 123 Mich. L. Rev. Online 23, 34 (2024); *see also Singleton*, 2025 WL 1342947, at *179 n.68 (noting that "the Department of Justice has previously observed that private plaintiffs have brought over 400 Section [2] cases resulting in judicial decisions since 1982, while the Department of Justice itself has brought just 44 cases") (citing Br. U.S. as Amicus Curie, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, 2024 WL 1417744 (8th Cir. Mar. 25, 2024)). A second recent study that attempted a comprehensive examination of every Section 2 case filed between 1982 and 2024 reached a similar conclusion. *See generally* Christopher B. Seaman, *Voting Rights and Private Rights of Action: An Empirical Study of Litigation Under Section 2 of the Voting Rights Act, 1982-2024* (Aug. 11, 2025) (SSRN draft), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5386558&dgcid=ejournal_htmlemail_election%3Alaw%3Avoting%3Arights%3Aejournal_abstractlink. Of the roughly 1500 cases the study found, 90% were brought by private plaintiffs (and about two-thirds of those cases were successfully resolved, often by consent). *Id.* at 1, 31-52.

The central role that private parties play in the enforcement of Section 2 makes the question of continued private enforcement immensely important. It also guarantees that this question will recur. In fact, whether Section 2 is privately enforceable—either through an implied right in Section 2 itself or

through Section 1983—has already been raised on this Court's mandatory docket. *See* Jurisdictional Statement, *State Bd. of Election Comm'rs v. Miss. State Conference NAACP*, No. -- (filed Aug. 26, 2025); *see also* Order, *Allen v. Singleton*, No. 25A109 (July 25, 2025) (extending Alabama's Jurisdictional Statement deadline to September 4, 2025). Because this question will repeatedly arise, the Court should grant certiorari now to ensure the same rule applies in every case.

II. The Eighth Circuit's conclusion that Section 2 of the Voting Rights Act is not privately enforceable is incorrect.

Both pathways to private enforcement of Section 2 of the Voting Rights Act—through Section 1983 as well as through an implied right of action—hinge on the fact that Section 2's text plainly creates individual rights. In *Arkansas NAACP* and in the present case, the Eighth Circuit held that it is not clear that Section 2 creates individual rights. And the Eighth Circuit further understood private enforceability to be an open question under this Court's precedents. *Arkansas NAACP I*, 86 F. 4th at 1216. But this is not so. Section 2 uses individual-focused, rights-conferring language, expressly stating that it secures "the right of any citizen" to be free from discrimination in voting. 52 U.S.C. § 10301(a). And this Court has already held that Section 2, like other provisions of the VRA such as Sections 5 and 10, is enforceable through its own right of action. *See Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).

A. Section 2 of the Voting Rights Act creates individual rights that are enforceable through Section 1983.

This Court's precedents compel the conclusion that Section 2 creates individual rights that are enforceable through Section 1983. *Gonzaga* sets out the framework for determining whether private plaintiffs can enforce a federal statute through Section 1983.

At *Gonzaga*'s first step, a court must "determine whether Congress *intended to create a federal right*" in the statute that a plaintiff seeks to enforce. 536 U.S. at 283 (emphasis in original). That analysis "is no different from the initial inquiry in an implied right of action case." *Id.* at 285. Once a court determines a federal right exists, that "right is presumptively enforceable by § 1983." *Id.* at 284. As such, 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." *Id.* In *Talevski*, this Court explained that this first step is satisfied where "the provision 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." 599 U.S. at 183 (citation and internal quotation marks omitted).

At the second step, the burden shifts to defendants to rebut the presumption of enforceability by showing that Congress "specifically foreclosed a remedy under § 1983." *Smith v. Robinson,* 468 U.S.

992, 1004–05, 1004 n.9 (1984). Defendants can make this showing only by demonstrating 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 (citations and internal quotation marks omitted).

Under this framework, Section 2 is plainly enforceable through Section 1983. Congress enacted the VRA to enforce the rights-creating guarantees of the Fourteenth and Fifteenth Amendments, and crafted Section 2 in explicitly rights-creating terms. Moreover, there is abundant textual evidence that Congress intended and sought to encourage vigorous private enforcement of Section 2. The Eighth Circuit's contrary conclusion should be reversed.

1. Section 2 of the Voting Rights Act is a rights-creating statute.

As this Court has recognized, Section 2 "grants" individual citizens "a right to be free from" discriminatory voting practices. *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (citation omitted); *see also Talevski*, 599 U.S. at 184 (finding that a statute "framing" the relevant section in terms of rights is "indicative of an individual 'rights-creating' focus" (quoting *Gonzaga*, 536 U.S. at 284)); *accord Medina*, 145 S. Ct. at 2235 (2025).

On its face, Section 2 contains distinctly rights-creating language. Section 2 protects the "right of any citizen . . . to vote" free from racial discrimination. 52 U.S.C. § 10301(a). Moreover, Congress explained that the Voting Rights Act is "[a]n Act . . . [t]o enforce the fifteenth amendment to the Constitution of the United States . . . ." Pub. L. No. 89-110, 79 Stat. 437, 437 (1965). Section 2 enforces Fifteenth Amendment's guarantee that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const. amend. XV.

Statutory language throughout the VRA confirms that Section 2 is rights-creating. As this Court has recognized, "a title may underscore that the statutory text creates a right." *Medina*, 145 S. Ct. at 2237. Thus, start with the statute's title, *i.e.*, the "Voting Rights Act." That Congress made "Rights" one of just three words in the law's title "underscore[s] that the statutory text creates a right." *Medina*, 145 S. Ct. at 2237.

There are more statutory titles to consider as well, each brightly flashing "rights-creating" signals. Section 2 is contained in Chapter 103 of Title 52. *See* 52 U.S.C. § 10301. Chapter 103's title is "Enforcement of Voting *Rights*." (emphasis added). Section 2 is codified at Section 10301 of Chapter 103. Section 10301's title is "Denial or abridgement of *right to vote* on account of race or color through voting qualifications or prerequisites; establishment of violation." *Id.* (emphasis added). And again, from there, Section 2's text explicitly confers a "*right of any*

citizen of the United States to vote" that cannot be denied or abridged "on account of race." *Id.* § 10301(a) (emphasis added); *see also* 52 U.S.C. § 10301(b) (focusing on "members of a class of citizens protected by subsection (a)").

Other provisions of the VRA confirm that Section 2 creates individual rights. For example, 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)).

In addition to focusing on individual rights-holders, the text of Section 2 also identifies the "class of beneficiaries," *Talevski*, 599 U.S. at 183, to which plaintiffs belong—individuals who are denied the right to vote "on account of race or color." 52 U.S.C. § 10301(a). Section 2 provides that a violation is established if political processes are not equally open to "members of a class of citizens" so protected. 52 U.S.C. § 10301(b). "If all of this is not rights-creating language with an unmistakable focus on the benefitted class, it is difficult to imagine what is." *Singleton v. Allen*, 740 F. Supp. 3d 1138, 1159 (N.D. Ala. 2024) (three-judge court) (internal quotations and citations omitted); *accord Ga. State Conf. of NAACP v. Georgia*, No. 1:21-CV-5338-ELB-SCJ-SDG, 2022 WL 18780945, at *7 (N.D. Ga. Sep. 26, 2022) (per curiam) (three-judge court).

2. Congress has repeatedly made clear that it intended for private enforcement of Section 2.

At the second step, although the VRA permits the United States to enforce Section 2, the statute contains no express "private judicial remedy," much less a "more restrictive" remedy than Section 1983. *City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 121 (2005). Instead, the fact that the overwhelming majority of Section 2 cases are brought by private plaintiffs demonstrates that private enforcement is not "incompatible" with, *Gonzaga*, 536 U.S. at 284 n.4, but instead "complement[s]," public enforcement of the statute, *Abrams*, 544 U.S. at 122; *see also* Katz, *Curbing Private Enforcement of the Voting Rights Act: Thoughts on Recent Developments*, 123 Mich. L. Rev. Online at 34 (explaining that in post-1982 case law through 2024, "private plaintiffs have been party to 96.4% of Section 2 claims that produced published opinions . . . and the sole litigants in 86.7% of these decisions").

In addition, there is ample textual evidence that Congress intended for private plaintiffs to enforce Section 2.

Section 3 of the VRA, passed in 1975, 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. Because Congress enacted and amended Section 2 pursuant to its power to enforce the Fourteenth and Fifteenth Amendments, it is among the "statute[s]" to which Section 3's private remedies apply. 52 U.S.C. § 10302.

Section 12(f) of the VRA grants federal courts jurisdiction over "proceedings instituted pursuant to [Section 12 of the VRA]" and states that they "shall exercise the same without regard to whether a person asserting rights under the provisions of [the VRA] shall have exhausted any administrative or other remedies that may be provided by law." 52 U.S.C. § 10308(f). Section 12(f) applies to "chapters 103 to 107" of the VRA—*i.e.*, to all of the statute's substantive provisions. 52 U.S.C. § 10308(f). Section 12(f) reflects Congress's intent that federal courts have subject matter jurisdiction over private suits to enforce the VRA's substantive provisions, including Section 2. *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]").

Finally, Section 14(e) of the VRA similarly indicates that private plaintiffs may sue to enforce Section 2. It provides that "[i]n 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). 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 (1975); *see also* H.R. Rep. No. 97-227, at 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"); S. Rep. No. 94-295, at 40 (1975) (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 upon private citizens to enforce the fundamental rights involved").

Collectively and individually, these provisions show that far from foreclosing private enforcement, Congress has long made it explicit that Section 2 is and must be privately enforceable.

3. The Eighth Circuit erred in disregarding Section 2's rights-creating language.

Notwithstanding the plain text of the Section 2 and the text and structure of VRA as a whole, the panel majority stated that Congress had not "spoken . . . with a clear voice that manifests an unambiguous intent to confer individual rights" because "the subject of § 2's prohibition is 'any State or political subdivision,' rather than on the conferral of a right to 'any citizen,'" App.25a-26a. (quoting 52 U.S.C. § 10301(a)). But this reasoning flaunts this Court's precedents.

First, this Court has explained that references to "who it is that must respect and honor the[] statutory rights," do not undermine a statute's focus on individual rights. *Talevski*, 599 U.S. at 185. Such language "is not a material diversion" from granting individual rights. *Id.* As *Talevski* notes, even the Fourteenth Amendment—which is indisputably enforceable under Section 1983—"directs state actors not to deny equal protection." *Id.* at 185 n.12. Indeed, under the Eighth Circuit's reasoning, the First Amendment's freedom of speech and religion protections would not be enforceable under Section 1983. *See* U.S. Const. amend I ("Congress shall make no law . . . .").

Talevski itself addressed two provisions of the Federal Nursing Home Reform Act and held that they created enforceable rights. 599 U.S. at 181-82. Section 2's "focus" on States and political subdivisions is no greater than the FNHRA's focus on nursing facilities. Both statutes begin by referencing the regulated entity before acknowledging the individual rights those entities cannot infringe. *Compare, e.g.*, 52 U.S.C. § 10301(a), *with* 42 U.S.C. § 1396r(c)(1)(A)(ii). But as this Court explained in *Talevski*, "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," 599 U.S. at 185.

Second, the Eighth Circuit misunderstood and misapplied *Gonzaga*'s "unambiguous conferral" requirement. This Court has repeatedly cautioned that although Section 1983 can provide a cause of

action for statutes enacted pursuant to the Constitution's spending power, greater hesitancy is required in that context. In *Pennhurst State School & Hospital v. Halderman*, the Court explained that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." 451 U.S. 1, 28 (1981).

In *Gonzaga*, the Court considered whether the Family Educational Rights and Privacy Act ("FERPA"), also a spending power statute, could be enforced through § 1983. 536 U.S. 273, 276 (2002). In concluding that FERPA was not enforceable through Section 1983, the Court cited *Pennhurst* and explained that "[w]e made clear that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, *federal funding provisions* provide basis for private enforcement by § 1983." *Id.* at 280 (quoting *Pennhurst*, 451 U.S. at 17, 28, & n.21) (second bracket in original) (emphasis added). In *Talevski*, the Court again noted that "[f]or Spending Clause legislation in particular," it will be the "atypical" statute that will "unambiguously confer individual rights." 599 U.S. at 183 (citation modified and citation omitted). *Medina* also emphasized that "spending-power statutes" are "especially unlikely" to guarantee enforceable "rights, privileges or immunities" as opposed to "benefits or interests." 145 S. Ct. at 2229, 2230 (citations omitted).

Section 2 is, of course, not spending power legislation, but legislation enacted to enforce the Fourteenth and Fifteenth Amendments. *See* Pub. L. No. 89-110, 79 Stat. 437, 437 (1965) ("An Act . . . [t]o enforce the fifteenth amendment to the Constitution of the United States . . . ."); S. Rep. No. 97-417, at 27, 39 (1982) (explaining that Section 2 is enacted pursuant to both Fourteenth and Fifteenth Amendment enforcement powers). Indeed, like Section 1983 itself, the principal purpose of Section 2 is to guarantee "equality of rights." *Maine v. Thiboutot*, 448 U.S. 1, 7 (1980) (explaining that Congress's purpose in making statutory rights enforceable through Section 1983 was to ensure "that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute"); *see also* 52 U.S.C. § 10301(b) (providing that a violation occurs where political process is not "equally open to participation"). Because Section 2 is Reconstruction Amendment enforcement legislation, it sits comfortably in the heartland of laws properly enforceable through Section 1983. *Gonzaga*'s unambiguous conferral requirement was fashioned to police the outer boundaries of Section 1983 enforcement, and to vindicate the separation of powers by ensuring that Congress, not the Courts, takes the lead in authorizing private suits to enforce new statutory rights. *Medina,* 145 S. Ct. at 2229.

Gonzaga's unambiguous conferral requirement is superfluous here, given the Reconstruction Amendment enforcement context. Statutes enforcing

both the Fourteenth and Fifteenth Amendments are presumptively rights-creating, and therefore presumptively enforceable under Section 1983. That is so because the Reconstruction Amendments themselves necessarily prohibit state actors from "subject[ing] any citizen of the United States . . . to the deprivation of [] rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The entire premise of the Reconstruction Amendments, and enforcement legislation enacted pursuant to them, is to protect individual rights. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."); *id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). The Eighth Circuit thus erred in holding that there is some clarion level of rights-creating language that Section 2 fails to reach. Section 2's rights-creating nature could be no clearer. Ultimately, the text of Section 2 is so plainly rights-creating that it satisfies any possible version of an unambiguous conferral requirement. The Eighth Circuit's decision to the contrary is erroneous and should be reversed.

B. Section 2 is also privately enforceable through an implied right of action.

This Court's precedents also make clear that Section 2 is privately enforceable through an implied right of action. In *Morse v. Republican Party of Virginia*, five justices correctly recognized that although Section 2 "provides no right to sue on its face, 'the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965.'" 517 U.S. 186, 232 (opinion of Stevens, J., joined by Ginsburg, J.) (omission in original) (quoting S. Rep. 97-417, at 30 (1982)); *accord id.* at 240 (Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.) ("Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5.").

Decades prior, this Court held in *Allen* that despite the lack of express statutory language, private plaintiffs could enforce Section 5 of the VRA. 393 U.S. at 556-557. Given *Allen*, the Court in *Morse* recognized that Congress had similarly intended to create private rights of action to enforce Section 2, as well as the prohibition on poll taxes in Section 10 of the VRA. *See* 517 U.S. at 232-234 (opinion of Stevens, J.); *id.* at 240 (Breyer, J., concurring).

As Chief Judge Colloton explained, "[t]he *Morse* majority . . . necessarily decided that § 2 is privately enforceable as an essential analytical step in its decision that § 10 is privately enforceable." *Arkansas NAACP II*, 91 F.4th at 970 (Colloton, C.J., dissenting). Central to the *Morse* holding is that private plaintiffs

must be able to enforce Section 10 because "[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." 517 U.S. at 232 (opinion of Stevens, J.); *accord id.* at 240 (Breyer, J., concurring) (stating that *Allen*'s rationale "applies with similar force not only to § 2 but also to § 10"). Thus, the Court's decision in *Morse* that Section 2 is privately enforceable is no mere "background assumption[]" or "dicta." *Arkansas NAACP I*, 86 F.4th at 1215. Instead, the essential conclusion that private plaintiffs can enforce Section 2 undergirds the Court's reasoning, making it part and parcel of the holding in *Morse*.

Moreover, the sweep of this Court's VRA precedents leading up to *Morse* make clear how sharp and unwarranted the Eighth Circuit's departure here is. Again, beginning with *Allen*, this Court held that despite the lack of express statutory language, private plaintiffs could enforce Section 5 of the VRA. 393 U.S. at 556-557.

Allen was decided in light of the established understanding that voting rights are generally considered "private rights," principally enforced by individual voters. *United States v. Raines*, 362 U.S. 17, 27 (1960). *Allen* explains that the references to the Attorney General in the VRA "were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." 393 U.S. at 555 n.18 (quoting *Raines*, 362 U.S. at 27). Moreover, *Allen*'s holding that Section 5 is privately enforceable is not tied to any language specific to that

provision, but instead follows from the "broad purpose" of the VRA "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." 393 U.S. at 556-57.

At the time it was decided, Congress had no reason to regard *Allen*'s reasoning as any less applicable to Section 2 than to Section 5. And subsequent cases did not alter that understanding. In *City of Mobile v. Bolden*, this Court assumed the existence of a private right of action to enforce Section 2. 446 U.S. 55, 60-61 (1980). When Congress amended Section 2 in response to *Bolden* to make clear that proof of discriminatory intent is not necessary to establish a violation of the statute, there was thus no need to expressly provide a private right of action. Instead, in the 1982 Senate Report that this Court has called the "authoritative source for legislative intent" regarding Section 2, *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986), Congress simply "reiterate[d] the existence of the private right of action under section 2." S. Rep. No. 97-417, at 30 (1982); *see* H.R. Rep. No. 97-227, at 32 (1981).

This Court's decision in *Gingles*—a case brought by private plaintiffs—continued to reflect the understanding that Section 2 is privately enforceable. *See* 478 U.S. at 50-52 (describing what "the minority group must be able to demonstrate" to establish a Section 2 violation—language that is inconsistent enforcement only by the Attorney General). Likewise, Congress had no need to codify a private right for Section 2 when it amended the Voting Rights Act in 2006 because, by that point, the Court had explicitly

concluded that the statute is privately enforceable. *Morse*, 517 U.S. at 232; *accord id.* at 240 (Breyer, J., concurring).

Statutory stare decisis thus compels this Court to adhere to the reasoning of the majority of justices in *Morse*. "Congress is undoubtedly aware of [this Court] construing § 2 to [be privately enforceable]. It can change that if it likes. But until and unless it does, statutory stare decisis counsels [this Court] staying the course." *Milligan*, 599 U.S. at 39. Congress has never questioned the view that Section 2 is privately enforceable. Since *Morse*, Congress has twice amended Section 2 and made no attempt to cabin private enforcement. "Congress is presumed to . . . adopt" preexisting judicial interpretations "when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009) (citation omitted). "[T]he stare decisis standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict." *Milligan*, 599 U.S. at 42 (Kavanaugh, J., concurring). Accordingly, the Court need not reach beyond its prior holding in *Morse* to decide that Section 2 is privately enforceable.

III. This case presents an excellent vehicle for review.

This case presents an excellent vehicle for this Court's review. The Eighth Circuit alone has created the sharp circuit split. While other states are attempting to follow the path carved by Arkansas and North Dakota, no other court of appeals nor three-

judge district court has followed the Eighth Circuit's erroneous reasoning and held that private plaintiffs cannot enforce Section 2. As such, while Mississippi and Alabama are raising this issue on this Court's mandatory docket, *see supra* at 24, it will not come in the same posture, as the three-judge courts there rejected the States' arguments. Addressing the question in this case will necessarily and most easily allow this Court to fully address the reasoning of the court of appeals that created the split.

CONCLUSION

For the foregoing reasons, the petition should be granted.

