No. 25A-_____

In the Supreme Court of the United States

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

Applicants,

v.

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

Respondent.

EMERGENCY APPLICATION TO STAY THE EIGHTH CIRCUIT'S MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

Mark P. Gaber
Anna M. Baldwin
Melissa Neal
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200

Timothy Q. Purdon*
ROBINS KAPLAN, LLP
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501
(701) 255-3000

Bryan L. Sells
THE LAW OFFICE OF
BRYAN L. SELLS, LLC
PO Box 5493
Atlanta, GA 31107
(404) 480-4212

John E. Echohawk
Counsel of Record
Matthew Campbell
Allison Neswood
Jacqueline De León
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Avenue
Boulder, CO 80302
(303) 447-8760

Leonard R. Powell
Samantha Blencke
NATIVE AMERICAN RIGHTS FUND
950 F Street NW, Suite 1050
Washington, DC 20004
(202) 785-4166

Counsel for Applicants

**Counsel for Applicants Turtle Mountain Band of Chippewa Indians and Spirit Lake Nation*

PARTIES TO THE PROCEEDING

The applicants 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Rules

Other Authorities

EMERGENCY APPLICATION TO STAY THE EIGHTH CIRCUIT'S MANDATE PENDING PETITION FOR CERTIORARI

TO: The Honorable Brett M. Kavanaugh, Circuit Justice for the Eighth Circuit

Pursuant to Supreme Court Rules 22 and 23, Applicants respectfully request a stay of the Eighth Circuit's mandate pending this Court's disposition of Applicants' forthcoming petition for certiorari. The Eighth Circuit, over the dissent of Chief Judge Colloton, denied Applicants' motion to stay the issuance of the mandate on July 10, 2025, and thus absent action by this Court the mandate will issue on July 17, 2025. *See* Fed. R. App. P. 41(b). Applicants ("Plaintiffs") also respectfully ask this Court to administratively stay issuance of the mandate pending disposition of this Application because the North Dakota Legislative Council has published a memorandum questioning whether Plaintiff Collette Brown, who is an elected state representative, is eligible to remain in office once the Eighth Circuit's mandate issues vacating the district court's judgment, which had enjoined the 2021 enacted North Dakota legislative map as violating Section 2 of the Voting Rights Act. Appendix ("App.") 101. An administrative stay is warranted to maintain the status quo while the Court considers this stay application. Finally, to the extent the mandate is issued before this Application is granted, Applicants ask that the mandate be both recalled and stayed.

INTRODUCTION

"Since 1982, private plaintiffs have brought more than 400 actions based on § 2 [of the Voting Rights Act] that have resulted in judicial decisions." *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710, 721 (8th Cir. 2025)

(Colloton, C.J., dissenting). But as a result of the decision below, private plaintiffs can no longer enforce Section 2 of the Voting Rights Act (VRA) in the Eighth Circuit.

The divided panel did not overturn the district court's conclusion in this case that the challenged legislative map denies Native American voters an equal opportunity to elect their candidates of choice. Instead, the panel majority held that private plaintiffs cannot rely on 42 U.S.C. § 1983 to file suit under the Voting Rights Act to stop such unlawful voting discrimination. The decision below follows another divided decision of the Eighth Circuit in which it found that Section 2 itself provides no implied right of action. Together, these decisions make the Eighth Circuit the only Circuit in which private plaintiffs cannot enforce Section 2.

The Eighth Circuit has now held that the VRA neither provides a right of action for Section 2, nor does Section 2 create individual rights that can be enforced through Section 1983. Indeed, the Eighth Circuit has held that Section 2 does not unambiguously confer any individual rights at all. This is so, the majority below reasoned, because the VRA also identifies states and political subdivisions as the entities that are prohibited from denying or abridging a citizen's right to vote. The divided panel thus held that a statute that confers rights *and* identifies those prohibited from violating those rights is, in fact, not one that protects against "the deprivation of any rights . . . secured by the Constitution and laws." 42 U.S.C. § 1983.

