No. 25-234

# In the Supreme Court of the United States

STATE BOARD OF ELECTION COMMISSIONERS, ET AL.,
*Appellants,*

v.

MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
*Appellees.*

**On Appeal from the United States District Court for the Southern District of Mississippi**

## BRIEF OPPOSING MOTION TO AFFIRM


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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Constitutional Provisions**



**Statutes**

**Other Authorities**

## INTRODUCTION

Appellees do not contest that this case cleanly invokes this Court's mandatory jurisdiction and squarely presents the question whether private parties may sue to enforce section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Appellees agree that there is "a circuit split on the question presented" (Mot. 35) and do not dispute that the question has enormous practical ramifications. Yet appellees urge this Court to decide this case summarily. The acknowledged circuit conflict and undisputed importance of the question presented doom that plea. JS 29-33. And appellees—like the district court, multiple courts of appeals, and many private litigants—are wrong on the merits of that question: private parties may not sue to enforce section 2. JS 17-28. This Court should note probable jurisdiction, set this case for oral argument, and reverse.



## ARGUMENT

### I. The District Court Erred In Holding That Private Parties May Sue To Enforce Section 2 Of The Voting Rights Act.

The district court erred in holding that private parties may sue to enforce section 2. JS 17-28. Appellees' defense of that ruling (Mot. 16-34) fails.

A. Appellees claim that this Court "decided the question presented" in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). Mot. 16 (formatting altered); *see* Mot. 16-18. That is wrong. JS 26-27.

*Morse* did not decide whether private parties may enforce section 2: it decided that private parties may enforce section 10—a poll-tax provision. JS 26-27; *see* Mot. 16-17 ("*Morse* was about whether Section 10 ...

was privately enforceable."). *Morse* did not reach a "holding" (or "conclusion") on section 2. Mot. 16, 17. *Morse*'s lead opinions made "assumptions" about section 2—"mere dicta" ("at most") with "hardly any analysis." *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204, 1215-16 (8th Cir. 2023); *compare Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (cited at Mot. 16) (adhering to a "well-established," "oft-repeated understanding" that had "grounded" this Court's state-sovereign-immunity decisions "[f]or over a century").

Because *Morse* does not reach a holding on section 2, it leaves open the question presented here. "[T]his Court is bound by holdings"—not "language," "assumption[s]," or dicta. *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). "[A]ssumptions" about "the validity of antecedent propositions" "are not binding in future cases that directly raise the questions" underlying those assumptions. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); *see Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("assum[ptions]" made without "squarely address[ing]" an issue are not "b[i]nd[ing]" in later cases). These points wash away the rest of appellees' arguments about *Morse*: *Morse* did not reach a holding on section 2 that "must be taken as given," that Congress may have "adopt[ed]," or that has "statutory stare decisis" effect. Mot. 17-18. So—even putting aside the implausibility that disparate dicta across two separate opinions could "squarely foreclose[ ]" a highly consequential legal position that warrants plenary Supreme Court review, Mot. 1—*Morse* provides no basis for the district court's ruling.

B. Appellees contend that private parties may sue to enforce section 2 under 42 U.S.C. § 1983 (Mot. 18-30) or under an implied right of action (Mot. 30-34). These arguments fail. JS 17-28.

1. Appellees' arguments fail because section 2 does not create a federal right—which alone bars private suits to enforce it. JS 19-22; *contra* Mot. 19-25, 30.

Appellees emphasize that section 2(a) "explicitly identifie[s] a 'right' to vote free from race discrimination." Mot. 20; *see* Mot. 21, 22, 24. Section 2(a) does refer to a "right." But that is not enough. JS 19-20. Section 2(a) is not "phrased with an unmistakable focus on the benefited class." *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002) (cleaned up). It is "phrased in terms of" the acts prohibited and actors regulated, not the "persons benefited." *Ibid.* Merely "speak[ing] in terms of rights" does not create a federal right in "clear and unambiguous terms." *Id.* at 289 n.7, 290 (cleaned up). So it is here. *Contra* Mot. 21. That view is reinforced by contrasting section 2(a) with the Civil Rights Act of 1964. JS 22. Appellees downplay the latter statute. Mot. 24-25. But it shows that when Congress passed the VRA it knew how to focus on the benefited class in a way that creates individual rights—and it did not do that in section 2. JS 22. Appellees also dispute that section 2(b) shows that section 2 has an "aggregate" focus. Mot. 24. But appellees ignore that section 2(b) focuses on "political processes" rather than on an individual right, that Congress drew section 2(b)'s text from caselaw emphasizing the "group" nature of liability in voting cases, and that this Court's lead case on section 2 confirms the provision's group focus. JS 20-21.