September 2, 2025

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JULY 10, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Appellees,

v.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Appellant,

NORTH DAKOTA LEGISLATIVE ASSEMBLY, *et al.*

STATE OF ALABAMA, *et al.*,

Amici on Behalf of Appellants,

NATIONAL CONGRESS OF AMERICAN INDIANS, *et al.*,

Amici on Behalf of Appellees.

Filed July 10, 2025

Appendix A

Appeal from U.S. District Court
for the District of North Dakota - Eastern
(3:22-cv-00022-PDW)

REVISED ORDER

Before COLLOTON, Chief Judge, GRUENDER, and KOBES, Circuit Judges.

Appellees' motion to stay the mandate is denied. Chief Judge Colloton would grant the motion.

July 10, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/_____
Susan E. Bindler

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JULY 3, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Appellees,

v.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Appellant,

NORTH DAKOTA LEGISLATIVE ASSEMBLY, *et al.*

STATE OF ALABAMA, *et al.*,

Amici on Behalf of Appellant,

NATIONAL CONGRESS OF AMERICAN INDIANS, *et al.*,

Amici on Behalf of Appellees.

Filed July 3, 2025

Appendix B

Appeal from U.S. District Court
for the District of North Dakota - Eastern
(3:22-cv-00022-PDW)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Chief Judge Colloton, Judge Smith, and Judge Kelly would grant the petition for rehearing en banc.

Judge Erickson did not participate in the consideration or decision of this matter.

July 3, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/_____
Susan E. Bindler

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MAY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS; SPIRIT LAKE TRIBE; WESLEY DAVIS; ZACHERY S. KING; COLLETTE BROWN,

Plaintiffs-Appellees,

v.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Defendant-Appellant,

NORTH DAKOTA LEGISLATIVE ASSEMBLY; WILLIAM R. DEVLIN, REPRESENTATIVE ALSO KNOWN AS BILL DEVLIN; SENATOR RAY HOLMBERG, REPRESENTATIVE; SENATOR RICHARD WARDNER, REPRESENTATIVE; SENATOR NICOLE POOLMAN, REPRESENTATIVE; MICHAEL NATHE, REPRESENTATIVE; TERRY JONES, REPRESENTATIVE; CLAIRE NESS, SENIOR COUNSEL AT THE NORTH DAKOTA LEGISLATIVE COUNCIL,

Movants,

Appendix C

STATE OF ALABAMA; STATE OF FLORIDA;
STATE OF GEORGIA; STATE OF IOWA;
STATE OF KANSAS; STATE OF LOUISIANA;
STATE OF MISSISSIPPI; STATE OF MISSOURI;
STATE OF MONTANA; STATE OF NEBRASKA;
STATE OF SOUTH CAROLINA; STATE OF
SOUTH DAKOTA; STATE OF TEXAS;
STATE OF UTAH; STATE OF WEST VIRGINIA,

Amici on Behalf of Appellant(s),

NATIONAL CONGRESS OF AMERICAN INDIANS;
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW; UNITED STATES OF AMERICA;
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.,

Amici on Behalf of Appellee(s).

Filed May 14, 2025

Appeal from U.S. District Court for the
District of North Dakota - Eastern
(3:22-cv-00022-PDW)

JUDGMENT

Before COLLOTON, Chief Judge, GRUENDER, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

Appendix C

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

May 14, 2025

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MAY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-3655

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS; SPIRIT LAKE TRIBE; WESLEY DAVIS; ZACHERY S. KING; COLLETTE BROWN,

Plaintiffs-Appellees,

v.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Defendant-Appellant,

NORTH DAKOTA LEGISLATIVE ASSEMBLY; WILLIAM R. DEVLIN, REPRESENTATIVE ALSO KNOWN AS BILL DEVLIN; SENATOR RAY HOLMBERG, REPRESENTATIVE; SENATOR RICHARD WARDNER, REPRESENTATIVE; SENATOR NICOLE POOLMAN, REPRESENTATIVE; MICHAEL NATHE, REPRESENTATIVE; TERRY JONES, REPRESENTATIVE; CLAIRE NESS, SENIOR COUNSEL AT THE NORTH DAKOTA LEGISLATIVE COUNCIL,

Movants,

Appendix D

STATE OF ALABAMA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF IOWA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF WEST VIRGINIA,

Amici on Behalf of Appellant(s),

NATIONAL CONGRESS OF AMERICAN INDIANS; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; UNITED STATES OF AMERICA; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,

Amici on Behalf of Appellee(s).

Appeal from United States District Court
for the District of North Dakota - Eastern

Submitted: October 22, 2024
Filed: May 14, 2025

Before COLLOTON, Chief Judge, GRUENDER and KOBES, Circuit Judges.

GRUENDER, Circuit Judge.

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023),

reh'g denied, 91 F.4th 967 (8th Cir. 2024), we held that § 2 of the Voting Rights Act ("the Act") does not provide for an implied private right of action to remedy certain voting guarantees contained in the Act. The question before us today is whether private plaintiffs can instead maintain a private right of action for alleged violations of § 2 through 42 U.S.C. § 1983. We answer this question in the negative and vacate the judgment of the district court.

I.

In 2021, Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, and three individual Native American voters sued North Dakota's Secretary of State ("the Secretary") under § 2 of the Act and 42 U.S.C. § 1983, alleging that the State's 2021 redistricting diluted Native American voting strength in violation of § 2 of the Act. Section 2 prohibits "vote dilution," which occurs when the voting strength of a politically cohesive minority group is diluted by either (1) unlawfully packing one district with a supermajority of the minority or (2) dividing the minority group among several districts so that the majority bloc outnumbers the minority group in each of the districts. *See Voinovich v. Quilter*, 507 U.S. 146, 153-54, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993). Specifically, § 2 provides that:

> (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 of the United States to vote on account of race

> or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).[1]
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

The Secretary filed a motion to dismiss the complaint, asserting that the private plaintiffs lacked a cause of action. The Secretary argued that § 2 did not permit a private right of action and that the private plaintiffs

1. Section 10303(f)(2) states that "[n]o 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 because he is a member of a language minority group."

could not use § 1983 as an end around to bring claims for alleged § 2 violations. The district court declined to decide whether § 2, standing alone, contained an implied private right of action.[2] Instead, the district court concluded that the plaintiffs could enforce § 2 of the Act through § 1983 and, on that basis, denied the motion to dismiss.

After denying the Secretary's motion to dismiss, the case proceeded to a bench trial. On November 17, 2023, the district court ruled that the 2021 redistricting map violated § 2 and permanently enjoined the Secretary from "administering, enforcing, preparing for, or in any way permitting the nomination or election" of candidates in several legislative districts. The district court ordered that a remedial map be drawn and gave North Dakota's Legislative Assembly ("the Assembly") approximately one month to adopt one. After the Assembly failed to adopt a remedial map by the court-imposed deadline, the district court ordered that the Assembly adopt the plaintiffs' proposed map for the November 2024 election. The plaintiffs' map combined two distinct Native American tribal reservations into a single, elongated district that stretched diagonally across northeast North Dakota.

The Secretary appeals, arguing that the district court erred in finding that private plaintiffs could enforce § 2 of the Act through § 1983. In addition, the Secretary argues that the district court erred in finding that the 2021 redistricting map violated § 2.

---

2. At the time of the district court's decision, we had not yet considered whether § 2 of the Act is privately enforceable. We have since held that private plaintiffs do not have the ability to sue under § 2. *See Ark. State Conf.*, 86 F.4th 1204.

Appendix D

II.

To understand the context of § 2, we must examine the Act's historical background. We begin with the Fifteenth Amendment, which was ratified in 1870. It guarantees that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and gives to Congress the "power to enforce [the Amendment] by appropriate legislation." U.S. Const. amend. XV.

Despite its enactment, some States flagrantly disregarded the Fifteenth Amendment by instituting measures that disenfranchised minority voters. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). Congress attempted to cure the problem of racial discrimination in voting by enacting new laws. *Id.* at 313. One such law was the Civil Rights Act of 1871. That statute "created the federal cause of action now codified as § 1983." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 177, 143 S. Ct. 1444, 216 L. Ed. 2d 183 (2023). In relevant part, § 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, § 1983 provides a cause of action for private plaintiffs seeking to enforce the Fifteenth Amendment. *See, e.g., United States v. Raines*, 172 F. Supp. 552, 556 (M.D. Ga. 1959), *rev'd on other grounds*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) ("[T]he self executing ban of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor." (internal quotation marks omitted)). Another law that Congress enacted to cope with the problem of racial discrimination was the Civil Rights Act of 1964, which outlawed certain tactics used by States to disqualify minorities from voting in federal elections. *Katzenbach*, 383 U.S. at 313.

Congress's new laws, however, did little to protect voters prior to disenfranchisement, and after the fact litigation proved to be too costly and time consuming. *Id.* at 314. As a result, "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of [the] country through unremitting and ingenious defiance of the Constitution," and it "concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." *Id.* at 309.

Congress responded by passing the Voting Rights Act in 1965 to "banish the blight of racial discrimination in voting." *Id.* at 308. The Act "create[d] stringent new remedies for voting discrimination where it persist[ed] on a pervasive scale," and "Congress assumed the power to prescribe these remedies from . . . the Fifteenth Amendment." *Id.* As originally enacted, § 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 or color." Section 2 "had little independent force because it was a mirror image of the Fifteenth Amendment: each prohibited intentional discrimination." *Ark. State Conf.*, 86 F.4th at 1208 (internal quotation marks omitted). However, § 2 paired with § 12 did something new: together, the provisions granted the Attorney General the power to bring civil suits for injunctive and other relief against State and local officials who violated § 2. 52 U.S.C. § 10308(d). Accordingly, private plaintiffs maintained the ability to bring a § 1983 lawsuit to enforce the Fifteenth Amendment, while the Attorney General was invested with authority under § 12 of the Act to enforce the rights guaranteed by the Fifteenth Amendment.

Fifteen years later, the Supreme Court considered in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), whether a § 2 violation required discriminatory purpose or intent. Private plaintiffs claimed that the City of Mobile had a practice of unfairly diluting the voting strength of minorities in violation of § 2 of the Act, the Fourteenth Amendment, and the Fifteenth Amendment. *Id.* at 58 (plurality opinion). The plurality opinion for four Justices declined to address the § 2 claim as separate from the Fifteenth Amendment claim because, even "[a]ssuming . . . that there exist[ed] a private right of action[,] . . . it [was] apparent that the language of § 2 no more than elaborate[d] upon that of the Fifteenth Amendment." *Id.* at 60. "The plurality then observed

that prior decisions had made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 658, 141 S. Ct. 2321, 210 L. Ed. 2d 753 (2021) (internal quotation marks and alteration omitted). Thus, *Bolden* "confirmed what many already thought: without purposeful exclusion of voters from the political process, there was no § 2 or Fifteenth Amendment violation." *Ark. State Conf.*, 86 F.4th at 1208 (internal quotation marks omitted).

In 1982, Congress amended § 2 in response to *Bolden*. *See Chisom v. Roemer*, 501 U.S. 380, 393, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991). Congress replaced the language "to deny or abridge" with "in a manner which results in a denial or abridgement," and added subsection (b). *Id.* at 393-94. "The two purposes of the amendment are apparent from its text." *Id.* at 395; *Brnovich*, 594 U.S. at 658 ("The oft-cited Report of the Senate Judiciary Committee accompanying the 1982 Amendment stated that the amendment's purpose was to repudiate *Bolden* and establish a new vote-dilution test."). The amended version of subsection (a) "adopts a results test, thus providing that proof of discriminatory intent is no longer necessary to establish *any* violation of that section." *Chisom*, 501 U.S. at 395. And subsection (b) "provides guidance about how the results test is to be applied." *Id.* In changing the evidentiary bar required to prove a § 2 violation, Congress made it easier to prevail under § 2 than under the Fifteenth Amendment. "Congress took no action, however, to clarify *who* [could] sue under § 2."

Ark. State Conf., 86 F.4th at 1208.

For decades, courts assumed that an implied private right of action existed under § 2 to enforce alleged violations of the Act. *See id.* at 1219 n.8 (Smith, J., dissenting) ("[S]ince 1982, more than 400 Section 2 cases have been litigated in federal court [under an assumed private right of action]."). In *Arkansas State Conference*, this court considered a challenge to that assumption. After reviewing the text, history, and structure of the Act, we concluded that § 2 does not permit an implied private right of action. *Id.* at 1207 (majority opinion). We declined to address whether the private plaintiffs could instead maintain a private right of action for alleged violations of § 2 through § 1983, as "the plaintiffs did *not* plead a § 1983 claim, brief it [in the district court], or request leave to add it, even after being put on notice of the possible deficiency in their original complaint." *Ark. State Conf.*, 91 F.4th at 967 (Stras, J., concurring in the denial of rehearing) (internal quotation marks and alterations omitted). The private plaintiffs in this case, however, properly brought the § 1983 issue before the court, and it is this issue which we address today.

III.

We review *de novo* whether a plaintiff has a cause of action. *Buckley v. Hennepin Cnty.*, 9 F.4th 757, 760 (8th Cir. 2021). Section 1983 provides a cause of action to any citizen deprived by a person acting under color of state law of "any rights . . . secured by the Constitution and laws." A cause of action does not exist under § 1983

merely because a state official has violated a federal statute. *Frison v. Zebro*, 339 F.3d 994, 998 (8th Cir. 2003). "This is because in order to seek redress through § 1983, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id.* (internal quotation marks and alterations omitted); *see Talevski*, 599 U.S. at 183 ("Although federal statutes have the potential to create § 1983-enforceable rights, they do not do so as a matter of course.").

In *Gonzaga University v. Doe*, 536 U.S. 273, 283-84, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002), the Supreme Court set forth a two-step process for determining whether a cause of action exists under § 1983. The first step requires a court to determine whether Congress intended to create "new rights enforceable under § 1983." *Id.* at 290. The Court has stated that nothing short of an "unambiguously" conferred individual right would support a cause of action brought under § 1983. *Id.* at 283. This is a "stringent" standard and only the "atypical case" will surmount the "significant hurdle." *Talevski*, 599 U.S. at 183-84, 186. The "touchstone" for determining whether a provision unambiguously confers a new individual right is "congressional intent," which we discern from the text and structure of the statute. *Frison*, 339 F.3d at 999.

A statute unambiguously confers an individual right when it is phrased "with an *unmistakable focus* on the benefited class." *Gonzaga*, 536 U.S. at 284. Conversely, a plaintiff asserts only a violation of federal law when the statute "focus[es] on the person regulated" or "the agencies that . . . regulat[e]," rather than on the

"individuals protected." *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). In the latter case, a plaintiff merely "falls within the general zone of interest that the statute is intended to protect." *Gonzaga*, 536 U.S. at 283. If a plaintiff demonstrates that the statute at issue confers a federal right, then that "right is presumptively enforceable by § 1983." *Id.* at 284. *Gonzaga*'s second step allows a defendant to "rebut this presumption by showing that Congress specifically foreclosed a remedy under § 1983." *Id.* at 284 n.4 (internal quotation marks omitted).

In *Arkansas State Conference*, we carefully examined the text and structure of the Act and determined that § 2 did not satisfy the first step of *Gonzaga*. 86 F.4th at 1209-10. The question in *Arkansas State Conference* was whether § 2 contained an implied private right of action, which is admittedly a different inquiry than whether a statutory violation may be enforced through § 1983. *See Gonzaga*, 536 U.S. at 283. "But the inquiries overlap in one meaningful respect—in either case we must *first* determine whether Congress *intended to create a federal right*." *Id.* (first emphasis added); *see id.* at 290 ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."). The Supreme Court has emphasized that, in both the implied right of action context and the § 1983 context, the "*initial* inquiry" is determining whether the statute confers any right at all. *Id.* at 285 (emphasis added); *see City of Rancho Palos Verdes v. Abrams*, 544

U.S. 113, 119, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (referring to *Gonzaga*'s first step as the "threshold" inquiry). It is thus unnecessary to undertake an independent analysis of *Gonzaga*'s first step given that *Arkansas State Conference* has already decided the issue.[3] We need only recite and elaborate upon our decision there.

We recognized in *Arkansas State Conference* that certain language in § 2 "unmistakably focuses on the benefited class" in that the very first sentence refers to the "right of any citizen." 86 F.4th at 1210 (alterations omitted). In this fashion, § 2 contains elements similar to those statutes which the Supreme Court has held unambiguously confer individual rights. Take, for example, Title VI of the

3. The plaintiffs contend that the relevant statements in *Arkansas State Conference* are *dicta* because the court went on to address the private remedy issue. The court discussed the private remedy issue to bolster the conclusion it had already reached with respect to the first step of *Gonzaga*—that § 2 does not provide for an implied private right of action. *See Osher v. City of St. Louis*, 903 F.3d 698, 703 (8th Cir. 2018) (discussing the private remedy issue even though the court had already concluded that the first step of *Gonzaga* was not met). In addition, the United States as *amici* argues that the statements are *dicta* because the court declined to address the § 1983 issue. The court did not address the § 1983 issue because "the plaintiffs did *not* plead a § 1983 claim, brief it [in the district court], or request leave to add it, even after being put on notice of the possible deficiency in their original complaint." *Ark. State Conf.*, 91 F.4th at 967 (Stras, J., concurring in the denial of rehearing) (internal quotation marks and alterations omitted). Even on appeal, "only a single footnote in one of the briefs mention[ed] the possibility." *Ark. State Conf.*, 86 F.4th at 1218.

Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 ("No person . . . shall . . . be subjected to discrimination"), which contain "explicit right-or duty-creating language" in that they focus on the "individuals protected." *Gonzaga*, 536 U.S. at 284 n.3, 287 (internal quotation marks omitted). However, we also found that the gravamen of § 2 is a proscription of discriminatory conduct, with the very subject of its prohibition being "any State or political subdivision." 52 U.S.C. § 10301(a); *see Ark. State Conf.*, 86 F.4th at 1209 (noting that the opening passage of § 2 "is a general proscription of discriminatory conduct, not a grant of a right to any identifiable class" (internal quotation marks and citations omitted)). Provisions that focus on the persons or entities regulated do "not confer the sort of *individual* entitlement that is enforceable under § 1983." *Gonzaga*, 536 U.S. at 287 (internal quotation marks omitted).

In *Gonzaga*, the Supreme Court examined the nondisclosure provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *Id.* In relevant part, FERPA directs the Secretary of Education to enforce that: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency or organization." 20 U.S.C. § 1232g(b)(1). Even though FERPA as a whole contains numerous references to "rights," the Court held that FERPA's nondisclosure provisions "lack the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." *Gonzaga*, 536

U.S. at 287 (internal quotation marks omitted); *see* 20 U.S.C. § 1232g. This is because a "focus on the states as regulated entities evinces . . . a degree of removal from the interests of the [individuals]." *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1199 (8th Cir. 2013). Here, § 2's prohibition prevents "any State or political subdivision" from imposing an improper voting qualification or prerequisite, while in *Gonzaga*, the prohibition prevented the Secretary of Education from disbursing funds under certain conditions.