A stay is appropriate because there is a reasonable probability that this Court will grant certiorari and a fair prospect that it will reverse the Eighth Circuit's judgment. These decisions starkly split from those of the Fifth, Sixth, and Eleventh

Circuits as well as every three-judge district court to consider the question. They directly contravene this Court's Section 1983 and Section 2 precedents. They turn the statutory text of both Section 2 and Section 1983 on their heads. They upend sixty years of practice. And they knee-cap Congress's most important civil rights statute. That blow is especially harmful to Native Americans and these Plaintiffs in particular. North Dakota—like many states—has a long and sad history of official discrimination against Native Americans that persists to this day. Tribal Nations and individual Native American voters have successfully fought for decades to vindicate their voting rights under Section 2.

Take this case. North Dakota reduced from three to one the number of legislative seats in which Native American voters in northeastern North Dakota could elect representatives of their choice. The district court found in Plaintiffs' favor and imposed a remedial map—one the Secretary neither objected to nor appealed—correcting the violation and resulting in the election of three Native American legislators in 2024, including Plaintiff Representative Collette Brown.

Plaintiffs face potentially urgent harm in the absence of a stay. In a memorandum posted on its website after the Eighth Circuit denied Plaintiffs' stay motion, the North Dakota Legislative Council contends that it is questionable whether legislators elected pursuant to the district court's remedial map may continue to serve once the Eighth Circuit's mandate issues if they do not reside in the 2021 legislatively adopted map's version of their district. App. 101.[1] Plaintiff Collete

[1] Plaintiffs do not agree with the Legislative Council's questioning of Representative Brown's legal status to retain her position. The North Dakota Constitution provides that "[a]n individual may not

Brown resides on the Spirit Lake Reservation and was elected in 2024 as a state representative for district 9. She does not reside in the 2021 map's version of district 9 that the district court enjoined. The specter that she becomes potentially ineligible to serve the moment the Eighth Circuit's mandate issues warrants entry of an administrative stay to maintain the status quo while the Court considers the stay application.

Moreover, apart from this urgent issue, the Secretary has contended that a map must be in place by December 31 to accommodate election procedures that commence in January for the 2026 election. But this Court likely cannot adjudicate Plaintiffs' certiorari petition (or subsequent merits case) by that date. Plaintiffs thus face irreparable harm if a decidedly unlawful map governs the 2026 election while similarly situated plaintiffs in other circuits retain their Section 2-compliant districts. And the Secretary is unharmed by maintaining the status quo—*i.e.*, implementing a map the imposition of which he declined to oppose or appeal.

This case "is not about the law as it exists." *Allen v. Milligan*, 599 U.S. 1, 23 (2023). It is about North Dakota's attempt to remake both Section 2 and Section 1983 jurisprudence anew. The Court should stay the Eighth Circuit's mandate while it considers this case.

---

serve in the legislative assembly unless the individual lives in the district from which selected." N.D. Const. art. IV, § 5. Representative Brown indeed lives in the district from which she was selected—district 9 in the map that governed the 2024 election. The Eighth Circuit's vacatur does not reach back in history to undo factual events that occurred. Regardless, however, the Legislative Council's memorandum warrants an administrative stay to maintain the status quo while the Court considers this stay application.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

I. 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.[2] PX P001 at 44; PX P042 at 6.[3] 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. 50. But the 2020 Census reported that district 9 was underpopulated, and thus it needed to expand to satisfy population equality requirements. App. 54. Because the district's northern boundary is the Canadian border, there were three options for its expansion—south, west, or east. App. 54. In late September 2021, the North Dakota legislative management redistricting committee ("redistricting committee") released a proposed map that added parts of two counties to the east—Towner and Cavalier Counties. App. 52. The added territory was almost entirely composed of white residents, with the Towner County portion having just a 2.7% NVAP and the Cavalier County portion having a 1.8% NVAP. App. 54. Overall, the addition of this nearly 100% white population dropped district 9's NVAP by 20 points. PX P042 at 3.