Appellees also claim that "Congress" "used the term 'right'" in section 2's "title," that "Congress" "then placed" section 2 in a chapter entitled "Enforcement of Voting Rights," and that "the overall piece of legislation" is called the "Voting Rights Act." Mot. 20-21; *see* Mot. 23 n.8. Much of that is wrong—and none of it overcomes the textual holes in appellees' position. "Congress" did not enact those section and chapter titles. No statute enacting or amending section 2 contains those titles. *See* 79 Stat. 437, 437 (1965); 84 Stat. 314, 314-15 (1970); 89 Stat. 400, 402 (1975); 96 Stat. 131, 134 (1982). The U.S. Code's editors added those titles as part of the VRA's codification in the Code. *See* Office of the Law Revision Counsel (OLRC), Detailed Guide to the United States Code, bit.ly/46Oa7Ra ("where there are no headings in the original act" passed by Congress, the Code's editors "will provide or modify headings for the Code section"). And Congress has not enacted Title 52 into positive law and so has not adopted the editors' titles. OLRC, United States Code, bit.ly/47aucjM (noting titles enacted as positive law). Appellees are thus wrong to liken section 2 to the statute in *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023) (cited at Mot. 19-23), which had subsection and subparagraph titles that Congress enacted into law. *Id.* at 184-85; *see* 42 U.S.C. § 1396r(c); 101 Stat. 1330-182, -188, -190 (1987). That leaves the VRA's title. But that is not enough—particularly for a law that addresses as many voting features across as many provisions as the VRA does. *Cf. Gonzaga*, 536 U.S. at 289 n.7 (rejecting private right of action under Family Educational *Rights* and Privacy Act); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 15, 18, 31-32 (1981)

(Developmentally Disabled Assistance and *Bill of Rights* Act did not create rights).

On statutory structure, appellees cite section 3 (which addresses certain "proceeding[s]" to enforce "voting guarantees" by "the Attorney General or an aggrieved person," 52 U.S.C. § 10302(a)) and section 12 (which authorizes the Attorney General to enforce section 2, *id.* § 10308(d)). Mot. 21. Appellants have explained why those provisions do not support—and indeed, refute—private enforcement of section 2. JS 28. On statutory context, appellees say that section 2 is "a core voting-rights statute." Mot. 22. In fact, in 1965 section 2 was a tertiary VRA provision (JS 6-7, 8) that "add[ed] nothing" to a Fifteenth Amendment claim (JS 8). Section 2 has become more prominent since it was amended in 1982, but that is in significant part because private plaintiffs have misused it. *See* Mot. 10 (recognizing that private use of section 2 has proliferated in the last 40 years, noting that most section 2 suits are brought by private parties, and conceding that most of those suits fail). And the VRA addresses enforcement extensively yet has never provided for private enforcement of section 2—even after a plurality of this Court called such enforcement into question. JS 21-22. To that, appellees have no answer.

Appellees attribute to appellants the view that private parties cannot enforce section 2 because of the language that section 2(a) "leads with." Mot. 22; *see* Mot. 22-24. But appellants' view rests on section 2's full text, structure, and context—"the entire legislative enactment," JS 19—not just on what one subsection "leads with." JS 19-22. Appellees say that, "by Appellants' logic," the First, Second, and Fourteenth Amendments do not confer individual

rights. Mot. 23-24. But when discerning rights, constitutional amendments and federal statutes are not on the same footing. Federal statutes "create individual rights only in atypical cases." *Medina v. Planned Parenthood South Atlantic*, 145 S. Ct. 2219, 2229 (2025) (cleaned up). That is not true of constitutional amendments, which are themselves atypical and enjoy a long tradition of establishing individual rights without focusing on (or in some cases mentioning) the persons benefited. *See* U.S. Const. amend. I, VIII.