We thus determined that § 2 "focuses on both" the individuals protected and the entities regulated. *Ark. State Conf.*, 86 F.4th at 1210. Given this dual focus on the individuals protected and the entities regulated, we concluded that "[i]t is unclear whether § 2 creates an individual right." *Id.* at 1209. The parties spar over the meaning of this particular language. However, the court's conclusion naturally follows from the recognition that Congress did not speak with a "clear voice" that manifests an "unambiguous" intent to confer individual rights. *Gonzaga*, 536 U.S. at 280. As this court has previously held, "[w]here structural elements of the statute and language in a discrete subsection give mixed signals about legislative intent, Congress has not spoken—as required by *Gonzaga*—with a clear voice that manifests an unambiguous intent to confer individual rights." *Doe v. Gillespie*, 867 F.3d 1034, 1043 (8th Cir. 2017) (internal quotation marks and citation omitted); *see id.* at 1045 ("Conflicting textual cues are insufficient."); *see also Carey v. Throwe*, 957 F.3d 468, 483 (4th Cir. 2020) ("To the extent [the *Gonzaga*] standard permits a gradation,

we think it sound to apply its most exacting lens when inferring a private remedy would upset the usual balance of state and federal power."). Accordingly, we conclude that the plaintiffs are within the general zone of interest that the statute is intended to protect, without the statute having unambiguously conferred an individual right.[4]

The plaintiffs raise several arguments against this conclusion, all of which we find unpersuasive. First, the plaintiffs argue that *Arkansas State Conference* is inconsistent with *Talevski*. Two statutory provisions were at issue in *Talevski*. One provision provides: "A nursing facility must protect and promote the rights of each resident, including . . . [t]he right to be free from . . . any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. § 1396r(c)(1)(A)(ii). The other provides: "A nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility" unless one of several enumerated exceptions is met. *Id.* § 1396r(c)(2)(A). The exceptions focus on the individual residents—

4. We do not decide the Secretary's additional arguments that § 2 does not unambiguously confer a new individual right because (1) it has an aggregate, rather than an individual, focus and (2) any right conferred is not "new." We also do not decide the fifteen States' argument as *amici* that § 2 creates new *remedies* enforceable by the Attorney General, not new *rights* enforceable by private plaintiffs. Furthermore, because we conclude that the statute at issue does not satisfy the first step of *Gonzaga*, we decline to address whether Congress specifically foreclosed a remedy under § 1983.

for example, one exception allows for transfer or discharge when it is "necessary to meet the resident's welfare." *Id.* And even when a transfer or discharge is to be effected, the provision states that the nursing facility must give the residents at least thirty days' notice unless *inter alia* "the resident's health improves" or "the resident's urgent medical needs" necessitate an earlier discharge. *Id.* § 1396r(c)(2)(B). The Court determined that these provisions contain "right-screating, individual-centric language with an unmistakable focus on the benefited class." *Talevski*, 599 U.S. at 183 (internal quotation marks omitted).

The plaintiffs argue that *Talevski* mandates a contrary outcome because the Court there stated that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Id.* at 185. The plaintiffs' argument, however, fails to recognize that the Court's reference to regulated parties merely acknowledged that those regulated parties were not a focus of the statutory provisions at issue in that case. As the Court found in *Talevski*, a statute's reference to regulated parties does not undermine a statute's focus on individual rights when it does not cause a "material diversion" from that focus. *Id.*; *see also Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 165 (4th Cir. 2024), *cert. granted in part*, 145 S. Ct. 1000, 220 L. Ed. 2d 372 (2024) (concluding that a statutory provision that focuses on "discrete beneficiaries"—and which does not also focus on the regulated entities—creates individual rights enforceable via § 1983). We did not suggest in

Arkansas State Conference that § 2 of the Act fails to secure individual rights simply because it mentions States and political subdivisions. Rather, the plain text of § 2 "focuses" on the States and political subdivisions. *Ark. State Conf.*, 86 F.4th at 1210. Indeed, the subject of § 2's prohibition is "any State or political subdivision," rather than on the conferral of a right to "any citizen." 52 U.S.C. § 10301(a); *see Ark. State Conf.*, 86 F.4th at 1209 ("The opening passage [of § 2] focuses on what states and political subdivisions cannot do, which is impose or apply discriminatory voting laws." (internal quotation marks and alterations omitted)). And § 2's historical background suggests that the "right of any citizen" in § 2 merely parrots a preexisting right guaranteed by the Fifteenth Amendment. *See* U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). *Arkansas State Conference* is therefore not inconsistent with *Talevski*.

Second, the plaintiffs suggest that § 2 must automatically confer an individual right because it contains the language "the right of any citizen . . . to vote" and "members of a class of citizens protected by subsection (a)." The Supreme Court has rejected the notion that the mere use of the word "right" in a statute is sufficient in and of itself to discern an unambiguous intent to confer individual rights. *See Gonzaga*, 536 U.S. at 289 n.7 (rejecting the dissent's suggestion that "any reference to 'rights,' . . . should give rise to a statute's enforceability under § 1983"). Instead, courts must "analyze the statutory provisions in detail,

in light of the entire legislative enactment, to determine whether the language in question created enforceable rights . . . within the meaning of § 1983." *Suter v. Artist M.*, 503 U.S. 347, 357, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992) (internal quotation marks omitted). We ask whether "Congress intended to create a federal right *for* the identified class, not merely that the plaintiffs fall within the general zone of interest that the statute is intended to protect." *Talevski*, 599 U.S. at 183 (internal quotation marks omitted). Section 2 focuses on both the entities regulated and "any citizen." 52 U.S.C. § 10301(a). And we have held that "[w]here structural elements of the statute and language in a discrete subsection give mixed signals about legislative intent, Congress has not spoken—as required by *Gonzaga*—with a clear voice that manifests an unambiguous intent to confer individual rights." *Gillespie*, 867 F.3d at 1043 (internal quotation marks and citation omitted). Thus, the mere reference to "right of any citizen" and "members of a class of citizens protected by subsection (a)" does not by itself unambiguously confer an individual right. 52 U.S.C. § 10301.

Third, the plaintiffs argue that *Gonzaga* only applies to statutes enacted under the Spending or Commerce Clauses. The Supreme Court, however, has not limited *Gonzaga*'s applicability to statutes enacted pursuant to the Spending or Commerce Clauses. *See McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005) ("Any possibility that *Gonzaga* is limited to statutes that rest on the spending power (as the law in *Gonzaga* did) has been dispelled by *Abrams*, 544 U.S. at 125, which treats *Gonzaga* as establishing the effect of § 1983 itself."). Rather, the Court

has applied the *Gonzaga* test in broadly applicable terms. For example, in *Talevski*, the Court cited *Gonzaga* for the proposition that it had "crafted a test for determining whether a particular federal law actually secures rights for § 1983 purposes." 599 U.S. at 175. The Court nowhere indicated that *Gonzaga*'s applicability was confined to the Spending or Commerce Clauses. Moreover, other circuits have applied *Gonzaga* outside of these two contexts. *See Vote.Org v. Callanen*, 89 F.4th 459, 474 (5th Cir. 2023) (applying *Gonzaga* to the Materiality Provision); *Schwier v. Cox*, 340 F.3d 1284, 1296-97 (11th Cir. 2003) (applying *Gonzaga* to § 1971 of the Voting Rights Act). Accordingly, we reject the plaintiffs' contention that *Gonzaga* only applies to statutes enacted under the Spending or Commerce Clauses.

Because § 2 does not unambiguously confer an individual right, the plaintiffs do not have a cause of action under 42 U.S.C. § 1983 to enforce § 2 of the Act. The district court erred in finding otherwise, and we need not decide whether the district court erred in concluding that the 2021 redistricting map violated § 2 of the Act.

IV.

For the foregoing reasons, we vacate the judgment of the district court and remand with instructions that the case be dismissed for want of a cause of action.

COLLOTON, Chief Judge, dissenting.

The essence of a claim under § 2 of the Voting Rights Act "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). Since 1982, private plaintiffs have brought more than 400 actions based on § 2 that have resulted in judicial decisions. The majority concludes that all of those cases should have been dismissed because § 2 of the Voting Rights Act does not confer a voting right. Consistent with all other courts to address the issue, I conclude that § 2 confers an individual right and that the enforcement scheme described in the Act is not incompatible with private enforcement under 42 U.S.C. § 1983. Because the district court did not clearly err in ruling that the plaintiffs met their burden to establish a violation of § 2, I would affirm the judgment.

I.

Section 1983 provides a cause of action for persons who are subjected to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The reference to "and laws" encompasses any law of the United States. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 174-80, 143 S. Ct. 1444, 216 L. Ed. 2d 183 (2023). A principal purpose of including "and laws" in § 1983 was to "ensure that federal legislation providing specifically for equality of rights would be brought within

the ambit of the civil action authorized by that statute." *Maine v. Thiboutot*, 448 U.S. 1, 7, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) (quoting *Chapman v. Hous. Welfare Rts. Org.*, 441 U.S. 600, 637, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979) (Powell, J., concurring)).

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). We examine the text and structure of a statute to determine whether Congress intended to confer an individual right. The Secretary argues that § 2 confers no individual right, and that a remedy under § 1983 is not available.

In *Gonzaga*, which involved a statute enacted pursuant to Congress's spending power, the Court held that nothing short of an unambiguously conferred right is enforceable under § 1983. *Id.* at 283. The Court explained that the "typical remedy" for a State's noncompliance with federally imposed conditions in spending laws is not a private cause of action but termination of funding by the federal government. *Id.* at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)). The Court also observed that where "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 286 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)).

Appendix D

The plaintiffs argue that the unambiguous conferral rule of *Gonzaga* should not apply to legislation like the Voting Rights Act that was enacted under Congress's power to enforce the Fifteenth Amendment. *Gonzaga* involved a statute enacted under Congress's spending power, and "§ 1983 actions are the exception—not the rule—for violations of Spending Clause statutes." *Talevski*, 599 U.S. at 193-94 (Barrett, J., concurring). But the federalism concerns that animated the Court's decisions on § 1983 and the Spending Clause do not have the same force here, because the Reconstruction Amendments already altered the constitutional balance by limiting the power of the States and enlarging the power of Congress. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 454, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). There is thus reason to question whether courts should apply a substantive canon requiring unmistakable clarity when interpreting laws enacted under the Fourteenth and Fifteenth Amendments. Why not simply implement the statute as written based on traditional tools of statutory interpretation?

It is unnecessary to pursue that inquiry further in this case, because even applying the unambiguous conferral rule of *Gonzaga*, it is clear that Congress in § 2 of the Voting Rights Act intended to confer a voting right. Subsection (a) of § 2 expressly forbids "a denial or abridgement of *the right of any citizen of the United States to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Subsection (b) then defines a violation of § 2 by reference to "members of a class of citizens protected by subsection (a)" and "members of a protected

class." *Id.* § 10301(b). The statute explicitly uses the term "right" to describe duties that a defined party ("State or political subdivision") owes to a particular individual ("any citizen"). *See Talevski*, 599 U.S. at 231 (Alito, J., dissenting).

As a three-judge district court explained last year after comprehensive analysis, "every sentence of Section Two either refers to rights of the benefited class, contains rights-creating language that creates new rights for that specific class, or expressly focuses on the benefited class." *Singleton v. Allen*, 740 F. Supp. 3d 1138, 1158 (N.D. Ala. 2024). Other courts likewise have recognized that § 2 includes clear rights-creating language and is enforceable under § 1983. *Coca v. City of Dodge City*, 669 F. Supp. 3d 1131, 1141-42 (D. Kan. 2023) ("Not only does Section 2 contain clear rights-creating language—a legal position thus far unquestioned by any members of the Supreme Court—but it also does not contain a comprehensive enforcement scheme incompatible with individual enforcement."); *Turtle Mt. Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2022 U.S. Dist. LEXIS 120070, 2022 WL 2528256, at *5 (D.N.D. July 7, 2022) ("It is difficult to imagine more explicit or clear rights creating language."); *League of United Latin Am. Citizens v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 U.S. Dist. LEXIS 231524, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court).

The Secretary resists this straightforward conclusion on several grounds. None is persuasive.

The Secretary contends that § 2 does not confer a voting right because it purportedly focuses on the entities regulated rather than the individuals protected. That § 2 forbids a State or political subdivision to impose certain voting procedures, however, does not negate the clear congressional intent to confer a voting right on members of what the statute describes as a protected class. The Supreme Court rejected the same argument in *Talevski*, where the statute at issue declared what a nursing facility must do to protect rights secured by the statute. *See* 42 U.S.C. § 1396r(c)(1)(A), (B), (2)(A), (B)(i) ("A nursing facility must . . . ."). The Court explained that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Talevski*, 599 U.S. at 185.

When the Supreme Court in an earlier case referred to statutes that "focus on the person regulated rather than the individuals protected," the Court described a provision that included no rights-creating language and was twice removed from the individuals who would benefit from the statutory protection. *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). By contrast, § 2 explicitly uses the phrase "right of any citizen of the United States to vote" and repeatedly focuses on the benefited class. Unlike *Doe v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), where a statute's reference to an individual was "nested within one of eighty-three subsections" and "two steps removed from the Act's focus on which state plans *the Secretary*" was required to approve, there are no "mixed signals" in § 2. *Id.* at 1042-43.

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Congress manifested the same intent in another provision of the Voting Rights Act, often called the Materiality Provision. That subsection, structured like § 2, provides that "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 . . . [that] is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Two circuits have rejected an argument comparable to the position advanced by the Secretary in this case: "although '[t]he subject of the sentence is the person acting under color of state law, . . . the focus of the text is nonetheless the protection of each individual's right to vote.'" *Vote.org v. Callanen*, 89 F.4th 459, 475 (5th Cir. 2023) (alterations in original) (quoting *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003)). *Schwier* anticipated the Supreme Court's insight in *Talevski*; *Vote.org* followed *Talveski*'s example. 89 F.4th at 474 & n.3. For the same reasons, § 2 unambiguously confers an individual voting right despite Congress's identification of the regulating entities as the subject of the provision.

The majority concludes that no analysis of the statute is necessary because this court supposedly decided in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), that § 2 of the Voting Rights Act does not confer an individual voting right. This conclusion misreads dicta in *Arkansas State Conference*. That decision held only that § 2 does not provide a private remedy. *Id.* at 1210-17. The panel was agnostic about whether § 2 confers a private right.

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The *Arkansas State Conference* opinion includes four inconclusive paragraphs in Part III.A about whether § 2 confers an individual right. *Id.* at 1209-10. The opinion makes plain that the court did not decide the issue. The first sentence of the discussion says it "is *unclear whether* § 2 creates an individual right." *Id.* at 1209 (emphasis added). The last sentence says it "is *unclear what to do* when a statute focuses on both" individuals who are protected and entities that are regulated. *Id.* at 1210 (emphasis added). After declining to decide whether § 2 confers an individual right, the panel skipped over that non-jurisdictional question and decided the case on another ground.

Arkansas State Conference thus contains only indeterminate dicta about whether § 2 confers an individual right, and ill-considered dicta at that. In professing that it is "unclear what to do when a statute focuses on both" a rights-holder and a regulated entity, the decision ignored *Talevski*. Several months before the decision in *Arkansas State Conference*, the Supreme Court explained that where statutory provisions confer a right with an "unmistakable focus on the benefited class," but "also establish who it is that must respect and honor these statutory rights," there is no "material diversion from the necessary focus" on the rights-holders. 599 U.S. at 185-86 (internal quotation omitted). For the reasons discussed, § 2 confers an individual voting right, and dicta in *Arkansas State Conference* present no barrier to this panel reaching the correct conclusion.

The Secretary next contends that § 2 has an "aggregate focus" and protects only "collective" rights. But the statute

protects the individual right of "any citizen," and "the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (quoting *Shaw v. Hunt*, 517 U.S. 899, 917, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996)). That a statute includes an "unmistakable focus on the benefited class" does not alter the individual rights-creating nature of the statute. *Talevski*, 599 U.S. at 186 (internal quotation omitted).

The Secretary also maintains that § 2 does not confer an individual right because it allegedly repeats the same protection already secured by the Fifteenth Amendment. The majority refutes that argument: "In changing the evidentiary bar required to prove a § 2 violation, Congress made it easier to prevail under § 2 than under the Fifteenth Amendment." *Ante*, at 7. In any event, potential overlap with the Fifteenth Amendment does not remove rights conferred by § 2 from the scope of "any rights . . . secured by the Constitution and laws." 42 U.S.C. § 1983. The plain language of § 1983 encompasses such a right, and the Supreme Court has recognized that § 5 and § 10 of the Voting Rights Act confer individual rights (and rights of action) despite a comparable grounding in the Fifteenth Amendment. *Morse v. Republican Party of Va.*, 517 U.S. 186, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969); *see Singleton*, 740 F. Supp. 3d at 1161-62.

Where, as here, Congress conferred a right on individuals, there is a presumption that Congress intended

for the right to be enforceable under § 1983. The Secretary next contends, however, that the Voting Rights Act includes a comprehensive enforcement scheme that implies a congressional intent to preclude private enforcement.

"[T]he *sine qua non* of a finding that Congress implicitly intended to preclude a private right of action under § 1983 is incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted." *Talevski*, 599 U.S. at 187. "[T]he inquiry boils down to what Congress intended, as divined from text and context." *Id.*

The Secretary argues that because § 12 of the Act, 52 U.S.C. § 10308(d), provides for enforcement actions by the Attorney General, Congress must have intended to preclude private actions under § 1983. This contention is unconvincing.

The Supreme Court has discerned congressional intent to preclude enforcement under § 1983 only where statutes included "self-contained enforcement schemes that included statute-specific rights of action." *Talevski*, 599 U.S. at 189 (citations omitted). In each of those cases, the statute at issue "required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies under the statute's enforcement scheme before suing under its dedicated right of action." *Id.* (internal quotation omitted). "And each statute-specific right of action offered fewer benefits than those available under § 1983." *Id.*

There are no equivalent indicia of congressional intent to preclude enforcement of the Voting Rights Act under § 1983. The Act includes no statute-specific right of action that might suggest an intent to make the § 1983 remedy unavailable. The Act does confer authority to sue on a government official, but there is no "unusually elaborate" set of enforcement provisions applicable to both government officials and private citizens. *Cf. Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). The authority of the Attorney General to bring enforcement actions in select cases comfortably coexists with the ability of private plaintiffs to sue under § 1983 to vindicate their own voting rights. The "presumption is that § 1983 can play its textually prescribed role as a vehicle for enforcing those rights, even alongside a detailed enforcement regime that also protects those interests, so long as § 1983 enforcement is not incompatible with Congress's handiwork." *Talevski*, 599 U.S. at 188-89.

For these reasons, the district court correctly concluded that the plaintiffs could sue under § 1983 to allege a violation of their rights under § 2 of the Voting Rights Act.

II.

The Secretary argues alternatively that the district court erred by granting relief on the merits under § 2. The district court's decision is adequately supported by the record and should be affirmed.

Appendix D

To prove a violation of § 2, plaintiffs must establish three preconditions as described by the Court in *Gingles*:

> First, the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district. Second, the minority group must be able to show that it is politically cohesive. And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.

Allen v. Milligan, 599 U.S. 1, 18, 143 S. Ct. 1487, 216 L. Ed. 2d 60 (2023) (internal citations omitted). If the three preconditions are established, plaintiffs "must then show, under the 'totality of the circumstances,' that the political process is not 'equally open' to minority voters." *Id.* (quoting *Gingles*, 478 U.S. at 45-46).

The plaintiffs challenged North Dakota state legislative districts 9 and 15, which were created by the State's 2021 legislative redistricting plan. Under the plan, district 9 encompassed all of Rolette County and stretched eastward to include portions of Towner and Cavalier Counties. District 9 was divided into two subdistricts: 9A and 9B. The Turtle Mountain Reservation was placed in subdistrict 9A. Portions of the Tribe's trust lands located within Rolette County were placed in subdistrict 9B along with the portions of Towner and Cavalier Counties encompassed by district 9. The Spirit Lake Reservation was placed in district 15.

Under the 2021 plan, voters in district 9 and district 15 each elected one state senator. Voters in subdistricts 9A and 9B each elected one member of the state House of Representatives. Voters in district 15 elected two at-large members of the state House. According to the 2020 Census, the Native American voting age populations of Rolette County and the relevant portions of Towner and Cavalier Counties are 74.4 percent, 2.7 percent, and 1.8 percent, respectively. Subdistrict 9A, subdistrict 9B, and district 15 had Native American voting age populations of 79.8 percent, 32.2 percent, and 23.1 percent, respectively.

To support their vote dilution claim under § 2, the plaintiffs introduced two maps illustrating alternative configurations of district 9. The maps were offered to demonstrate that the Native American voting age population in northeast North Dakota is sufficiently large and geographically compact to constitute an effective majority in a single multimember district. Under both illustrative plans, the Turtle Mountain Reservation and trust lands and the Spirit Lake Reservation are encompassed by district 9. The Native American voting age population is 66.1 percent in the plaintiffs' first illustrative plan and 69.1 percent in the second illustrative plan.