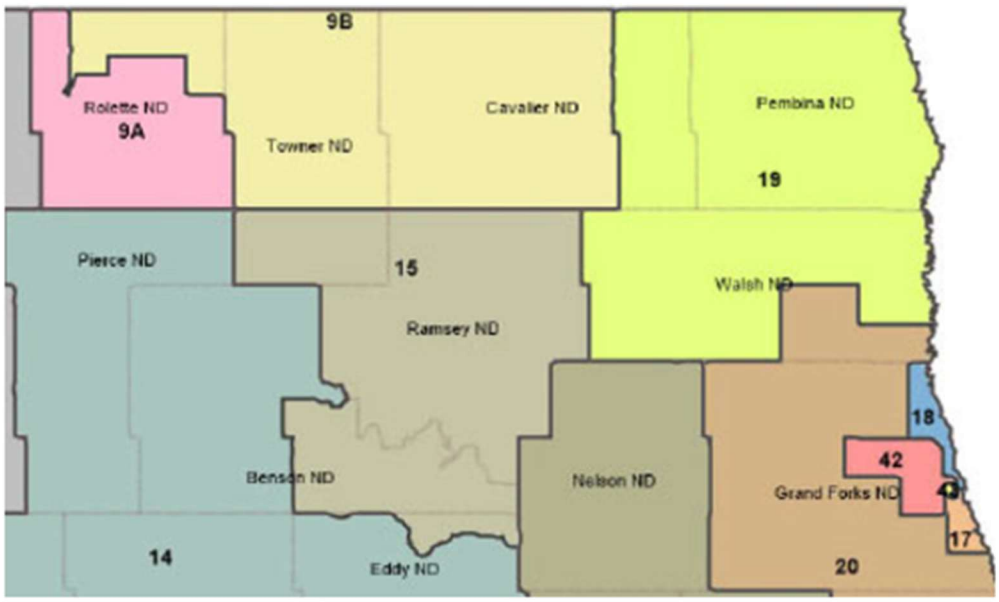
Additionally, the redistricting committee proposed subdividing district 9 into two single-member house districts, districts 9A and 9B. App. 52. With an NVAP of roughly 80%, district 9A was overwhelmingly packed with Native Americans and

[2] Most North Dakota legislative districts are multimember.

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

contained the Turtle Mountain Band of Chippewa Indians ("Turtle Mountain") reservation and part of its off-reservation trust lands. App. 54. District 9B had an NVAP of 32.2% and contained the remainder of the Turtle Mountain off-reservation trust lands as well as the portions of Towner and Cavalier Counties appended to district 9. App. 54.

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. 54. The configuration is shown below:



App. 54.

Following release of this proposed plan, the chairmen of Turtle Mountain and Spirit Lake requested that the redistricting committee revise the proposal to unify Turtle Mountain and Spirit Lake in district 9 by extending the district south from Rolette County into Benson County rather than eastward from Rolette County into Towner and Cavalier Counties. App. 52-53. The two Tribal Chairman highlighted

how nonracial interests favored the unification of Benson and Rolette Counties, thereby bringing together the two Tribal Nations. They also showed how voting in the region was racially polarized and emphasized that the redistricting committee's proposal would reduce the opportunity for Native American voters to elect their preferred candidates. App. 52-53. The committee rejected the Tribal Nations' proposal, instead voting to advance House Bill 1504, which contained the original proposed configuration for districts 9, 9A, 9B, and 15. App. 53. The legislative assembly enacted the Bill and the Governor signed it into law. App. 53.