Last, appellees claim that the private-right-of-action framework associated with *Gonzaga University v. Doe*—in particular, the requirement that Congress must create a right "clear[ly] and unambiguous[ly]" for it to be enforceable under section 1983, 536 U.S. at 290—applies only to spending-power laws. Mot. 27-30. That claim is wrong. JS 17-19. And it is foreclosed by *Medina*, which shows that the framework applies whenever a court assesses whether a claimed right may be enforced under section 1983. Part II-A of *Medina* lays out the principles that apply to private rights of action under section 1983 generally. 145 S. Ct. at 2229-30. This Court examined section 1983's text, set out the two-step framework for assessing enforceability under section 1983, tied that framework to "the separation of powers," and never mentioned the spending power. *Id.* at 2229. (Part II-A also observed that federal statutes create individual rights only in "atypical cases," *ibid.* (cleaned up)—refuting appellees' claim that this observation applies only to "Spending-Power statutes." Mot. 28; *see* Mot. 2, 5, 19.) Then, in Part II-B, this Court said that although "it is rare ... for *any* statute to confer an enforceable right, spending-power statutes ... are

*especially* unlikely to do so," 145 S. Ct. at 2230 (emphases added), and explained why that is so, *id.* at 2230-31. Nothing in the Court's opinion casts doubt on the general applicability of the two-step right-of-action framework. And this Court has applied that framework outside the spending-power context. *See Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119-21 (2005) (Telecommunications Act of 1996). Appellees ignore all this and rely on a decision that predates *Gonzaga* and invokes caselaw that (as *Medina* says, 145 S. Ct. at 2233-34) is bad law. Mot. 29-30 (citing *Livadas v. Bradshaw*, 512 U.S. 107, 132-33 (1994)). The general right-of-action framework—applied in *Gonzaga* and many other cases—applies here.

2. Appellees' arguments also fail because, even if section 2 did create a right, private parties could not enforce it. JS 22-25; *contra* Mot. 25-27, 31-34.

Appellees suggest that only an "incompatible *private* remedy scheme" can block use of section 1983. Mot. 26; *see* Mot. 25-27. That is not so. "[O]ne private judicial remedy against another, more expansive remedy ... is not required to find that a statute forecloses recourse to § 1983." *Talevski*, 599 U.S. at 195 (Barrett, J., concurring). Rather, a defendant need show only "that Congress did not intend" that section 1983 would be available for the "newly created right." *Rancho Palos Verdes*, 544 U.S. at 120. Congress's choice to "authori[ze]" a "government official[ ]" "to sue" can disclose that intent. *Talevski*, 599 U.S. at 195 (Barrett, J., concurring). Congress made that choice with section 2. JS 24-25. Appellees suggest that structure and context "confirm that Congress understood and intended that private parties would enforce" section 2. Mot. 27. The opposite is true. Congress authorized only the Attorney

General to enforce section 2—and it did so in a statute that addresses litigation and enforcement extensively and turned away from private enforcement. JS 24-25.

On an implied right, appellees claim that Congress intended "a private remedy" to enforce section 2 because "[t]he VRA repeatedly references private enforcement." Mot. 31; *see* Mot. 31-34. Appellees cite section 3, which addresses certain "proceeding[s]" to enforce "voting guarantees" by "the Attorney General or an aggrieved person," 52 U.S.C. § 10302(a); section 12(f), which says that district courts have "jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of chapters 103 to 107 of this title shall have exhausted" remedies, *id.* § 10308(f); and section 14, which permits attorneys' fees for "the prevailing party, other than the United States," *id.* § 10310(e). Mot. 31-34. Those provisions show at most that Congress contemplated that private parties could sue to enforce some "voting guarantees" and may "assert[ ]" certain rights under the VRA—not that they may sue to enforce *section 2*. JS 28; *see* JS 23-24. Broad references to enforceable "rights" under a vast array of statutory provisions do not show an intention to create a private remedy to enforce section 2 specifically—particularly when Congress in section 12 expressly authorized the Attorney General to enforce section 2. JS 23-24. Appellees suggest that Congress provided that authorization to foreclose the argument that only private parties could sue to enforce voting rights and that Congress had "no similar need with respect to private parties." Mot. 32-33. That is not a credible view of a statute that addresses enforcement and litigation extensively yet