After a four-day bench trial, the district court ruled that the plaintiffs had satisfied the three preconditions to establish § 2 liability under *Gingles*. The court then concluded that under the totality of the circumstances, the

State's 2021 legislative redistricting plan "deprive[d] Native American voters" in districts 9 and 15 and subdistricts 9A and 9B "of an equal opportunity to participate in the political process and to elect representatives of their choice, in violation of Section 2 of the VRA." Accordingly, the court enjoined the Secretary from implementing elections in the contested districts, and gave the Secretary and the North Dakota Legislative Assembly thirty-five days to submit a proposed remedial redistricting plan.

The Secretary and Legislative Assembly failed to submit a proposed remedial plan by the deadline, so the court ordered the Secretary to adopt and implement one of the plaintiffs' illustrative plans as the remedial map. The Secretary did not appeal the district court's remedial order.

On this appeal, the Secretary argues that the district court erred in finding that the plaintiffs met their burden to establish the first and second *Gingles* preconditions. He does not challenge the court's findings as to the third precondition or the totality of the circumstances.

Vote dilution claims are "peculiarly dependent upon the facts of each case," and require "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (internal quotations omitted). To preserve "the benefit of the trial court's particular familiarity with the indigenous political reality," we apply a clear error standard of review to the

predicate factual determinations and to the ultimate finding regarding vote dilution. *Id.*; *Abrams v. Johnson*, 521 U.S. 74, 91, 93, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997). The plaintiffs bear the burden to show unlawful vote dilution. *Voinovich v. Quilter*, 507 U.S. 146, 155-56, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993).

As to the first *Gingles* precondition, a district is "reasonably configured . . . if it comports with traditional districting criteria," including geographic contiguity and compactness, respect for existing political boundaries, and keeping together communities of interest. *Milligan*, 599 U.S. at 18, 20, 34. The district court found that the plaintiffs' illustrative maps satisfied these criteria.

The court first concluded that the illustrative districts do "not appear more oddly shaped than other districts" and "are reasonably compact" based on objective compactness scores and in comparison to other districts created by the State's 2021 redistricting plan. The court next found that the illustrative redistricting plans respect existing political boundaries by consolidating the Turtle Mountain Band's reservation and trust lands into one district. The court also determined that the Tribes represent a community of interest based on shared representational interests, socioeconomic statuses, education levels, and cultural practices and values, and found that the illustrative plans effectively keep this community of interest together in one district. The court found that the Native American voting age population is 66.1 percent

in the plaintiffs' first illustrative plan and 69.1 percent in their second illustrative plan. These findings are supported by the record, and the court did not clearly err in ruling that the plaintiffs met their burden to establish the first precondition.

The Secretary urges reversal on two grounds. First, the Secretary argues that the court erred because the State's enacted version of district 9 apparently performs better than the plaintiffs' illustrative maps with respect to certain traditional districting criteria. But *Gingles* does not require a district court to conduct a "beauty contest" between the plaintiffs' illustrative maps and the State's districts as enacted. *Id.* at 21. The court did not clearly err in finding that the illustrative maps comported with traditional districting criteria. The court was not required to resolve whether the illustrative maps or the State's districts were in some sense superior as measured by those criteria. The illustrative maps satisfied the first precondition by establishing that the minority group was sufficiently large and geographically compact to constitute a majority in a reasonably configured district.

The Secretary also contends that the district court erred by omitting an explicit finding on whether race was the predominant factor motivating the plaintiffs' illustrative district lines. "Section 2 itself 'demands consideration of race,'" but "race may not be 'the predominant factor in drawing district lines unless there is a compelling reason.'" *Milligan*, 599 U.S. at 30-31 (plurality opinion)

(first quoting *Abbott v. Perez*, 585 U.S. 579, 587, 138 S. Ct. 2305, 201 L. Ed. 2d 714 (2018), then quoting *Cooper v. Harris*, 581 U.S. 285, 291, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017)). "Race predominates in the drawing of district lines . . . when 'race-neutral considerations come into play only after the race-based decision had been made.'" *Id.* (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017)). But "race consciousness" in drawing a map "does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

The Secretary asserts that race was the predominant factor in drawing the illustrative maps, and that the plaintiffs failed to establish the first precondition because their maps are impermissible racial gerrymanders. The only evidence cited is that plaintiffs' illustrative districts stretch diagonally across the State and join two Native American reservations. As the district court observed, however, the plaintiffs' illustrative districts do "not appear more oddly shaped than other districts." Nor is the fact that the maps join two Native American reservations sufficient to undermine the district court's ruling. Nonracial considerations—such as consolidating reservation and trust lands and keeping together tribal communities of interest—justify the district lines. Insofar as race was considered in order to show that an additional majority-minority district could be drawn, that is "the whole point of the enterprise," *Milligan*, 599 U.S.

at 33 (plurality opinion), and it is therefore permissible under the statute. By rejecting the State's arguments, the district court implicitly found that race did not impermissibly predominate.

The plaintiffs' illustrative districts are not "so bizarre [on their] face that [they are] unexplainable on grounds other than race." *Shaw*, 509 U.S. at 644 (internal quotation omitted). Nor is this a case where the districts have "no integrity in terms of traditional, neutral redistricting criteria." *Milligan*, 599 U.S. at 28 (quoting *Bush v. Vera*, 517 U.S. 952, 960, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality opinion)). As in *Milligan*, "[w]hile the line between racial predominance and racial consciousness can be difficult to discern, it was not breached here." *Id.* at 31 (plurality opinion) (citation omitted). The Secretary cites no persuasive evidence of racial predominance, and his own expert testified that he had no evidence that the demonstrative plans are a racial gerrymander. With no direct evidence of legislative purpose or compelling circumstantial evidence of impermissible race-based redistricting, remand for an express finding on lack of racial predominance is not warranted. *See Bethune-Hill*, 580 U.S. at 190.

The second *Gingles* precondition requires the plaintiffs to show that the minority group is politically cohesive. *Milligan*, 599 U.S. at 18. This showing "typically requires a statistical and non-statistical evaluation of the relevant elections." *Bone Shirt*, 461 F.3d at 1020.

Appendix D

The parties and their experts agreed that voting in at-large elections in districts 9 and 15, as enacted by the State in 2021, is racially polarized, with Native American voters cohesively supporting the same candidates. Although subdistricts 9A and 9B of the State's 2021 redistricting plan did not contain enough precincts for a full statistical analysis, the court considered available population statistics, election data, and expert reports and testimony interpreting this information. The court reasonably inferred that the undisputed political cohesiveness at the district level was also present at the subdistrict level.

The court's statistical inference was buttressed by testimony from tribal leaders that voters who live on the Turtle Mountain Reservation and voters who live on the Spirit Lake Reservation vote similarly. *See Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir. 1989) ("The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive."). Considering this statistical and nonstatistical evidence, the district court did not clearly err in finding that Native American voters in the relevant districts and subdistricts are a politically cohesive group.

* * *

In sum, § 2 of the Voting Rights Act confers an individual right, and the enforcement authority of the Attorney General is not incompatible with private

enforcement of the right under § 1983. The district court did not clearly err in ruling that the plaintiffs met their burden to establish the first two *Gingles* preconditions. I would therefore affirm the judgment of the district court.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED JANUARY 8, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 3:22-cv-22

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Plaintiffs,

vs.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Defendant.

Filed January 8, 2024

ORDER

The North Dakota Legislative Assembly moves for an extension of time to file (Doc. 156) and to expedite (Doc. 162). Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown oppose the motion (Doc. 161) and move for a remedial order (Doc. 159). The Legislative Assembly opposes the Plaintiffs' motion. Doc. 163. Defendant Michael Howe, Secretary of State of North Dakota, has not responded to either motion.

Appendix E

As to the Legislative Assembly's motion for extension of time to file, the Assembly asks for an extension of time to file a remedial plan until February 9, 2024. An initial problem with the Legislative Assembly's request is that it is not a party to this case, and it did not seek leave to file its motion for an extension of time to file. Another problem is that the two parties to this case oppose the extension sought by the Legislative Assembly. The Plaintiffs actively oppose the extension, and the Secretary did not file a response, though he did oppose the same motion made by the Legislative Assembly to the Eighth Circuit Court of Appeals.

After finding a Section 2 violation of the Voting Rights Act, federal law requires that, "whenever practicable," the state be "afford[ed] a reasonable opportunity . . . to adopt[] a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Here, that is what the Court ordered. The Secretary was provided a reasonable time, until December 22, 2023, to propose a remedial plan. The Plaintiffs are correct that the Court did not order the Secretary (or the Legislative Assembly) to adopt a new plan by that date; it provided a reasonable opportunity to the Secretary to propose his own plan to correct the proven Section 2 violation. The law requires nothing more and nothing less. But if the Secretary elects to not offer a proposed remedial plan (as is the case here), then it becomes the "unwelcome obligation of the federal court" to devise a remedy. *Id.* (internal citations and quotations omitted). And that is where we find ourselves now. On this record, an extension of time is not warranted because

the Secretary was provided a reasonable opportunity to propose a remedial plan, and an extension has not been requested by either party to this case. So, the motion for extension of time to file (Doc. 156) and the motion to expedite (Doc. 162) are **DENIED**.

Given that the Secretary did not submit a proposed remedial plan by December 22, 2023, the Plaintiffs now move for a remedial order. Doc. 159. Substantively, the Eighth Circuit stated in *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022-23 (8th Cir. 2006):

> In formulating a remedial plan, the first and foremost obligation of the district court is to correct the Section 2 violation. *See Westwego Citizens for Better Gov't*, 946 F.2d at 1124. Second, the plan should be narrowly tailored, and achieve population equality while avoiding, when possible, the use of multi-member districts. *Abrams v. Johnson*, 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); *Chapman v. Meier*, 420 U.S. 1, 26-27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). Third, the plan must not violate Sections 2 or 5 of the Voting Rights Act. Finally, the plan should not "intrude on state policy any more than is necessary" to uphold the requirements of the Constitution. *Upham v. Seamon*, 456 U.S. 37, 41-42, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) (per curiam) (quoting *White v. Weiser*, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973)).

Here, the Plaintiffs' proposed plan 2 meets all four requirements. It corrects the Section 2 violation, is narrowly tailored, and achieves population equality. Per this Court's findings, proposed plan 2 "comports with traditional redistricting principles." Doc. 125 at 18-19. Proposed plan 2 does not violate Section 2 of the Voting Rights Act. Doc. 125. It requires changes to only three districts (Doc. 65-2 at 41) and is the least intrusive option that complies with the Voting Rights Act and the Constitution.

Procedurally, the Court notes that the Secretary did not respond to the motion, and Civil Local Rule 7.1(F) states that an adverse party's "failure to serve and file a response to a motion may be deemed an admission that the motion is well taken." D.N.D. Civ. Local R. 7.1(F). The Court deems the Secretary's lack of response as an admission that the motion for a remedial order encouraging the Court to adopt proposed plan 2 is well taken.

Because the motion (Doc. 159) is unopposed and is in the interest of justice, it is **GRANTED**. The Court **ORDERS** that the Plaintiffs' proposed plan 2 be adopted and implemented as the remedial map to correct the Section 2 violation.

IT IS SO ORDERED.

Dated this 8th day of January, 2024.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

APPENDIX F — AMENDED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED DECEMBER 15, 2023

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Appellees,

v.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Appellant,

NORTH DAKOTA LEGISLATIVE ASSEMBLY, *et al.*

Filed December 15, 2023

Appeal from U.S. District Court for the
District of North Dakota - Eastern
(3:22-cv-00022-PDW)

AMENDED ORDER

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

Appendix F

The application for leave to file an overlength motion is granted. The motion to expedite is granted. The motion for a stay of the district court's judgment has been considered by the court and is denied.

December 15, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED DECEMBER 12, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 3:22-cv-22

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Plaintiffs,

vs.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Defendant.

Filed December 12, 2023

ORDER

Defendant Michael Howe, the Secretary of State of North Dakota, moves to stay the remedial order and judgment pending appeal in this Voting Rights Act ("VRA") case. Doc. 131. Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown move to amend or correct the remedial order, given the Secretary's motion to stay. Doc. 134. The Plaintiffs oppose the Secretary's motion (Doc. 142), and the Secretary opposes the Plaintiffs'

motion (Doc. 140). The North Dakota Legislative Assembly also moves to intervene and moves for a stay. Doc. 137; Doc. 151. All four motions are denied.

A. Motion to Stay Judgment Pending Appeal

The Secretary asks for a stay of the judgment finding a Section 2 violation after trial and a final decision on the merits. Tellingly though, the Secretary does not challenge the merits of the order and decision on the Section 2 claim. Instead, he argues (1) a stay of the judgment is appropriate per *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and (2) that 42 U.S.C. § 1983 does not apply to the VRA.

1. *Purcell* Principle

In his motion, the Secretary largely leans on *Purcell* to suggest a stay pending appeal is warranted. But *Purcell* does not apply on these facts. And even if it did, it is perhaps more troubling to suggest that Purcell permits what the Secretary asks for here—that a federal court overlook and stay a proven Section 2 violation because it requires a state to correct the violation well before any election is ever scheduled to occur.

Purcell and its progeny articulated a general principle "that lower federal courts should ordinarily not alter the election rules on the *eve* of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___, 140 S. Ct. 1205, 1207 (2020) (emphasis added). But the context is critical—*Purcell* and the majority of cases relying on and citing to it are cases involving *preliminary* injunctive

relief, where there is no merits decision on a claim. *Purcell*, 549 U.S. at 4 (granting stay of preliminary injunction concerning voter identification procedures entered weeks before an election); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (granting stay of preliminary injunction entered close to an election date); *Wise v. Circosta*, 978 F.3d 93, 103 (4th Cir. 2020) (denying preliminary injunction of new absentee ballot rule less than a month before election); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (granting stay of preliminary injunction entered 9 days before election); *Genetski v. Benson*, No. 20-000216-MM, 2020 WL 7033539, at *2 (Mich. Ct. Cl. Nov. 2, 2020) (declining to grant preliminary injunction the day before an election). As explained in *Purcell*, there are "considerations specific to election cases" when deciding whether to *enjoin* an election law *in close temporal proximity to an election*. *Purcell*, 549 U.S. at 4. Also of chief concern in *Purcell* cases is the risk of voter confusion. *See Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring) (stating, "Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.").

This is not a preliminary injunctive relief case. This is a case where a Section 2 violation of the VRA was proven by evidence at trial. Beyond that, there is no imminent election, little risk of voter confusion, and the final judgment was not issued on the "eve" of any election. It strains credibility to seriously suggest otherwise. As the Plaintiffs correctly point out, the deadlines cited by

the Secretary concern the *opening* date for candidate signature gathering—for elections that are still months away. Indeed, the Secretary's concern is not as to voter confusion but rather the administrative burden of correcting the Section 2 violation. Because there is no imminent election and no order for preliminary injunctive relief enjoining an election rule, *Purcell* does not apply, and it does not support granting a stay pending appeal.

2. Traditional Stay Pending Appeal Factors

Setting *Purcell* aside, in deciding whether to grant a stay pending appeal, courts consider four factors: (1) whether the stay applicant has made a strong showing that the applicant is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Chafin v. Chafin*, 568 U.S. 165, 179 (2013). "The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020). Stays pending appeal are disfavored, even if the movant may be irreparably harmed. *Nken v. Holder*, 556 U.S. 418, 427 (2009).

First, the Secretary has not made a strong showing he is likely to succeed on the merits. Once again, nowhere in the Secretary's motion does he challenge (or even address) the merits of the Section 2 claim and the Court's finding of a Section 2 violation after trial. He instead focuses

on a new legal theory that 42 U.S.C. § 1983 provides no cause of action for private plaintiffs to bring a Section 2 claim. This issue was addressed in an order denying the Secretary's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), though both parties raise new arguments that were not raised during the initial briefing of that issue. No doubt this issue is ripe for appellate review given the Eighth Circuit's recent decision in *Arkansas State Conference of NAACP v. Arkansas Board of Apportionment*, __ F.4th ___, No. 22-1395, 2023 WL 8011300 (8th Cir. Nov. 20, 2023). But simply because the issue is set for appellate review does not mean the Secretary has made a strong showing that he is likely to succeed on the merits. This seems particularly true when he does not challenge or address the merits of the substantive Section 2 claim at issue. So, the first factor does not weigh in favor of a stay pending appeal.

Next, the Secretary will not be irreparably injured absent a stay. The Secretary largely rehashes his *Purcell* analysis to show irreparable injury absent a stay. As noted above, *Purcell* does not apply, and the Court struggles to understand how the Secretary would be irreparably injured by complying with Section 2 of the VRA. And per *Nken*, even if the Secretary may be irreparably harmed, a stay pending appeal is not a matter of right. 556 U.S. at 433. The second factor does not weigh in favor of a stay pending appeal.

Third, granting a stay would substantially injure the Plaintiffs and all other Native Americans voting in districts 9 and 15. A stay would effectively allow an

ongoing Section 2 violation to continue until a decision on the § 1983 issue is reached by a reviewing court. There is substantial harm inherent in the deprivation of the Plaintiffs' fundamental voting rights. *See Martin v. Kemp*, 341 F. Supp. 3d 1326, 1340 (N.D. Ga. 2018). As such, the third factor weighs heavily against a stay.

Finally, the public interest lies in correcting Section 2 violations, particularly when those violations are proven by evidence and data at trial. Concerns as to the logistics of preparing for an election cycle cannot trump violations of federal law and individual voting rights. This factor also weighs against a stay pending appeal.

Again, it is worth emphasizing that this motion for a stay pending appeal is *not* made in the context of any preliminary injunction where there is no final decision on the merits of a claim. And it is *not* made in the context of any imminent election. Instead, it is a request for a stay after a full and final decision on the merits, after a trial, on a Section 2 claim—a merits decision the Secretary does not address or even challenge in his motion. In that context, the law and the four factors conclusively instruct that a stay pending appeal is inappropriate, and the Secretary's motion to stay is denied.

B. Motion to Amend or Correct Remedial Order and Motion to Intervene

Turning to the Plaintiffs' motion to amend or correct the remedial order, the motion presents an issue of jurisdiction. The filing of a notice of appeal generally

divests the district court of jurisdiction over the case, and the district court cannot reexamine or supplement the order being appealed. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Liddell v. Board of Educ.*, 73 F.3d 819, 822 (8th Cir. 1996). Here, the Plaintiffs ask the Court to reexamine the deadlines in the remedial order in response to the Secretary's *Purcell* concerns. But the Court cannot reexamine the remedial order because the Secretary filed his notice of appeal before the motion to amend or correct. The Court lacks jurisdiction to amend or correct the remedial order, and the motion (Doc. 134) is denied.

The same is true for the Legislative Assembly's motion to intervene and motion to stay. It is axiomatic that the motion to intervene is untimely per Federal Rule of Civil Procedure 24, but again, this Court lacks jurisdiction to reexamine or supplement the order and judgment on appeal. Adding the Legislative Assembly as a party at this late stage is a rather extraordinary request to supplement the order and judgment on appeal, and the motions (Doc. 137; Doc. 151) are denied.

C. Conclusion

After a trial, and careful review of all of the evidence and data, the Court concluded the 2021 redistricting plan violated Section 2 of the VRA. Put simply, the facts and the law do not support a stay of the remedial order and judgment pending appeal. The Secretary's motion to stay pending appeal (Doc. 131) is **DENIED**. Because the notice of appeal divested this Court of jurisdiction over this case,

the Plaintiffs' motion to amend or correct the remedial order (Doc. 134) and the Legislative Assembly's motion to intervene (Doc. 137) and motion to stay (Doc. 151) are also **DENIED**.

IT IS SO ORDERED.

Dated this 12th day of December, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

APPENDIX H — MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED NOVEMBER 17, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 3:22-cv-22

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Plaintiffs,

vs.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Defendant.

Filed November 17, 2023

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Turtle Mountain Band of Chippewa Indians ("Turtle Mountain Tribe"), Spirit Lake Tribe ("Spirit Lake Tribe"), Wesley Davis, Zachery S. King, and Collette Brown assert the State of North Dakota's 2021 legislative redistricting plan dilutes Native American voting strength by unlawfully packing subdistrict 9A of district 9 with a supermajority of Native Americans and cracking the

remaining Native American voters in the region into other districts, including district 15—in violation of Section 2 of the Voting Rights Act of 1965. Defendant Michael Howe, the Secretary of State of North Dakota, denies the Section 2 claim, arguing the 2021 redistricting plan is lawful.