The results of the November 2022 election played out as the Tribal Chairmen had warned. The incumbent preferred by Native American voters in district 9, Native American Senator Richard Marcellais, lost to his white opponent. PX P001 at 21. Plaintiff Collette Brown—a Native American who was also preferred by Native American voters—lost her bid for district 15 senator. PX P001 at 27. Native American voters elected their preferred candidate, Representative Jayme Davis, in district 9A, PX P001 at 21, while the incumbent Native American preferred candidate lost in district 9B, PX P001 at 21.[4]

For the first time since 1990, there were no Native Americans serving in the North Dakota Senate following the 2022 election, and districts in which Native Americans had the opportunity to elect candidates of their choice in the region shrunk from three seats to just one.

---

[4] *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].

II. District Court proceedings

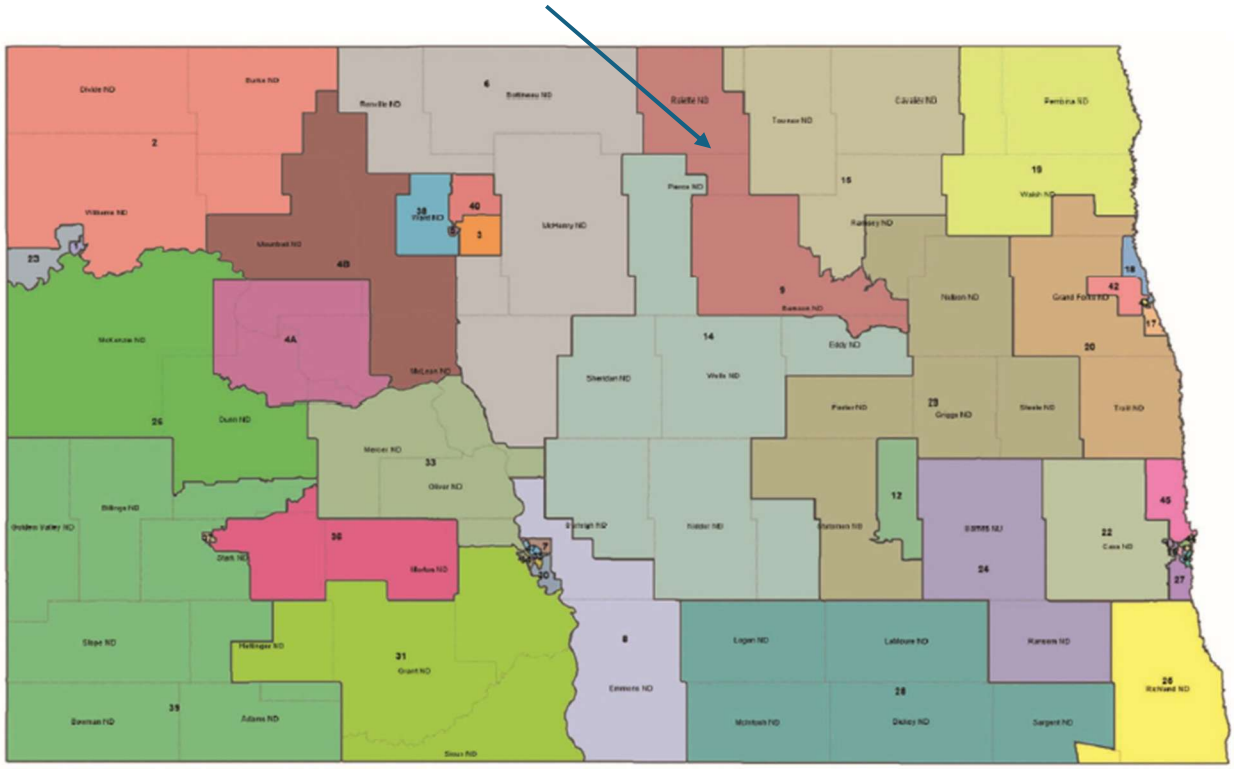
In February 2022, Plaintiffs filed suit against the North Dakota Secretary of State ("the Secretary") under 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act ("VRA"). ECF No. 1 at 1. The suit alleged that the configuration of districts 9, 9A, 9B, and 15 diluted Native American voting strength in northeastern North Dakota by reducing from three to one the number of legislators Native American voters had an equal opportunity to elect.