nowhere provides for private enforcement of section 2. JS 25. And appellees ignore a far more telling congressional response: when Congress amended section 2 in response to *Mobile v. Bolden*, 446 U.S. 55 (1980), it did not authorize the "private right of action to enforce" section 2 that the *Mobile* plurality called into question. *Id.* at 60 & n.8. Last, appellees cite legislative history. Mot. 32, 34. That reliance underscores that the only text that appellees have is not text that Congress enacted. JS 27-28.



## II. The Question Presented Is Substantial And Warrants Plenary Review.

Appellees agree that there is "a circuit split on the question presented" (Mot. 35) and do not dispute that the question has enormous practical ramifications. JS 29-31, 32-33. Appellees do not contest that this case is a sound vehicle: it cleanly invokes this Court's mandatory jurisdiction under 28 U.S.C. § 1253, it presents only one question (allowing the parties to give that question thorough attention), that question is a pure issue of law, and the case embraces both the express- and implied-right-of-action theories for privately enforcing section 2. JS 17; Mot. 12-13; App.22a-24a. Yet appellees resist plenary review (Mot. 34-36), mainly on the ground that the district court "got the question presented right" and that the answer is "clear." Mot. 34, 35. Appellants' merits arguments doom that claim—and at all events show that summary disposition is improper. JS 17-28. The acknowledged circuit conflict and undisputed practical importance of the question presented confirm that plenary review is warranted. JS 29-31, 32-33.

Appellees' other arguments against plenary review fail too. Appellees say that the circuit conflict is "lopsided" and not "entrenched." Mot. 35. The circuit conflict is not lopsided. It is 3-to-1 or 2-to-1, and the latter side of the conflict consists of two thorough Eighth Circuit decisions and so is unusually weighty. JS 29-31. The conflict is also entrenched. The Eighth Circuit cemented its view by denying rehearing en banc in both cases forming one side of the conflict. *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 91 F.4th 967, 967 (8th Cir. 2024); *Turtle Mountain Band of Chippewa Indians v. Howe*, 2025 WL 1833993, at *1 (8th Cir. July 3, 2025). Appellees do not claim that any court of appeals on the other side of the conflict—which includes a 26-year-old Sixth Circuit decision—is likely to revisit its position. Mot. 35. And the question presented has received extensive appellate consideration: the Eighth Circuit's two careful decisions came with thorough dissents. Appellees' answer to all this is that this Court should just knock out the conflict by summarily affirming. Mot. 35-36. Even putting aside that appellees are wrong on the merits, summary affirmance is not a proper way to resolve a circuit conflict on an unsettled and profoundly important issue in a case that cleanly invokes this Court's mandatory appellate jurisdiction.

Appellees also dispute that the question presented has significant constitutional importance—claiming that, in arguing otherwise (JS 31-32), appellants "cite only Spending Power cases that are inapposite." Mot. 36. But *Abbott v. Perez*, 585 U.S. 579 (2018)—which appellees cited three times (JS 32) and which underscores this case's federalism and equal-protection implications—is not a spending-power

case. And the federalism and separation-of-powers features discussed in cases like *Medina* (JS 31-32), transcend the spending power and broadly apply when private parties seek to enforce federal law.

Ultimately, appellees' arguments support plenary review. Appellees highlight this case's importance by recognizing that, if appellants are right on the merits, then many section 2 cases "'never should have proceeded.'" Mot. 36 (quoting JS 32). They spotlight the problems of rampant private enforcement when they admit that most of the many private-plaintiff section 2 lawsuits fail. Mot. 10. And their glib dismissal of this case's constitutional dimensions (Mot. 36) reinforces that private parties "have little incentive to respect" structural constitutional limitations (JS 32) and that Congress had good reason not to deputize millions of politically unaccountable actors to upend redistricting plans and sow chaos after every census (JS 32-33). However this Court rules on those points, it should do so on plenary review.

## CONCLUSION

This Court should note probable jurisdiction, set this case for oral argument, and reject the district court's judgment.

Respectfully submitted.

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