Section 2 of the VRA prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a). It prohibits what the Tribes claim happened here—"the distribution of minority voters into districts in a way that dilutes their voting power." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 142 S. Ct. 1245, 1248, 212 L. Ed. 2d 251 (2022) (citing *Thornburg v. Gingles*, 478 U.S. 30, 46, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)). In *Gingles*, the United States Supreme Court identified three preconditions that must be initially satisfied to proceed with a Section 2 voter dilution claim:

1. The minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;

2. The minority group . . . is politically cohesive; and,

3. The white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate.

478 U.S. at 50-51. Failure to prove any of the three preconditions defeats a Section 2 claim. *Clay v. Bd. of Educ.*, 90 F.3d 1357, 1362 (8th Cir. 1996). If all preconditions are met, then there is a viable voter dilution claim, and the analysis shifts to determining whether, under the totality of the circumstances, members of the racial minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b).

A four-day bench trial was held on June 12, 2023. After consideration of the testimony at trial, the exhibits introduced into evidence, the briefs of the parties, and the applicable law, what follows are my findings of fact and conclusions of law. And as explained below, the Tribes have established a Section 2 violation of the VRA.

I. FINDINGS OF FACT

A. The Parties

Two Tribes and three individual voters make up the Plaintiffs. For the Tribes, the Turtle Mountain Tribe is a federally recognized Tribe under 88 Fed. Reg. 2112 (2023), possessing "the immunities and privileges available to federally recognized Indian Tribes[.]" Jamie Azure is its Chairman. Doc. 117 at 10:25-11:4. The Turtle Mountain Reservation is located entirely within Rolette County in northeastern North Dakota and covers 72 square miles. A large portion of Turtle Mountain's trust land is also located in Rolette County. *Id.* at 13:12-14:23; *Id.* at 15:11-16:4. The Turtle Mountain Tribe has over 34,000 enrolled

members, and approximately 19,000 members live on and around the Turtle Mountain Reservation, including on Turtle Mountain trust lands in Rolette County. *Id.* at 13:12-14:23.

The second Tribe is the Spirit Lake Tribe, which is also a federally recognized Tribe. Douglas Yankton, Sr. is its former Chairman. He served as Chairman during the 2021 redistricting process. Doc. 115 at 45:12-22. The Spirit Lake Tribe is located on the Spirt Lake Reservation. The Spirit Lake Reservation covers approximately 405 square miles, primarily in Benson County in northeastern North Dakota. *Id.* at 47:10-48:2, 55:13-23. The Spirit Lake Tribe has approximately 7,559 enrolled members, with approximately 4,500 members living on or near the Spirit Lake Reservation. *Id.* at 47:10-48:2.

Three individual voters join the Tribes as Plaintiffs: Wesley Davis, Zachary King, and Collette Brown. Davis and King are enrolled members of the Turtle Mountain Tribe. They live on the Turtle Mountain Reservation, are eligible to vote, and plan to continue voting in elections. They currently reside in what is now Senate district 9 and House subdistrict 9A. Doc. 108 at 6. Brown is an enrolled member of the Spirit Lake Tribe. She lives on the Spirit Lake Reservation, is eligible to vote, and plans to continue voting in elections. She resides in district 15. Doc. 116 at 7:8-9:11.

The Secretary is sued in his official capacity as Secretary of State of North Dakota. Doc. 108 at 7. The Secretary is responsible for "supervis[ing] the conduct

of elections," and "publish[ing] . . . a map of all legislative districts." N.D. Cent. Code §§ 16.1-01-01(1) & (2)(a).

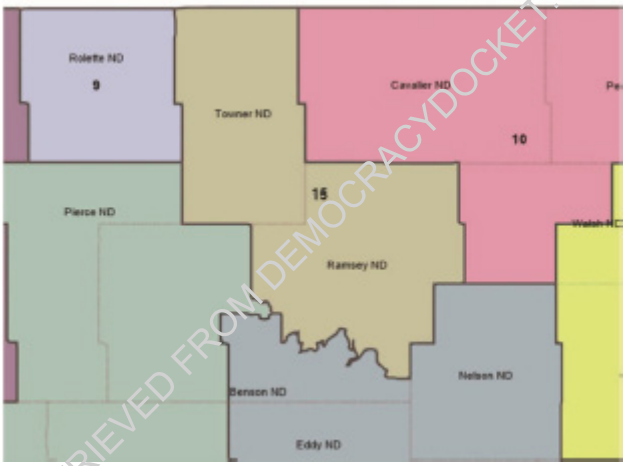
B. North Dakota's 2021 Redistricting Plan

Article IV, Section 2 of the North Dakota Constitution requires the state legislature to redraw the district boundaries of each legislative district following the Census that happens every 10 years. The North Dakota Legislative Assembly ("Legislative Assembly") is required to "guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates." N.D. Const., Art. IV, Sec. 2. It is also required to "fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators" and requires that the "senate must be composed of not less than forty nor more than fifty-four members, and the house of representatives must be composed of not less than eighty nor more than one hundred eight members. These houses are jointly designated as the legislative assembly of the state of North Dakota." *Id.*, Sec. 1. So, one Senator and at least two House members are allocated to each district. Section 2 of Article IV allows the House members to be either elected at-large from the district or elected from subdistricts created within the district. *Id.*, Sec. 2.

1. North Dakota's Legislative Districts Before the 2021 Redistricting

Recall that the Tribes challenge changes made to districts 9 and 15. For the decade prior to the 2021

redistricting, district 9 was entirely within Rolette County. Doc. 108 at 3. It had a Native American voting age population ("NVAP") of 74.4%, did not contain any subdistricts, and contained the entirety of the Turtle Mountain Reservation, and its trust land located within Rolette County. *Id.* This map shows the pre-2021 legislative districts in the region:



Pl. Ex. 103.

2. 2021 Redistricting Process and Plan

As a result of the COVID-19 pandemic, the 2020 Census data was delayed. Doc. 116 at 149:18-150:2. While waiting for the new data, on April 21, 2021, Governor Burgum signed House Bill 1397. It established a legislative management redistricting committee ("Redistricting Committee") that was required to develop and submit

a redistricting plan by November 30, 2021, along with implementation legislation. Doc. 108 at 1.

On May 20, 2021, then-Chairman Yankton sent a letter to the Redistricting Committee, requesting they schedule public hearings on each of the reservations located within North Dakota. Pl. Ex. 155. In response, the North Dakota Tribal and State Relations Committee held a joint meeting with the Tribal Council of the Turtle Mountain Tribe at the Turtle Mountain Community College on the Turtle Mountain Reservation. Def. Ex. 305; Doc. 108 at 2.

Redistricting was discussed at the joint meeting for roughly 30 minutes. Def. Ex. 418 at 17:18-21; Def. Ex. 305. Chairman Azure testified he became aware that redistricting had been added to the meeting agenda shortly before the meeting began. Doc. 117 at 29:21-31:24. He testified the Tribe had limited information about the 2020 Census population data and the discussion focused primarily on a population undercount. *Id.* at 29:21-31:24. One individual spoke in favor of subdistricts generally during the 30-minute discussion. *Id.* at 70:4-73:19.

Eventually, on August 12, 2021, the Census Bureau released redistricting data in legacy format (meaning the format used in specific redistricting software). Doc. 108 at 2. The Census data was released in a user-friendly format to the public on September 16, 2021. *Id.* at 2. The Redistricting Committee held public meetings in Bismarck on August 26, 2021, in Fargo on September 8, 2021, and again in Bismarck on September 15 and 16. Additional public meetings of the Redistricting Committee

were held in Bismarck on September 22 and 23, and September 28 and 29. *Id.* at 3.

Brown testified on behalf of the Spirit Lake Tribe at the August 26 Redistricting Committee meeting. She advocated for the Redistricting Committee to consider tribal input and for the use of single member districts to elect representatives to the House. Def. Ex. 327. Brown also encouraged the Redistricting Committee to comply with the requirements of the VRA. *Id.*

On September 1, 2021, the Tribal and State Relations Committee held a public meeting at the Spirit Lake Casino and Resort on the Spirit Lake Reservation and discussed redistricting. Doc. 108 at 2. Chairman Yankton testified that Spirit Lake may be interested in a legislative subdistrict to elect its House member. Def. Ex. 334. At subsequent meetings, representatives of Spirit Lake requested a subdistrict. Def. Ex. 351; Def. Ex. 398.

At its September 28 and 29 meetings, the Redistricting Committee released several proposals for creating two subdistricts in district 9. Def. Ex. 405. One proposal extended district 9 to the east to incorporate population from Towner and Cavalier Counties, created a subdistrict in district 9 that generally encompassed the Turtle Mountain Reservation, and placed Spirit Lake in an at-large district with no subdistrict. Def. Ex. 408.

About a month after that proposed plan was introduced, the Tribes each consulted their leadership, obtained an analysis of racially polarized voting, created

a new proposal for district 9, and sent a letter to the Governor and legislative leaders with their proposal. Pl. Ex. 156 at 19-24; Doc. 115 at 77:5-79:18; Doc. 117 at 34:14-36:11. The letter stated that the Redistricting Committee's proposal as to district 9, which placed the Turtle Mountain Reservation in a subdistrict, was a VRA violation. It also stated that the Turtle Mountain Tribe did not request to be placed in a subdistrict. Pl. Ex. 156 at 19-24. Included in the letter was an illustration of an alternative district map, where the Turtle Mountain and Spirit Lake Reservations were placed into a single legislative district with no subdistricts. Pl. Ex. 156 at 19-24; Doc. 108 at 4. Effectively, this alternative district combined Rolette County with portions of Pierce and Benson Counties, instead of combining Rolette County with portions of Towner and Cavalier Counties. *Compare* Pl. Ex. 156 at 19-24 *with* Def. Ex. 408. The letter stated that voting in the region is racially polarized, with Native American voters preferring different candidates than white voters. *Id.* at 19-24.

Then, at the November 8, 2021, Redistricting Committee meeting, Senator Richard Marcellais, who represented district 9 since his election in 2006, spoke in favor of the Tribes' proposed district. Def. Ex. 429 at 21-23. Representative Marvin Nelson from district 9 also spoke in favor of the proposal. *Id.* at 33-35. Representative Joshua Boschee moved for the adoption of an amendment to include the Tribes' proposal, but the amendment did not pass. Doc. 108 at 4. The Redistricting Committee passed and approved its final redistricting plan and report, which recommended passing the original proposal

involving districts 9 and 15 (extending district 9 to the east to incorporate population from Towner and Cavalier Counties, creating a subdistrict in district 9 encompassing the Turtle Mountain Reservation, and placing Spirit Lake in an at-large district with no subdistrict).

The next day, the House of Representatives debated and passed House Bill 1504, the redistricting legislation accompanying the Redistricting Committee's final plan and report. *Id.* at 5. Then the Senate debated House Bill 1504. Senator Marcellais moved for an amendment (similar to the one he proposed to the Redistricting Committee), but it did not pass. *Id.* The Senate passed House Bill 1504, which was signed by Governor Burgum on November 11, 2021. *Id.*

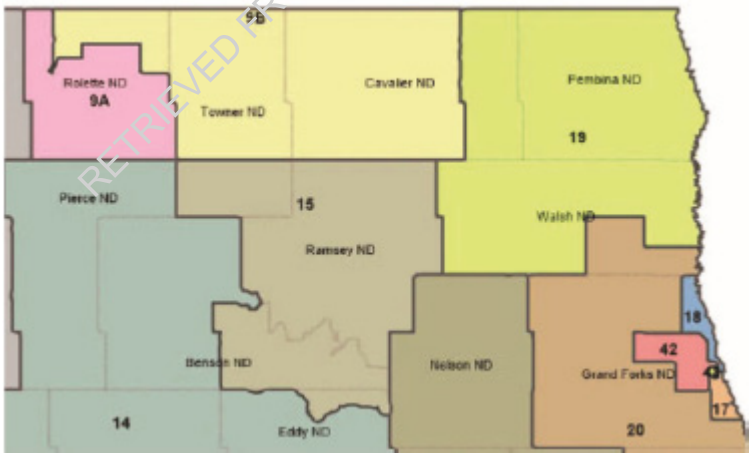
3. 2021 Redistricting Plan As Enacted

As enacted, the 2021 redistricting plan created 47 legislative districts and subdivided district 9 into single-member House subdistricts 9A and 9B. *Id.* The plan extended district 9 eastward to include portions of Towner and Cavalier Counties, with the Towner County and Cavalier County portions included with parts of Rolette County in subdistrict 9B. Pl. Ex. 100. It also placed the Turtle Mountain Reservation into Senate district 9 and House subdistrict 9A and placed portions of Turtle Mountain trust lands located within Rolette County into House subdistrict 9B. Doc. 108 at 5. The plan placed the Spirit Lake Reservation in district 15. Doc. 108 at 5.

Appendix H

According to the 2020 Census, the NVAP of Rolette County is 74.4%. The NVAP of the portion of Towner County in district 9 is 2.7%. There is an NVAP of 1.8% in the portion of Cavalier County in district 9. Pl. Ex. 1 at 16. Subdistrict 9A has a NVAP of 79.8% and subdistrict 9B has a NVAP of 32.2%. Pl. Ex. 42 at 7; Doc. 115 at 134:13-19, 136:7-137:25. District 15 has a NVAP of 23.1%. Doc. 115 at 135:3-13; Doc. 108 at 4.

Voters in Senate district 9 and Senate district 15 each elect one Senator. Doc. 108 at 5. Voters in House subdistricts 9A and 9B each elect one representative to the House of Representatives. *Id.* Voters in district 15 elect two representatives at-large to the House of Representatives. *Id.* This is the 2021 plan's map of the legislative districts in northeastern North Dakota:

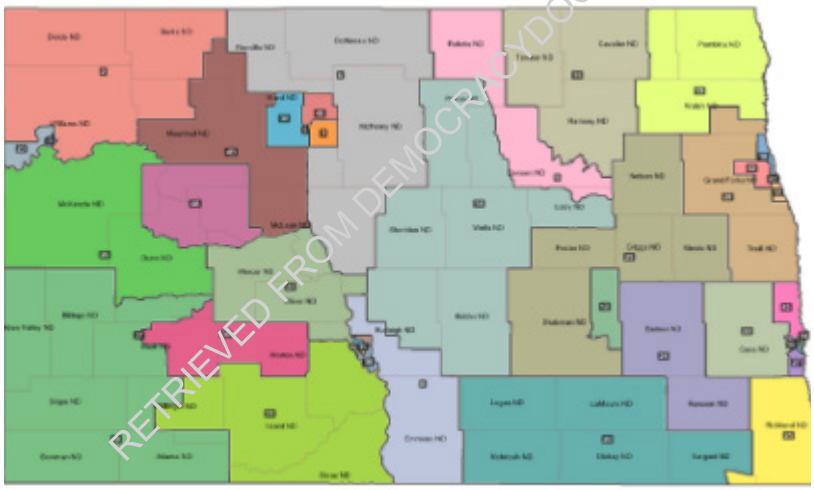


Pl. Ex. 101.

Appendix H

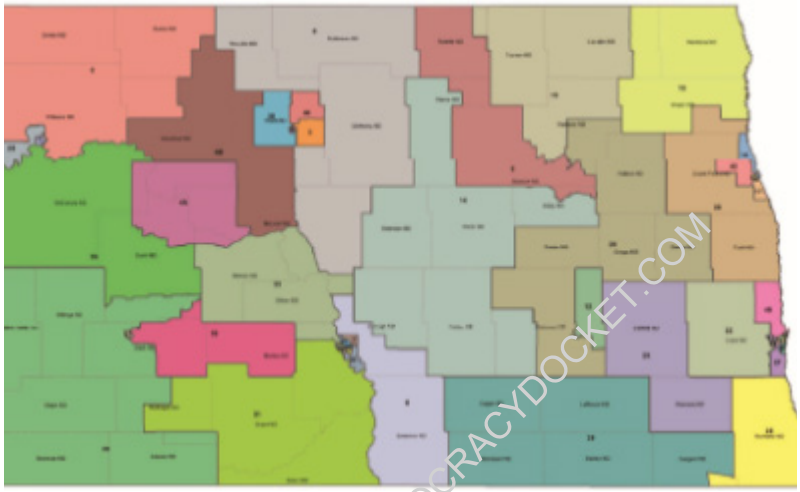
C. The Tribes' Proposed Plans

In support of their Section 2 claim, the Tribes produced two proposed plans containing alternative district configurations that demonstrate the Native American population in northeast North Dakota is sufficiently large and geographically compact to constitute an effective majority in a single multimember district. This is the first proposed plan:



Pl. Ex. 105. And this is the second proposed plan:

Appendix H



Pl. Ex. 106. Both feature a district 9 that has a majority NVAP. The first proposed plan has a NVAP of 66.1%, and the second has a NVAP of 69.1%. Doc. 115 at 134:22-135:2, 135:14-17, 166:1-3.

D. Trial Testimony and Evidence on Section 2 Claim

At trial, former Chairman Yankton (Doc. 115 at 41-120), Collette Brown (Doc. 116 at 6-44), former Senator Richard Marcellais (Doc. 116 at 44-71), former House of Representatives member Marvin Nelson (Doc. 116 at 170-189), and Chairman Jamie Azure (Doc. 117 at 10-66) testified as fact witnesses for the Tribes. Erika White (Doc. 117 at 186-203) and Bryan Nybakken (Doc. 118 at 6-38), two representatives of the Secretary of State's office, testified as fact witnesses for the Secretary.

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Four expert witnesses testified. Dr. Loren Collingwood (Doc. 115 at 120-201), Dr. Daniel McCool (Doc. 116 at 72-143), and Dr. Weston McCool (Doc. 116 at 144-170) testified as expert witnesses for the Tribes. Dr. M.V. Hood III (Doc. 117 at 72-182) testified as an expert witness for the Secretary.

Former Chairman Yankton testified to the shared representational interests, socioeconomic status, and cultural and political values of Turtle Mountain Tribal members and Spirit Lake Tribal members. Doc. 115 at 50:24-52:11, 52:24-73:9; Doc. 117 at 22:4-16-27:15, 28:18-25; 50:3-7; 52:23-53:1, 55:9-12. 115. He also testified as to the political cohesiveness of the Tribes, explaining that the voters who live on the Turtle Mountain Reservation and the voters who live on the Spirit Lake Reservation vote similarly. Doc. 115 at 52:12-53:25.

He also testified specifically as to the 2018 election (which is a key point of contention in this case), where Native American voter turnout was particularly high. He stated that there were unique circumstances that led to increased Native American voter turnout in 2018. Those circumstances included the election being a high-profile race, a backlash by Native American voters (who perceived North Dakota as trying to block them from voting by imposing a residential address requirement to vote), and the significant national attention and resources that flowed into the Tribes following the decision allowing the address requirement to go into effect just before the election. He testified that those resources—and resulting high voter turnout among Native American voters—was

unlike anything he had seen, before or since. Doc. 115 at 80:18-86:17.

Dr. Loren Collingwood testified next. Doc. 115 at 119. Dr. Collingwood is an Associate Professor of Political Science at the University of New Mexico. *Id.* at 120. He teaches statistical programming, along with American politics, among other things. He has published several papers on the VRA and is qualified as an expert on voting behavior, race and ethnicity, racially polarized voting, map drawing, electoral performance, and redistricting analysis. *Id.* at 128:7-17.

Dr. Collingwood's expert testimony was extensive. He opined on each of the three *Gingles* preconditions. He reviewed the statistical data and analysis he used in reaching his expert conclusions as to racially polarized voting, white bloc voting, and the NVAP in the as-enacted districts compared to the Tribes' proposed districts. His expert reports were also admitted and received as exhibits. Pl. Ex. 1, 42.

Dr. Collingwood concluded that all three *Gingles* preconditions were met in districts 9 and 15. He found that racially polarized voting is present in North Dakota statewide and specifically in districts 9 and 15. He also found that, in statewide elections featuring Native American candidates, white voters vote as a bloc to Native American voters in all of the elections analyzed. He opined on the NVAP percentages. He further opined that there is racially polarized voting in district 9, subdistricts 9A and 9B, and district 15. Doc. 115 at 144-45.