The Secretary moved to dismiss, arguing, *inter alia*, that there is no implied right of action to enforce Section 2 of the Voting Rights Act. App. 90-91. The district court did not reach this question because Plaintiffs also plead their claim under 42 U.S.C. § 1983, which the court held provided Plaintiffs a cause of action to enforce Section 2. App. 91. Applying the test articulated in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), 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. 95 (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. 96. Accordingly, the district court ruled that "the Secretary has not rebutted the presumption that § 1983 may provide a remedy for the Plaintiffs in this case." App. 97.

The district court held a four-day bench trial in June 2023 and on November 17, 2023, ruled in Plaintiffs' favor. The court ruled that Plaintiffs had proved each of the three *Gingles* preconditions. Regarding the first, the court reasoned that

Plaintiffs proffered two demonstrative districts in which Native Americans would be a majority of eligible voters, with NVAPs of 66-69%. App. 64. Plaintiffs' demonstrative plan 1 is shown below, with district 9—which connects Rolette and Benson Counties—identified by an arrow.

Plaintiffs' Demonstrative Plan 1



App. 55.

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. 64-65. Citing the trial evidence, the court observed that the demonstrative districts "did not appear more oddly shaped than other districts" and were "reasonably compact." App. 65. Indeed, the Secretary's expert

conceded as much, testifying that Plaintiffs' proposed districts were compact and that demonstrative district 9 in Plaintiffs' Plan 1 split the same number of counties as the enacted version of district 15 while resolving the enacted plan's split of Towner County. ECF No. 117 at 115, 122-23. Moreover, the Secretary's expert testified that Plaintiffs' Plan 2 split fewer counties in the region than the enacted plan and had the same number of statewide county splits. ECF No. 117 at 124; *see Allen v. Milligan*, 599 U.S. 1, 44 n.2 (2023) (Kavanaugh, J., concurring) ("In this case, for example, it is important that at least some of plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan.").

The Secretary's expert likewise testified that Plaintiffs' demonstrative plans better respected communities of interest than did the enacted plan. ECF No. 117 at 130. Ultimately, the Secretary's expert conceded that a reasonably configured district in which Native American voters constitute the majority of eligible voters could be drawn in the region, such that an evaluation of Plaintiffs' demonstrative districts was "more of a remedial question than it is necessarily a *Gingles* 1 question." ECF No. 117 at 110-11.

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. 65. In particular, the court credited testimony of the Chairmen that "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." App. 65.

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 expert testified to the contrary. He agreed that "Native American [T]ribes can have shared interests other than the race of their members," and that he had no basis to dispute the testimony of the Tribal Chairmen regarding the Tribes' nonracial shared interests. He conceded that he "ha[d] no evidence that plaintiffs' demonstrative plans are a racial gerrymander." ECF No. 117 at 167-68.

With respect to the second *Gingles* precondition, the district court observed that "[t]he parties and their experts agree that voting in district 9 and 15 (when voting at large) is racially polarized, with Native American voters cohesively supporting the same candidates." App. 66. Reviewing the electoral, demographic, and qualitative evidence, the district court likewise concluded that Plaintiffs had shown by a preponderance of the evidence that Native Americans within subdistricts 9A and 9B were politically cohesive, App. 67, a view shared by the Secretary's expert, ECF No. 117 at 140-42.

The district court also considered at length the electoral evidence and concluded that Plaintiffs had proved the third *Gingles* precondition, *i.e.*, whether white voters usually defeat the preferred candidates of Native American voters. App. 67-80.

Finally, the district court assessed the totality of circumstances evidence and concluded that Plaintiffs had shown a violation of Section 2. App. 84. The court enjoined further implementation of the affected districts and provided more than a month for the legislative assembly to adopt a remedial map. App. 84-85.