Dr. Collingwood also opined on white bloc voting. *Id.* at 153-66. After wide review of his statistical analysis, he concluded that the white voting bloc usually defeats the Native American-preferred candidate of choice in districts 9, 9B, and 15. *Id.*

As to the 2018 election, Dr. Collingwood testified that the election was "an anomalous election." *Id.* at 156. He noted that he had "never seen any turnout number like this, ever." *Id.* As a result, he gave the 2018 election results less probative value and less weight, though the results were still included in his analysis. *Id.* at 158.

Collette Brown testified next for the Tribes. Doc. 116 at 6. Brown is the Gaming Commission Executive Director for the Spirit Lake Gaming Commission. *Id.* at 8. She ran for the Senate seat in district 15 in the 2022 election. *Id.* at 9. She spoke about the need for Native American representation and some of the difficulties she faced in her election campaign. *Id.* at 14. Brown also testified about her involvement in the 2021 redistricting process. *Id.* at 23. She stated that the Tribes did not request the subdistricts in district 9A and 9B. *Id.* at 23.

Former Senator Richard Marcellais testified next. Marcellais is an enrolled member of the Turtle Mountain Tribe and was the elected state Senator for district 9 from 2006-2022. *Id.* at 45, 48. He testified that he lost the 2022 election, and that after his loss, there are no Native Americans serving in the North Dakota Senate. *Id.* at 53.

Dr. Daniel McCool then testified as the second expert witness for the Tribes. Dr. Daniel McCool is a political science professor at the University of Utah. He specializes in Native American voting rights and Native American water rights. *Id.* at 73. He opined on the presence of the Senate Factors in North Dakota and the impact of the 2021 redistricting plan on Native Americans. *Id.* at 81. He reviewed in detail his expert report and concluded that there was substantial evidence of all of the Senate Factors, except factors four and six. *Id.* at 89-126. He concluded that, under the totality of the circumstances, Native Americans in North Dakota have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *Id.*

Dr. Weston McCool testified as the third expert witness for the Tribes. He is a National Science Foundation post-doctoral research fellow with the Anthropology Department at the University of Utah. *Id.* at 144. His expertise is in quantitative data analysis and analytical methods. *Id.* He opined specifically as to Senate Factor 5. He reviewed his statistical analysis of seven socioeconomic variables, including education, employment, and health. *Id.* at 161. He concluded that Native Americans in the counties at issue bear the effects of discrimination along the socioeconomic factors articulated by Senate Factor 5, and the disparities serve as obstacles to hinder Native Americans' ability to effectively participate in the political process. *Id.*

Next former Representative Marvin Nelson testified. Doc. 116 at 170. He testified as to his experience representing Rolette County from 2010 to 2022. *Id.* at 172.

The final witness for the Tribes was Turtle Mountain Tribal Chairman Jamie Azure. Doc. 117 at 11. He testified about the Turtle Mountain Tribe and its membership. *Id.* at 14. He also spoke about the legislative district make-up before the 2021 redistricting plan, relative to the Tribes' Reservations and trust lands. *Id.* at 17. And as to the 2021 redistricting plan, he testified about the Tribes sharing community interests and that the Tribes did not request the subdistricts as enacted in district 9. *Id.* at 19.

Chairman Azure also spoke at length about the 2018 election. *Id.* at 20. He discussed the record voter turnout that year because of concerns over a voter identification law. He noted there was "a lot of attention" and many national resources were directed at the Tribes. *Id.* He also said he had never seen that level of Native American voter engagement in his life and has not seen it since. *Id.* at 21.

The first witness for the Secretary was expert witness Dr. M.V. Hood, III. He is a political science professor at the University of Georgia and director of the School of Public and International Affairs Survey Research Center. Doc. 117 at 72. Dr. Hood is an expert on American politics, election administration, southern politics, racial politics, and Senate electoral politics. *Id.* at 75:12-76:7.

Dr. Hood's expert testimony was extensive. He reviewed his expert report (Pl. Ex. 81) and opined on

each of the three *Gingles* preconditions. Doc. 117 at 72:2-182:20. Notably, he testified that he agreed that the first precondition was met but questioned whether there was enough data to prove the second precondition. *Id.* at 89.

On the third precondition (white bloc voting), he reached a different result than Dr. Collingwood. *Id.* He analyzed the same elections as Dr. Collingwood (Doc. 117 at 83:14-18), though he statistically weighed the elections differently, and concluded that white bloc voting was not present in district 9 at-large and as-enacted. *Id.* at 86. He stated that "*Gingles* 3 is not met because the Native American candidate of choice is not typically being defeated by the majority white voting bloc." *Id.* at 89. Dr. Hood also testified that he did not review the 2022 election results. *Id.* at 162.

As to the 2018 election, Dr. Hood testified that the Native American turnout in 2018 was historically high and that the results should not necessarily be excluded from a performance analysis. Dr. Hood testified that those 2018 results "prove[] that Native American turnout can be that high" and that if "[i]t was that high in 2018," it could be that high again. *Id.* at 86:7-15.

Erika White, the North Dakota Election Director, testified next. She spoke about the role of the Secretary in North Dakota elections and the processes and deadlines that are imposed on state elections by statute. Doc. 117 at 192. She testified too about the redistricting process.

The Secretary's final witness was Brian Nybakken, the Elections Systems Administration Manager in the Secretary's Elections Office. Doc. 118 at 6-33. He testified about the elections systems in place in North Dakota, auditor training, voter identification requirements, and certain election issues pertaining to Native Americans in North Dakota. *Id.*

II. CONCLUSIONS OF LAW

Section 2 of the VRA prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a). A violation of Section 2 is established if it is shown that "the political processes leading to [a] nomination or election" in the jurisdiction "are not equally open to participation by [minority voters] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and white voters to elect their preferred candidates." *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1017-18 (8th Cir. 2006) (cleaned up).

Section 2 prohibits "the distribution of minority voters into districts in a way that dilutes their voting power." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 142 S. Ct. 1245, 1248, 212 L. Ed. 2d 251 (2022) (citing *Gingles*, 478 U.S. at 46). Recall that, under *Gingles*, three

preconditions must be initially satisfied to proceed with a Section 2 voter dilution claim:

> 1. The minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;
>
> 2. The minority group . . . is politically cohesive; and,
>
> 3. The white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate.

478 U.S. at 50-51. Failure to prove any of the three preconditions defeats a Section 2 claim. *Clay v. Bd. of Educ.*, 90 F.3d 1357, 1362 (8th Cir. 1996).

If all preconditions are met, then there is a viable voter dilution claim, and the analysis shifts to determining whether, under the totality of the circumstances, members of the racial minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b); *see also Johnson v. De Grandy*, 512 U.S. 997, 1011-12, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) (once the three preconditions are met, the totality of the circumstances is addressed). To assess the totality of the circumstances, the Court considers the factors identified in the Senate Judiciary Committee Majority Report accompanying the bill that

amended Section 2 (also known as the "Senate Factors"). S. Rep., at 28-29, U.S. Code Cong. & Admin. News 1982, pp. 206-207; *Gingles*, 478 U.S. at 36. Two other factors are also relevant: (1) was there a significant lack of response from elected officials to the needs of the minority group, and (2) was the policy underlying the jurisdiction's use of the current boundaries tenuous. *Gingles*, 478 U.S. at 44; *Bone Shirt*, 461 F.3d at 1022.

The Senate Report stresses that these factors are "neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45. The extent to which voting is racially polarized (Senate Factor 2) and the extent to which minorities have been elected under the challenged scheme (Senate Factor 7) predominate the analysis. *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 938 (8th Cir. 2018); *Bone Shirt*, 461 F.3d at 1022; *Cottier v. City of Martin*, 551 F.3d 733, 740 (8th Cir. 2008); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir. 1995).

A. The *Gingles* Preconditions

1. *Gingles* 1: Sufficiently Large and Geographically Compact

The first *Gingles* precondition requires a Section 2 plaintiff to demonstrate that the minority group (here, Native Americans) is sufficiently large and geographically

compact to constitute a majority in a potential district.[1] *Gingles*, 478 U.S. at 50. This is also known as the "majority-minority standard." *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 931 (E.D. Ark. 2012). As explained in *Gingles*, "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50. So, this precondition focuses on electoral *potential*—and specifically here, whether Native American voters have the potential to constitute the majority of voters "in some reasonably configured legislative district." *See Cooper v. Harris*, 581 U.S. 285, 301, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017); *see also Houston v. Lafayette Cnty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995). Hence the analysis for the first precondition considers the *proposed* district(s) and not the existing district. *See, e.g.*, *Bone Shirt*, 461 F.3d at 1018.

As an initial matter, the Secretary argues the first precondition is not met because district 9, as-enacted, better reflects traditional redistricting criteria than the Tribes' proposed districts. He also asserts that the first precondition is not met as to district 15. But a Section 2 claim is not a competition between which version of district 9 better respects traditional redistricting criteria. *See*

1. While the first precondition refers to a minority constituting a majority in a "single-member district," the analysis is done on a case-by-case basis, and the *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim." *See Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993).

Allen v. Milligan, 599 U.S. 1, 143 S. Ct. 1487, 1505, 216 L. Ed. 2d 60 (2023) (noting *Gingles* 1 is not a "beauty contest" between plaintiffs' maps and the state's districts). The claim is not defeated simply because the challenged plan performs better on certain traditional redistricting criteria than the proposed plan. *Id.* (finding that plaintiffs' demonstrative plans were reasonably configured, even where the enacted plan arguably performed better on certain traditional redistricting criteria than the demonstrative plans).

With that issue resolved, the question is whether Native American voters have the potential to constitute the majority of voters in some reasonably configured legislative district. The parties agree that Native American voters have the potential to constitute the majority of voters in both proposed versions of district 9. The NVAP in the Tribes' first proposed plan is 66.1%. Doc. 15 at 134:22-135:2, 135:14-17, 166:1-3. The NVAP in the Tribes' second proposed plan is 69.1%. *Id.* So, the remaining issue is whether these proposed districts are "reasonably configured." *See Johnson v. De Grandy*, 512 U.S. 997, 1008, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994).[2]

A district is reasonably configured "if it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Milligan*, 143 S. Ct. at 1503.

2. *De Grandy* articulated this standard in the context of single-member districts. Here, given the comparison of subdistricts to multimember districts, it is more useful to consider the number of representatives that Native American voters have an opportunity to elect.

Courts may also consider other traditional redistricting criteria, including respect for political boundaries and keeping together communities of interest. *Id.* at 1505 (considering respect for political subdivisions and communities of interest as traditional redistricting criteria); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 259, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015) (citing compactness and not splitting counties or precincts as examples of traditional redistricting criteria, amongst others).

The evidence at trial shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest. First, as to contiguity and compactness, the proposed districts are made up of a contiguous land base (Pl. Exs. 105, 106) and contain no obvious irregularities as to compactness. Indeed, the evidence at trial demonstrated that the proposed districts did not appear more oddly shaped than other districts, and both proposed districts are reasonably compact. *See* Doc. 115 at 139:17-23, 141:4-8; Pl. Ex. 1 at 32, 39. The proposed plans are also comparatively compact when viewed against other districts in the 2021 redistricting plan. Pl. Ex. 1 at 32, 39. Statistically too, Dr. Collingwood testified the compactness scores of the proposed districts are within the range of compactness scores for other districts in the 2021 redistricting plan. *See* Doc. 115 at 139:17-140:5, 141:24-143:20; Pl. Ex. 1 at 32, 39; Pl. Ex. 42 at 9-11; Pl. Ex. 126, 128, and 129.

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The Tribes' proposed plans also respect existing political boundaries, including Reservation boundaries, and keep together communities of interest. As to political boundaries, the proposed plans keep together the Turtle Mountain Reservation and its trust lands. Pl. Exs. 105, 106. The plans similarly preserve and keep together two communities of interest. Several witnesses testified that the Tribes represent a community of interest because of their geographic proximity and their members shared representational interests, socioeconomic statuses, and cultural values. Doc. 115 at 50:24-52:11, 52:24-73:9; Doc. 117 at 22:4-16-27:15, 28:18-25; 50:3-7; 52:23-53:1, 55:9-12. Chairman Azure and former Chairman Yankton persuasively testified to all these shared interests. *Id.* As to representational interests, the Tribes often collaborate to lobby the Legislative Assembly on their shared issues, including gaming, law enforcement, child welfare, taxation, and road maintenance, among others. *See* Doc. 115 at 56:12-61:18, 64:1-70:6; Doc. 116 at 21:11-21; Doc. 117 at 25:23-28:8. The residents on the Tribes' Reservations also have similar socioeconomic and education levels—levels that differ from the white residents in neighboring counties. Pl. Ex.73 at 513; Doc. 116 at 156:17-159:8; 161:13-161:24. Residents of the Tribes also participate in similar cultural practices and events and share cultural values. *See* Doc. 117 at 18:14-19:13.

All this evidence shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries,

and keeping together communities of interest.[3] The proposed plans demonstrate that Native American voters have the potential to constitute the majority of voters in some reasonably configured legislative district. And as a result, the Tribes have proven by a preponderance of the evidence that the first *Gingles* precondition is satisfied.

2. *Gingles* 2: Racially Polarized Voting and Political Cohesion

"The second *Gingles* precondition requires a showing that the Native American minority is politically cohesive." *Bone Shirt*, 461 F.3d at 1020. "Proving this factor typically requires a statistical and non-statistical evaluation of the relevant elections." *Id.* (citing *Cottier*, 445 F.3d at 1118). "Evidence of political cohesiveness is shown by minority voting preferences, distinct from the majority, demonstrated in actual elections, and can be established with the same evidence plaintiffs must offer to establish racially polarized voting, because political cohesiveness is implicit in racially polarized voting." *Id.*

The parties and their experts agree that voting in districts 9 and 15 (when voting at large) is racially polarized, with Native American voters cohesively supporting the same candidates. Doc. 108 at 6. Based on

3. The Secretary expresses concern that the districts under the Tribes' proposed plans would be illegal racial gerrymanders. But even assuming race was the predominate motivating factor in drawing the districts, establishing (and then remedying) a Section 2 violation provides a compelling justification for adopting one of the proposed plans. *See Cooper*, 581 U.S. at 292.

the evidence at trial, voting in subdistricts 9A and 9B is also racially polarized, with Native American voters cohesively supporting the same candidates. Pl. Ex. 13, 14; Doc. 115 at 145:23-146:2. Although subdistricts 9A and 9B do not contain enough precincts for a full statistical analysis, subdistrict 9A has an NVAP of 68.5%. Pl. Ex. 1 at 15. That, combined with the undisputed political cohesiveness of district 9 at-large, demonstrates that voters in subdistrict 9A are politically cohesive. Pl. Ex. 1 at 15; Doc. 115 at 149:7-150:25.

Dr. Hood agreed that Native American voters are politically cohesive in subdistricts 9A and 9B. Pl. Ex. 80 at 4-6; Doc. 117 at 139:19-140:16. He testified that his conclusion assumed that the vote distribution within in each subdistrict "mirrors the overall district." Doc. 117 at 140:1-16. Testimony from Chairman Azure and former Chairman Yankton confirms the statistical data. Both testified that voters living on the Turtle Mountain Reservation and Spirit Lake Reservation vote similarly. Doc. 116 at 18:5-19:19, 28:14-25; Doc. 115 at 52:12-53:25.

The statistical evidence, combined with the lay witness testimony, shows that the Native American minority is politically cohesive. The Tribes have proven by a preponderance of the evidence that the second *Gingles* precondition is met.

3. *Gingles* 3: White Bloc Voting

With the first and second preconditions met, the analysis turns to the third precondition, which is the

chief point of disagreement between the Tribes and the Secretary. The third *Gingles* precondition "asks whether the white majority typically votes in a bloc to defeat the minority candidate." *Bone Shirt*, 461 F.3d at 1020. "This is determined through three inquiries: (1) identifying the minority-preferred candidates; (2) determining whether the white majority votes as a bloc to defeat the minority preferred candidate, and (3) determining whether there were special circumstances . . . present when minority-preferred candidates won." *Id.* (cleaned up).

Not all elections are equally relevant in assessing white bloc voting. "Endogenous[4] and interracial elections are the best indicators of whether the white majority usually defeats the minority candidate." *Id.* "Although they are not as probative as endogenous elections, exogenous elections hold some probative value." *Id.* In addition, "[t]he more recent an election, the higher its probative value." *Id.* There is no requirement that a particular number of elections be analyzed in determining whether white bloc voting usually defeats minority-preferred candidates. *Gingles*, 478 U.S. at 57 n.25. "The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." *Id.*

In assessing the third precondition, courts look to the districts in which it is alleged that Native American

4. An endogenous election is an election where a district (or subdistrict) is electing a direct representative for that district (or subdistrict), as opposed to an exogenous election, which in this case, are statewide elections.

preferred candidates are prevented from winning, not on neighboring "packed" districts. *Bone Shirt*, 461 F.3d at 1027 (Gruender, J., concurring) ("If the State's approach were correct, packing would be both the problem and the solution—i.e., having illegally packed Indians into one district, the State could then point out that Indians are sometimes able to elect their preferred candidate in the packed district"); *De Grandy*, 512 U.S. at 1003-04 (focusing on whether white voters vote as a bloc "to bar minority groups from electing their chosen candidates except in a district where a given minority makes up the voting majority"). Finally, courts must also consider whether "special circumstances . . . may explain minority electoral success in a polarized contest." *Gingles*, 478 U.S. at 57 & n.26. Special circumstances must be considered if "the election was not representative of the typical way in which the electoral process functions." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998).

i. Subdistrict 9B

Starting with subdistrict 9B, the parties agree that a white bloc voting usually defeats Native American preferred candidates in subdistrict 9B when the three most probative election types are considered. And the evidence at trial supports that conclusion.

Because the challenged plan that created the subdistrict was enacted in 2021, the only endogenous election data available is from the 2022 election. Nonetheless, the data is highly probative. One of two state legislative elections in subdistrict 9B's boundaries was

the district 9 at-large Senate election, which featured a Native American candidate,[5] who lost:

Election	Result	Native American Candidate Win or Lose
2022 State Senate District 9	Weston: 63.0% Marcellais*: 36.8%	Lose

Pl. Ex. 1 at 21. The other endogenous election in subdistrict 9B featured two white candidates. The Native American preferred candidate, incumbent Marvin Nelson, also lost:

Election	Result	Native American Candidate Win or Lose
2022 State House District 9	Henderson: 56.5% Nelson*: 37.6%	Lose

Id. Beyond the 2022 endogenous election data, there are four exogenous (or statewide) elections since 2016 that featured Native American candidates that voters in precincts within the boundaries of now-subdistrict 9B voted in.[6] In each of those contests, the Native American candidate lost:

5. In all tables below, the Native American preferred candidates are marked with an asterisk.

6. To account for the lack of subdistrict specific election data, this data is generated from collecting precinct data from those precincts now in subdistrict 9B.

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Election	Result	Native American Candidate Win or Lose
2022 Public Service Commissioner	Fedorchak: 64.4% Moniz*: 35.3%	Lose
2016 Insurance Commissioner	Godfread: 58.4% Buffalo*: 41.6%	Lose
2016 Public Service Commissioner	Fedorchak: 60.2% Hunte-Beaubrun*: 32.4%	Lose

Id. at 17-20.

The next set of data focuses on the most recent three election cycles, where special circumstances were not present—here, the 2022, 2020, and 2016 elections.[7] Per the table below, the defeat rate of the Native American preferred candidates was 100% for every election cycle:

7. As discussed in detail below, the 2018 election involved special circumstances that made it atypical.

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Election	Result	Native American Preferred Candidate Win or Lose	Defeat Rate for Native American Preferred Candidates
2022 Agricultural Commissioner	Goehring: 70.9% Dooley*: 28.9%	Lose	**2022 Defeat Rate: 100%**
2022 Attorney General	Wrigley: 65.6% Lamb*: 34.3%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 65.4% Hammer*: 34.3%	Lose	
2022 Secretary of State	Howe: 57.1% Powell*: 33.7%	Lose	
2022 U.S. House	Armstrong: 61.4% Mund*: 38.4%	Lose	
2022 U.S. Senate	Hoeven: 60.6% Christiansen*: 27.5%	Lose	

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2020 Auditor	Gallion: 59.8% Hart*: 40.1%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Governor	Burgum: 65.3% Lenz*: 29.8%	Lose	
2020 President	Trump: 60.8% Biden*: 37.0%	Lose	
2020 Public Service Commissioner	Kroshus: 60.4% Buchmann*: 39.8%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Treasurer	Beadle: 58.6% Haugen*: 41.2%	Lose	
2020 U.S. House	Armstrong: 64.4% Raknerud*: 33.4%	Lose	
2016 Governor	Burgum: 61.7% Nelson*: 35.8%	Lose	**2022 + 2020 + 2016 Defeat Rate: 100%**
2016 President	Trump: 56.6% Clinton*: 33.8%	Lose	
2016 Treasurer	Schmidt: 53.6% Mathern*: 39.8%	Lose	
2016 U.S. Senate	Hoeven: 72.9% Glassheim*: 22.1%	Lose	

Pl. Ex. 1 at 17-20. This evidence establishes that white bloc voting usually—and always in the most probative elections—defeats the Native American preferred candidates in subdistrict 9B. As a result, the third precondition is met as to subdistrict 9B.

ii. District 15

The parties also agree that the same conclusion follows as to district 15. Again, the only endogenous election is the 2022 state legislative election, where two Native-American preferred candidates appeared on the ballot. Both were defeated:

Election	Result	Native American Candidate Win or Lose
2022 State Senate District 15	Estenson: 65.5% Brown*: 33.8%	Lose
2022 State House District 15	Frelich: 41.6% Johnson: 38.6% Lawrence-Skadsem*: 19.7%	Lose

Pl. Ex. 1 at 27. There have been no endogenous all-white elections in district 15. Four exogenous elections since 2016 have featured Native American candidates within the boundaries of district 15. In each of those contests—100% of the time—the Native American candidate lost:

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Election	Result	Native American Candidate Win or Lose
2022 Public Service Commissioner	Fedorchak: 69.3% Moniz*: 30.6%	Lose

Election	Result	Native American Candidate Win or Lose
2016 Insurance Commissioner	Godfread: 64.6% Buffalo*: 35.4%	Lose
2016 Public Service Commissioner	Fedorchak: 63.8% Hunte-Beaubrun*: 27.6%	Lose
2016 U.S. House	Cramer: 65.5% Iron Eyes*: 27.9%	Lose

Pl. Ex. 1 at 17-20. As shown below, Native American preferred candidates have lost every exogenous all-white election in the record:

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Election	Result	Native American Preferred Candidate Win or Lose	Defeat Rate for Native American Preferred Candidates
2022 Agricultural Commissioner	Goehring: 75.0% Dooley*: 24.9%	Lose	**2022 Defeat Rate: 100%**
2022 Attorney General	Wrigley: 70.9% Lamb*: 29.0%	Lose	
2022 Public Service Commissioner	Fedorchak: 69.3% Moniz*: 30.6%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 70.4% Hammer*: 29.4%	Lose	
2022 Secretary of State	Howe: 61.2% Powell*: 27.8%	Lose	
2022 U.S. House	Armstrong: 62.8% Mund*: 37.1%	Lose	
2022 U.S. Senate	Hoeven: 58.5% Christiansen*: 24.8%	Lose	

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2020 Auditor	Gallion: 65.4% Hart*: 34.5%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Governor	Burgum: 67.6% Lenz*: 25.8%	Lose	
2020 President	Trump: 64.3% Biden*: 33.0%	Lose	
2020 Public Service Commissioner	Kroshus: 64.1% Buchmann*: 35.7%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Treasurer	Beadle: 63.2% Haugen*: 36.3%	Lose	
2020 U.S. House	Armstrong: 68.7% Raknerud*: 28.1%	Lose	
2016 Governor	Burgum: 71.1% Nelson*: 24.8%	Lose	**2022 + 2020 + 2016 Defeat Rate: 100%**
2016 President	Trump: 57.6% Clinton*: 31.2%	Lose	
2016 Treasurer	Schmidt: 59.5% Mathern*: 31.8%	Lose	
2016 U.S. Senate	Hoeven: 75.7% Glassheim*: 18.5%	Lose	

Pl. Ex. 1 at 27-30.

Again, like subdistrict 9B, all this evidence establishes that white bloc voting usually—and always in the most probative elections—defeats the Native American preferred candidates in district 15. As a result, the third precondition is met as to district 15.

iii. District 9

District 9 at-large presents a much closer call and is the central point of disagreement between the parties. The Secretary disputes whether the white vote bloc usually defeats the Native American preferred candidate in (as-enacted and at-large) district 9. But based on the evidence at trial, the Tribes proved by a preponderance of the evidence that a white bloc voting does usually defeat Native American preferred candidates in the as-enacted and at-large district 9.

Without question, and consistent with case law, the most probative election in district 9 at-large is the 2022 Senate election. The election featured each of the three factors that makes an election more probative—(1) it is an endogenous election, (2) it featured a Native American candidate, and (3) it is part of the most recent election cycle. Native American incumbent Senator Marcellais lost his bid for reelection despite Native American voters casting roughly 80% of their ballots for him. Pl. Ex. 1 at 15; *see Bone Shirt*, 461 F.3d at 1021 (affirming finding that *Gingles* 3 was satisfied where "[i]n the only mixed-race endogenous election . . . the Indian-preferred candidate for state senate lost even though he received 70 percent of the Native-American vote"). As the 2022 election data shows,

Senator Marcellais, the Native American candidate, was defeated by his opponent, the candidate of choice of white voters in the district:

Election	Result	Native American Candidate Win or Lose
2022 Public Service Commissioner	Weston: 53.7% Marcellais*: 46.1%	Lose

Pl. Ex. 1 at 17. Moving to the statewide exogenous elections since 2016, four have featured Native American candidates within the current boundaries of district 9. In those elections, the Native American candidate lost half of the elections:

Election	Result	Native American Candidate Win or Lose
2022 Public Service Commissioner	Fedorchak: 54.1% Moniz*: 45.7%	Lose
2016 Public Service Commissioner	Fedorchak: 46.5% Hunte-Beaubrun*: 46.1%	Lose

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2016 Insurance Commissioner	Godfread: 43.2% Buffalo*: 56.8%	Win
2016 U.S. House	Cramer: 46.9% Iron Eyes*: 49.3%	Win

Pl. Ex. 1 at 17-20. When all contests featuring Native American candidates (whether endogenous or exogenous) are taken together, the defeat rate for Native American candidates is 60%.

Among exogenous all-white elections, Native American preferred candidates lost 100% of the 2022 elections, 67% of the 2022 and 2020 elections combined, and 56% of the 2022, 2020, and 2016 elections combined:

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Election	Result	Native American Preferred Candidate Win or Lose	Defeat Rate for Native American Preferred Candidates
2022 Agricultural Commissioner	Goehring: 60.2% Dooley*: 39.6%	Lose	**2022 Defeat Rate: 100%**
2022 Attorney General	Wrigley: 55.3% Lamb*: 44.6%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 55.2% Hammer*: 44.6%	Lose	
2022 Secretary of State	Howe: 47.5% Powell*: 42.3%	Lose	
2022 U.S. House	Armstrong: 52.8% Mund*: 47.0%	Lose	
2022 U.S. Senate	Hoeven: 51.3% Christiansen*: 36.4%	Lose	

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2020 Auditor	Gallion: 46.5% Hart*: 53.4%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Governor	Burgum: 52.8% Lenz*: 43.1%	Lose	
2020 President	Trump: 47.2% Biden*: 50.8%	Lose	
2020 Public Service Commissioner	Kroshus: 46.4% Buchmann*: 53.4%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Treasurer	Beadle: 45.6% Haugen*: 54.2%	Lose	
2020 U.S. House	Armstrong: 50.3% Raknerud*: 47.0%	Lose	
2016 Governor	Burgum: 48.3% Nelson*: 48.7%	Lose	**2022 + 2020 + 2016 Defeat Rate: 100%**
2016 President	Trump: 44.2% Clinton*: 45.1%	Lose	
2016 Treasurer	Schmidt: 41.6% Mathern*: 50.0%	Lose	
2016 U.S. Senate	Hoeven: 59.7% Glassheim*: 33.9%	Lose	

Pl. Ex. 1 at 17-20. From this data, a pattern emerges: the more recent the election, the more likely the Native American preferred candidate is to lose. When averaged together, the total defeat rate is 56%. Beyond that, even when the 2018 election results (which, as explained below, was an atypical election) are factored in, the 100% defeat rate for Native American candidates of choice in the most recent election is highly probative and compelling evidence of white bloc voting. Said another way, giving each election the appropriate weight per Eighth Circuit and Supreme Court case law, the evidence proves by a preponderance that Native American candidates of choice will not be successful over 50% of the time in as-enacted and at-large district 9.

iv. 2018 Election and Special Circumstances

One of the key differences of opinion between Dr. Collingwood and Dr. Hood concerns the probative value and weight of the 2018 election. "Only minority electoral success in typical elections is relevant to whether a Section 2 majority voting bloc usually defeats the minority's preferred candidate." *Ruiz*, 160 F.3d at 557. So, a central issue is whether 2018 was a typical election, deserving equal weight as other elections, or whether it was an atypical election, deserving less weight than other elections. The Secretary argues that 2018 is a typical election deserving equal weight; the Tribes assert that the 2018 election was atypical and deserves less weight.

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In 2018, a North Dakota voter identification law was upheld that required a residential address to vote. The voter identification requirement affected the number of Native Americans eligible to vote and resulted in significant national and regional attention to Native American voters and increasing voter turnout. Voter turnout did increase dramatically, as compared to years prior and since:

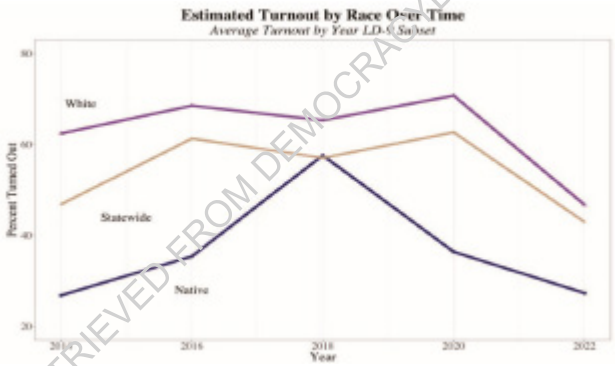
Election	White Electorate Share	Native American Electorate Share
2014	67%	33%
2016	63%	37%
2018	50%	50%
2020	63%	37%
2022	60%	40%

Pl. Ex. 42 at 4-5. Because of the increase in Native American voter turnout, Native American preferred candidates also performed much better than in any other years, prior or since. Pl. Ex. 1 at 18.

Chairman Azure and former Chairman Yankton persuasively testified about the extraordinary resources that poured into North Dakota's Native American reservations in the lead up to the 2018 election. Doc. 115 at 80:18-86:17; Doc. 117 at 21:8-12. The voter identification law caused a backlash among Native American voters, which was aided by substantial financial resources promoting get-out-the-vote efforts on the reservations. *Id.* National celebrities gave concerts and performances

on the reservations to promote turnout. *Id.* Both testified that the resources—and resulting turnout among Native American voters—was unlike anything they have seen before or since. *Id.*

That testimony is supported by the data. Native American turnout in 2018 was unusually high. Not only did it exceed statewide turnout and approach white turnout in district 9, but it inverted the normal pattern of lower turnout in midterm versus presidential elections:



Pl. Ex. 43.

With those facts in mind, the experts offer competing opinions on the probative value of the 2018 election. Dr. Hood concluded that the third precondition was not met in as-enacted and at-large district 9 because Native American preferred candidates were successful in over 50% of the elections he reviewed. To reach that conclusion and opinion, Dr. Hood reviewed the election data from Dr.

Collinwood's report and added together the elections in at-large district 9 and subdistrict 9A and 9B. Pl. Ex. 81 at 4. He also included the election data from the 2018 election. Doc. 117 at 143. In other words, Dr. Hood considered all election data equally and gave no probative weight or value to any one election. Doc. 117 at 85:19-86:6. Also, and importantly, Dr. Hood did not consider the 2022 election results. *Id.* at 150.

Dr. Collingwood reached a different conclusion. He concluded the 2018 election presented special circumstances, including unprecedented voter turnout, that "warrant and counsel against mechanically interpreting" the results. Pl. Ex. 1 at 18. As a result, he gave the 2018 election less weight when calculating white bloc voting in district 9. He also did consider the 2022 election, weighed that election more heavily, and concluded that the Native American preferred candidate "lost every single contest." Pl. Ex. 1 at 21. Dr. Collingwood opined that the third precondition is met because "white voters are voting as a bloc to prevent Native Americans from electing candidates of choice in recent elections, in endogenous elections . . , and in 60% of contests across all tested years in which the Native American preferred candidate was a Native American." Pl. Ex. 1 at 43.

Having heard the testimony by both experts at trial, along with having reviewed their respective reports, Dr. Collingwood's conclusions and analysis are more credible because they follow the general directives of the Eighth Circuit in weighing elections in VRA cases. Indeed, the Eighth Circuit has recognized that endogenous elections

should be considered more probative than exogenous elections; elections with a Native American candidate are more probative than elections that do not feature a Native American candidate; and that more recent elections have more probative value than less recent elections. *Bone Shirt*, 461 F.3d at 1020-21. Dr. Hood gave all elections equal probative value and generally weighed all elections the same. But Dr. Collingwood's report and methodology more closely tracks the instruction from the Eighth Circuit in weighing election data in VRA cases, making it more credible and reliable. In addition, Dr. Hood's testimony at trial acknowledged that endogenous elections, elections featuring Native American candidates, and more recent elections are more probative. Doc. 117 at 142:9-143:7. He also testified that the 2022 endogenous election for the district 9 Senate seat was the "single most probative" election because it featured all three probative characteristics (*id.* at 143:12-17), but he did not consider the 2022 endogenous election in reaching his conclusions (*id.* at 150).

Substantively and statistically, Dr. Hood's conclusion on the third precondition rests on adding together all data from district 9 and subdistricts 9A and 9B. But recall that subdistrict 9A has a near 80% NVAP, and Native American preferred candidates win 100% of the time. A district with a packed minority population is not one where the defeat of minority preferred candidates is to be expected, and it should not be considered as part of the third *Gingles* precondition. *See Bone Shirt*, 461 F.3d at 1027. And importantly, as Dr. Hood testified and acknowledged at trial, if subdistrict 9A was removed from

his analysis, the Native American preferred candidates defeat rate is 59.5%. Doc. 117 at 148:16-24. That alone also satisfies the third *Gingles* precondition.

Having reviewed the testimony and evidence, giving the elections the appropriate weight consistent with Eighth Circuit case law, the Tribes have proven by a preponderance of the evidence that the white majority typically votes in a bloc to defeat the minority candidate in as-enacted and at-large district 9. As such, the third *Gingles* precondition is also established as to as-enacted and at-large district 9.

B. Totality of the Circumstances and the Senate Factors

With the *Gingles* preconditions met, the Section 2 analysis turns to the totality of the circumstances and analysis of the Senate Factors. The Senate Factors come from the Senate Committee report to the 1982 amendment to the VRA and directs courts to consider the following factors in determining whether the totality of the circumstances indicate a Section 2 violation:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.R. No. 97-417 at 28-29 (1982); *Gingles*, 478 U.S. at 44-45. Two additional factors are also probative in determining a Section 2 violation: (1) was there a significant lack of response from elected officials to the needs of the minority group; and (2) was the policy underlying the jurisdiction's use of the current boundaries tenuous. *Gingles*, 478 U.S. at 44. "[T]his list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, . . . there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 45 (internal citations omitted).

1. Senate Factors 2 and 7

"Two factors predominate the totality-of-circumstances analysis: the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme." *Bone Shirt*, 461 F.3d at 1022. As to Senate Factor 2, the extent of racially polarized voting, the record reflects a high level of racially polarized voting in districts 9 and 15 and subdistricts 9A and 9B. That evidence is largely undisputed and was discussed at length above. As to Senate Factor 7—the extent to which Native Americans have been elected—the only election under the 2021 redistricting plan in 2022 resulted in the loss of a Native American Senator (who had held the seat since 2006). Brown, a Native American, also lost the district 15 race. In effect, as a result of the 2021 redistricting plan, Native

Americans experienced a net-loss of representation. Both factors weigh the totality of the circumstances towards a Section 2 violation.

2. Remaining Senate Factors

This leaves factors one, three,[8] and five,[9] along with tenuousness, lack of response, and proportionality. As to the first Senate Factor, which considers historical discrimination practices, the Tribes offered expert testimony from Dr. Daniel McCool. He testified as to the long history of mistreatment of Native Americans in North Dakota and discussed evidence of contemporary discrimination against Native Americans, including many successful voting discrimination claims affecting Native Americans. Doc. 116 at 90-126. The evidence of discrimination in the democratic and political process against Native Americans in North Dakota is well-documented and undisputed by the Secretary. So, the first Senate Factor 1 weighs toward a Section 2 violation.

Next, as to the third Senate Factor, which considers discrimination through voting practices and procedures, the Tribes suggest that the 2021 redistricting plan itself is the best evidence of voting practices or procedures that enhance the opportunity for discrimination. But beyond that blanket assertion, there is no evidence that the Secretary used the 2021 redistricting plan to enhance the

8. Senate Factor 4, which addresses candidate slating processes, is not applicable on these facts.

9. The parties agree that Senate Factor 6 is not at issue.

opportunity of discrimination against Native Americans. As a result, the third Senate Factor does not weigh toward finding Section 2 violation.

Senate Factor 5 considers the effects of discrimination against Native Americans more broadly, in such areas as education, employment, and health care. Dr. Weston McCool offered undisputed evidence as to the lower socio-economic status of Native Americans in North Dakota and that Native Americans continue to experience the effects of discrimination across a host of socioeconomic measures, which results in inequal access to the political process. Doc. 116 at 148. And the Secretary did not challenge that evidence. Senate Factor 5 weighs toward a Section 2 violation.

The three remaining factors in the totality of the circumstances analysis are tenuousness, lack of response, and proportionality. Tenuousness looks at the justification and explanation for the policy or law at issue. "The tenuousness of the justification for the state policy may indicate that the policy is unfair." *Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1197 (D.S.D. 2006).

While the actions of the Legislative Assembly may not have ultimately went far enough to comply with Section 2 of the VRA, the record establishes that the Secretary and the Legislative Assembly were intensely concerned with complying with the VRA in passing the 2021 redistricting plan and creating the districts and subdistricts at issue. The justification by the Secretary for

the 2021 redistricting plan is not tenuous, and this factor does not weigh in favor of a Section 2 violation.

The next factor is lack of response. The Tribes generally assert the Legislative Assembly was unresponsive to the needs of the Native American community. But the Secretary presented ample evidence of Tribal representatives and members generally advocating for subdistricts. Doc. 116 at 28, 32-33, 33-34, 134, 141. Again, the record is clear that the Legislative Assembly sought input from the Tribes and their members and attempted to work with the Tribes to comply with the VRA, even though the VRA compliance measures fell short. Also recall that the redistricting plan was developed under a truncated timeline because of the COVID-19 pandemic. On these facts, one cannot find a lack of response by the Secretary and the Legislative Assembly, and as a result, this factor does not weigh in favor of a Section 2 violation.

The final factor is proportionality. Based on their share of statewide VAP, Native Americans should hold three Senate seats and six House seats. However, under the 2021 redistricting plan, Native Americans hold zero seats in the Senate and two House seats. Either of the proposed plans would yield one Senate seat and three House seats. While certainly not dispositive, this obvious disparity as to proportionality is further evidence of vote dilution under the totality of circumstances.

All told, while a closer decision than suggested by the Tribes, the two most critical Senate Factors (2 and 7) weigh heavily towards finding a Section 2 violation. Those

factors, together with the evidence on Senate Factors 1, 5, and proportionality, demonstrates that the totality of the circumstances deprive Native American voters of an equal opportunity to participate in the political process and to elect representatives of their choice, in violation of Section 2 of the VRA.

III. CONCLUSION AND ORDER

"Determining whether a Section 2 violation exists is a complex, fact-intensive task that requires inquiry into sensitive and often difficult subjects." *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1082 (E.D. Missouri 2016). This case is no exception. It is evident that, during the redistricting process, the Secretary and the Legislative Assembly sought input from the Tribes and other Native American representatives. It is also evident that the Secretary and the Legislative Assembly did carefully examine the VRA and believed that creating the subdistricts in district 9 and changing the boundaries of districts 9 and 15 would comply with the VRA. But unfortunately, as to districts 9 and 15, those efforts did not go far enough to comply with Section 2.

"The question of whether political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Id.* (citing *Gingles*, 478 U.S. at 45). Having conducted that evaluation and review, the 2021 redistricting plan, as to districts 9 and 15 and subdistricts 9A and 9B, prevents Native American voters from having

an equal opportunity to elect candidates of their choice in violation of Section 2 of the VRA. The Secretary is permanently enjoined from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the North Dakota Legislative Assembly from districts 9 and 15 and subdistrict 9A and 9B. The Secretary and Legislative Assembly shall have until December 22, 2023, to adopt a plan to remedy the violation of Section 2. The Tribes shall file any objections to such a plan by January 5, 2024, along with any supporting expert analysis and potential remedial plan proposals. The Defendant shall have until January 19, 2024, to file any response. The first election for the state legislative positions in the remedial district shall occur in the November 2024 election.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 17th day of November, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

APPENDIX I — ORDER DENYING MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED JULY 7, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 3:22-cv-22

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, SPIRIT LAKE TRIBE, WESLEY DAVIS, ZACHERY S. KING, AND COLLETTE BROWN,

Plaintiffs,

vs.

ALVIN JAEGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF NORTH DAKOTA,

Defendant.

Filed July 7, 2022

ORDER DENYING MOTION TO DISMISS

Before the Court is the Defendant Secretary of State of North Dakota Alvin Jaeger's (the "Secretary") motion to dismiss for lack of jurisdiction and for failure to state a claim filed on April 15, 2022. Doc. No. 17. Plaintiffs Turtle Mountain Band of Chippewa Indians ("Turtle Mountain"), Spirit Lake Tribe ("Spirit Lake"), Wesley Davis, Zachery

S. King, and Collette Brown (together, the "Plaintiffs") responded in opposition on May 13, 2022. Doc. No. 24. The Secretary filed his reply on May 27, 2022. Doc. No. 26. The United States also filed a Statement of Interest. Doc. No. 25. For the reasons below, the motion to dismiss is denied.

I. FACTUAL BACKGROUND

Article IV, Section 2 of the North Dakota Constitution requires the state legislature to redraw the district boundaries of each legislative district following the census, which takes place at the end of each decade. Following the release of the 2020 Census results, North Dakota Governor Doug Burgum issued Executive Order 2021-17[1] on October 29, 2021. This Executive Order convened a special session of the Legislative Assembly for the purposes of "redistricting of government." N.D. Exec. Order No. 2021-17 (Oct. 29, 2021). On November 10, 2021, the Legislative Assembly passed House Bill 1504, which provided for a redistricting of North Dakota's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). House Bill 1504 was signed into law by North Dakota Governor Doug Burgum on November 11, 2021. *Id.*

In this action, the Plaintiffs challenge the above redistricting plan passed by the North Dakota Legislative Assembly (i.e., House Bill 1504), and signed by the North Dakota Governor, under Section 2 of the Voting Rights Act ("VRA") ("Section 2"), 52 U.S.C. § 10301. Doc. No.

1. N.D. Exec. Order No. 2021-17 (Oct. 29, 2021), available at: https://www.governor.nd.gov/executive-orders.

1. More specifically, the Plaintiffs bring a voter dilution claim and allege that the newly adopted redistricting plan dilutes the voting strength of Native Americans on the Turtle Mountain and Spirit Lake reservations, and in surrounding areas, in violation of Section 2 of the VRA. *Id.* at 29-31. In addition to the Section 2 challenge, the Plaintiffs also bring a claim under 42 U.S.C. § 1983 ("§ 1983"). *Id.* at 3. The Plaintiffs seek declaratory and injunctive relief prohibiting the Secretary from conducting elections under the allegedly dilutive redistricting plan and seek remedial relief from the State of North Dakota's failure to conduct elections under a plan that complies with the requirements of the VRA. *Id.* at 31. In lieu of an answer, the Secretary filed this motion to dismiss. Doc. No. 17.

II. LEGAL DISCUSSION

The Secretary's motion asks for dismissal on three grounds—first, that Turtle Mountain and Spirit Lake (together, the "Tribal Plaintiffs") lack standing to bring claims under the VRA. *Id.* at 8-13. Second, the Tribal Plaintiffs cannot allege a VRA claim because they are not "citizens" of the United States. *Id.* at 7-8. Finally, the Secretary argues that Section 2 of the Voting Rights Act does not provide a private right of action. *Id.* at 4-7. The Plaintiffs, for their part, argue the Tribal Plaintiffs have standing and that the citizenship requirement to bring a claim under the VRA has been satisfied. Additionally, as to the private right of action, the Plaintiffs argue that when read and considered together, § 1983 provides a private remedy to enforce Section 2 of the VRA, and

alternatively, Section 2 implies its own private right of action. The United States, in its Statement of Interest, similarly argues that Section 2 contains a private right of action, and alternatively, § 1983 provides a remedy that can be used to enforce Section 2 of the VRA. Doc. No. 25.

A. Standing

Turning first to the issue of standing, the Secretary argues that the Tribal Plaintiffs should be dismissed for lack of standing. The Tribal Plaintiffs respond that standing can be established through the individual Plaintiffs, the diversion of the Tribal Plaintiffs' resources, or the principles of organizational standing. The Court agrees that the Tribal Plaintiffs have standing.

1. Applicable Law

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. This jurisdictional limitation requires every plaintiff to demonstrate it has standing when bringing an action in federal court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin,* 422 U.S. 490, 518 (1975). The essence of standing is whether the party invoking federal jurisdiction is entitled to have the court decide the merits of the dispute. *Id.* at 498.

"[T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact' . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant' . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Sierra Club v. Robertson,* 28 F.3d 753, 757-58 (8th Cir. 1994) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560- 61 (1992)).

To show an injury-in-fact, a plaintiff must show "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical." *Id.* Merely alleging an injury related to some cognizable interest is not enough; rather, a plaintiff "must make an adequate showing that the injury is actual or certain to ensue." *Id.* If a plaintiff lacks Article III standing, a federal court has no subject-matter jurisdiction over the claim and the action must be dismissed. *Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.,* 813 F.3d 1124, 1128 (8th Cir. 2016).

2. Individual Standing

The Secretary does not dispute that the individual Plaintiffs in this matter have standing to bring this claim under Section 2. Instead, the Secretary's argument is focused on the Tribal Plaintiffs' lack of standing. When there are multiple plaintiffs, at least one of the plaintiffs must demonstrate standing for each claim and each form

of relief being sought. *Spirit Lake Tribe v. Jaeger,* No. 1:18-CV-222, 2020 WL 625279, at *3 (D.N.D. Feb. 10, 2020). One plaintiff having standing to bring a specific claim generally confers standing to all plaintiffs on that claim. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.,* 429 U.S. 252, 264 (1977); *see also Jones v. Gale,* 470 F.3d 1261, 1265 (8th Cir. 2006). Here, the individual Plaintiffs' right to sue has not been challenged, and even if it had been, the argument would fail, as individuals residing in an allegedly aggrieved voting district have standing to bring a claim under the VRA. *See Gill v. Whitford,* 138 S. Ct. 1916 (2018); *see also Roberts v. Wamser,* No. 88-1138, 1989 WL 94513 (8th Cir. Aug. 21, 1989). Because the individual Plaintiffs have standing, there is no authority to dismiss the Tribal Plaintiffs from the action due to lack of standing.

3. Diversion of Resources

Moreover, even without the individual Plaintiffs, the Tribal Plaintiffs have standing to bring a Section 2 claim. As this Court noted in *Spirit Lake,* "[t]he Court can see no reason why a federally recognized Indian Tribe would not have standing to sue to protect the voting rights of its members when private organizations like the NAACP and political parties are permitted to do so." 2020 WL 625279, at *5. Here, just as in *Spirit Lake,* the Tribal Plaintiffs assert they have been forced to divert resources in response to the North Dakota Legislative Assembly's actions. Doc. No 1, ¶¶ 43-44. This is sufficient to establish standing. *See Spirit Lake Tribe,* 2020 WL 625279, at *4. Further, and consistent with *Spirit Lake,*

because standing has been established in alternative ways, the Court need not examine the merits of associational standing or standing under *parens patriae*. *Id.*

4. Citizenship

The Secretary goes on to argue that the Tribal Plaintiffs cannot advance a VRA claim because they are not "citizens" of the United States. In *Spirit Lake,* this Court held that this argument is a challenge to standing. 2020 WL 625279, at *4. As discussed above, because the individual Plaintiffs have standing, there is no standing issue as to the Tribal Plaintiffs. Nevertheless, this Court held in *Spirit Lake* that the Indian Tribes do have standing to protect the voting rights of its members. *Id.* The same analysis applies here, and the Secretary's argument is without merit.

B. Private Right of Action

With the standing issues resolved, the Court turns to the Secretary's argument that Section 2 of the VRA does not provide a private right of action, and as a result, the complaint fails to state a claim (due to lack of subject matter jurisdiction) and the case must be dismissed. The Plaintiffs counter that their § 1983 claim provides the remedy necessary to enforce Section 2 of the VRA, and alternatively, the plain language of Section 2 implies a private right of action. The Court finds that § 1983 provides a private remedy for violations of Section 2 of the VRA, and therefore, it is not necessary for the Court

to decide whether Section 2, standing alone, contains a private right of action.

1. Relevant Legal Background

The question of whether Section 2 of the VRA contains a private right of action presents a novel legal question. In a recent United States Supreme Court decision involving a Section 2 case, Justice Gorsuch (joined by Justice Thomas) concurred with the majority opinion but wrote separately to "flag" an issue that was not before the Court. *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2350, 210 L. Ed. 2d 753 (2021). His concurrence stated, in relevant part:

> I join the Court's opinion in full, but flag one thing it does not decide. Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2. Lower courts have treated this issue as an open question.

Id. Following *Brnovich,* the United States District Court for the Eastern District of Arkansas took notice of Justice Gorsuch's concurrence, and when presented with a case alleging voter dilution among African American voters, examined whether Section 2, standing alone, contains a private right of action. *See generally Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment,* No. 4:21-CV-01239-LPR, 2022 WL 496908 (E.D. Ark. Feb. 17, 2022). In what can only be described a thorough and well-reasoned—though admittedly, controversial—order, the

district court found that Section 2 of the VRA, standing alone, does not provide a private right of action.[2]

Id. at 10. This lack of remedy inevitably led the district court to conclude that private individuals do not have a private right of action to enforce Section 2, and the case was dismissed for lack of subject matter jurisdiction after the Attorney General of the United States declined to join the lawsuit. *Id.* at 23. Here, the Secretary encourages this Court to follow *Arkansas State Conf. NAACP* and find that the Plaintiffs do not have a private right of action under Section 2 of the VRA—leading to dismissal of the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

2. Applicable Law

"Subject matter jurisdiction refers to the court's power to decide a certain class of cases." *LeMay v. United States Postal Serv.,* 450 F.3d 797, 799 (8th Cir. 2006) (citing *Continental Cablevision of St. Paul, Inc. v. United States Postal Serv.,* 945 F.2d 1434, 1437 (8th Cir. 1991)). "It is axiomatic that the federal courts lack plenary jurisdiction." *Southwestern Bell Tel. Co. v. Connect Communications Corp.,* 225 F.3d 942, 945 (8th Cir. 2000). Rather, "[t]he inferior federal courts may only exercise jurisdiction where Congress sees fit to allow it." *Id.* Put simply, federal courts cannot hear cases that fall outside

2. Notably, the district court explicitly states it did not consider whether Section 2 contains rights-creating language and that its decision was premised on the lack of a private remedy. *Arkansas State Conf. NAACP,* WL 496908, at *10.

of the limited jurisdiction granted to them. *Bhd. of Maint. of Way Emps. Div. of Int'l Bhd. of Teamsters v. Union Pac. R. Co.,* 475 F. Supp. 2d 819, 831 (N.D. Iowa 2007).

Federal Rule of Civil Procedure 8(a) requires a pleading only to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Nevertheless, a complaint may be dismissed for "failure to state a claim upon which relief can be granted," and a party may raise that defense by motion. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A plaintiff must show that success on the merits is more than a "sheer possibility." *Id.*

3. Section 1983

Whether the VRA contains a private right of action is significant because, without it, the Court does not have subject matter jurisdiction to decide a Section 2 claim that is not joined by the United States Attorney General. At first blush, the Secretary's argument, and the decision in *Arkansas State Conf. NAACP,* are compelling. However, unlike the complaint in *Arkansas State Conf. NAACP,* the Plaintiffs here seek relief under § 1983 and Section 2 of the VRA. So, the Plaintiffs argue they have a private right of action to support their Section 2 claim because the complaint seeks to enforce Section 2 in conjunction with § 1983. The Secretary, for his part, argues that Congress

effectively shut the door to a § 1983 remedy. However, the Court is not persuaded.

Section 1983 provides a remedy for violations of federal rights committed by state actors. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 284, 122 S. Ct. 2268, 2276 (2002). Rights are enforceable through § 1983 only if it is clear that Congress intended to establish an individual right. *Gonzaga Univ.,* 536 U.S. 273, at 284. "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Id.* This presumption of enforceability is only overcome in cases where Congress intended to foreclose any § 1983 remedy. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 19–20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); *see also Alexander v. Sandoval,* 532 U.S. 275, 290, 121 S. Ct. 1511, 1521, 149 L. Ed. 2d 517 (2001).

Prior to *Gonzaga University,* the United States Supreme Court's case law regarding what rights are enforceable through § 1983, in the Court's words, "may not [have been] models of clarity." *Gonzaga Univ.,* 536 U.S. 273, at 278. As such, the *Gonzaga University* Court sought to clarify the test for what rights can be enforced through § 1983. The Supreme Court held that the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute confers a right on a particular class of person. *Id.* at 258. Accordingly:

> A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.

Id. at 285 (cleaned up). In sum, § 1983 can create a remedy for a plaintiff when one does not already exist. When a statute does not provide an explicit right of action, the analysis of whether a plaintiff may bring a § 1983 claim is dependent on whether the statute sought to be enforced through § 1983 confers rights on a particular class of people.

Importantly (and likely not coincidentally), *Arkansas State Conf. NAACP,* which is the only factually similar case cited by the Secretary in support of his motion, specifically notes that § 1983 was not alleged in the complaint at issue in that case, and that because Section 2 lacked a private right of action, there was no need to consider whether the text of the statute conferred a right. 2022 WL 496908, at * 10. Stated another way, the analysis in *Arkansas State Conf. NAACP* ended because there was no private remedy available, and no other claims were alleged. However, here, because a § 1983 claim was alleged, there is a presumption of a private remedy, should Section 2 create a right. This fact is significant and undoubtably distinguishes *Arkansas State Conf. NAACP.* So, the questions this Court is left with, then, is whether

Section 2 confers rights on a particular class of people, and if so, whether the Secretary can rebut the presumption that § 1983 provides a remedy.

4. Text of Section 2

Turning to the first question, it is undisputed that Section 2 of the VRA does not explicitly contain a private right of action, making the Plaintiffs' claim contingent on the existence of an implied private right of action. As alluded to in *Gonzaga University,* to enforce a statute under an implied private right of action, the Plaintiffs must satisfy two requirements: (1) the statute's text must contain language that confers a right, and (2) the party must demonstrate the availability of a private remedy. *Sandoval,* 532 U.S. at 286–88, 121 S.Ct. 1511. As noted above, § 1983 provides a private remedy. The Court now turns to whether the text of Section 2 confers a right. As relevant here, Section 2 states:

> 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 of the United States to vote on account of race or color. . . .

52 U.S.C. § 10301(a). The plain language of Section 2 mandates that no government may restrict a citizen's right to vote based on an individual's race or color. It is difficult to imagine more explicit or clear rights creating

language. It cannot be seriously questioned that Section 2 confers a right on a particular class of people. And indeed, the Secretary does not argue that Section 2 does not contain rights creating language. When this right is taken collectively with the remedy available through § 1983, an implied private right of action is present, and the motion to dismiss must be denied, unless the Secretary can show that the VRA's enforcement scheme demonstrates congressional intent to preclude a § 1983 remedy. *See generally Gonzaga Univ.,* 536 U.S. 273.

5. The VRA's Enforcement Scheme

To that end, a party can rebut the presumption that a federal right is enforceable through § 1983 by demonstrating congressional intent to foreclose a § 1983 remedy. *See id.* at 284 n.4. Congressional intent may be found directly in the statute creating the right or inferred from the statute's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement." *City of Rancho Palos Verdes, Cal. v. Abrams,* 544 U.S. 113, 120 (2005). An express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a remedy under § 1983. *Blessing v. Freestone,* 520 U.S. 329, 341 (1997).

Section 2 does not contain any language creating a private remedy distinct from § 1983. In fact, Section 2 proscribes no remedy at all. As a result, the Court cannot conclude that anything in Section 2 indicates congressional

intent to specifically prevent enforcement through § 1983 by providing a separate private remedy.

Now to the enforcement scheme. The Secretary argues Section 12 of the VRA ("Section 12"), 52 U.S.C. § 10308, provides a comprehensive scheme to enforce Section 2 that is incompatible with private enforcement. Admittedly, Section 12 contains no express, private remedies and provides the right to the Attorney General to seek an injunction and potential fines and imprisonment for violations of the VRA. See 52 U.S.C. § 10308. Critically, though, there is also nothing in Section 12 that is incompatible with private enforcement, as there can be collective and private remedies available for the same federal statute. *See Cannon v. Univ. of Chicago,* 441 U.S. 677, 717 (1979) (collective and private remedies available for violation of Title IX). Tellingly, the VRA itself seems to anticipate private litigation, as it contains a provision allowing for court-ordered attorneys' fees for "the prevailing party, other than the United States." 52 U.S.C. § 10310(e).

Further, there has been private enforcement of Section 2 since the VRA's inception. *See Allen v. State Bd. of Elections,* 393 U.S. 544, 555 (1969); *Ala. State Conf. of NAACP v. Alabama,* 949 F.3d 647, 652 (11th Cir. 2020); *Mixon v. Ohio,* 193 F.3d 389, 398–99 (6th Cir. 1999); *Singleton v. Merrill,* No. 2:21-cv-1530-AMM, 2022 WL 265001, at *79 (N.D. Ala. Jan. 24, 2022). These private enforcement actions have co-existed with collective enforcement brought by the United States for decades. *See, e.g., Allen,* 393 U.S. 544, at 555.

Given the lack of evidence that Congress intended to provide an explicit private remedy, and the robust history of the private and collective rights co-existing, the Court cannot conclude that private enforcement of Section 2 is incompatible with the enforcement scheme in Section 12. As a result, the Secretary has not rebutted the presumption that § 1983 may provide a remedy for the Plaintiffs in this case, the Court has subject matter jurisdiction to entertain this private claim, and the complaint does not fail to state a claim upon which relief can be granted. Accordingly, the motion to dismiss is denied. Because this Court finds that Section 2 may be enforced through § 1983, the Court need not decide whether Section 2 of the VRA, standing alone, contains an implied private right of action.

III. CONCLUSION

The Court has carefully reviewed the record, the parties' filings, and the relevant legal authority. For the reasons above, the Secretary's motion to dismiss for lack of jurisdiction and failure to state a claim (Doc. No. 17) is **DENIED**.

IT IS SO ORDERED.

Dated this 7th day of July, 2022.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court