The district court denied the Secretary's motion for a stay pending appeal, rejecting his argument that Section 1983 did not provide Plaintiffs a cause of action to enforce Section 2. App. 41-46. The legislative assembly failed to adopt a proposed remedial map during the time allotted by the district court. After the chair of the redistricting committee publicly commented that he preferred Plaintiffs' demonstrative Plan 2 over Plaintiffs' demonstrative Plan 1, ECF No. 160 at 3-5, Plaintiffs requested that their Plan 2 be imposed as the remedial map. The Secretary filed no opposition, which the district court determined, pursuant to its local rules, to mean the Secretary viewed the motion as well-taken. App. 39. The district court granted the motion, imposing Plaintiffs' Plan 2 as the remedial map. App. 39.

III. Eighth Circuit proceedings

The Secretary appealed the district court's liability order, but not its order imposing the remedial map. After the district court denied the Secretary's motion for a stay of the district court's liability finding, the Secretary renewed that motion in the Eighth Circuit, contending, *inter alia*, that private plaintiffs cannot sue under 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 for a stay in an order by Judges Colloton, Benton, and Kelly. App. 40. As a result, the 2024 elections were held under the district court's remedial map, and Native American 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.[5]

A. Eighth Circuit holds that Section 2 contains no implied private right of action in *Arkansas NAACP*.

The Secretary's argument for a stay was premised on an Eighth Circuit decision that was published one business day after the district court issued its liability decision in this case. In *Arkansas State Conference NAACP v. Arkansas State Legislature*, a divided panel of the Eighth Circuit held that Section 2 does not contain an implied private right of action.[6] 86 F.4th 1204, 1207 (8th Cir. 2023) ("*Arkansas NAACP*"). The *Arkansas NAACP* majority first observed that it was "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.* (cleaned up) (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 noted that "[i]t is unclear what to do when a statute focuses on both." *Id.* at 1210. Notably, the majority

---

[5] 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].

[6] 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).

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* majority held that under the second step of the analysis, Congress had intended only the Attorney General, and not private plaintiffs, to enforce Section 2, notwithstanding Supreme Court precedent, decades of practice, and statutory references to "aggrieved person[s]" other than the U.S. Attorney General in the Act. *Arkansas NAACP*, 86 F.4th at 1211. Then-Chief Judge Smith dissented, concluding that five Justices in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), had found Section 2 to imply a private right of action. 86 F.4th at 1223 ("the simple fact is that a majority of the justices explicitly recognized a private right of action under Section 2 in *Morse*." (cleaned up)).

The *Arkansas NAACP* plaintiffs petitioned for en banc review, which the court denied—with Judge Smith, now Chief Judge Colloton, and Judge Kelly voting to grant rehearing. Dissenting from the denial of rehearing en banc, Chief Judge Colloton wrote that the panel majority "rendered an ambitious and unprecedented ruling" that contravened "controlling precedent for an inferior court" from the Supreme Court in *Morse*. *Arkansas State Conference of NAACP v. Arkansas Bd. of Apportionment*, 91 F.4th 967, 969-70 (8th Cir. 2024) ("*Arkansas NAACP II*")

(Colloton, C.J., dissenting). In denying rehearing en banc, Chief Judge Colloton observed that the Eighth Circuit "regrettably misses an opportunity to reaffirm its role as a dispassionate arbiter of issues that are properly presented by the parties." *Id.* at 974.

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 and vacated the district court's judgment, with Chief Judge Colloton dissenting. *Turtle Mountain*, 137 F.4th 710.[7]

The majority concluded that its prior decision in *Arkansas NAACP* (which did not present a Section 1983 claim) controlled the outcome in this case (which does include a Section 1983 claim). The majority started by addressing the *Gonzaga* test, which this Court fashioned to limit the overextension of Section 1983 claims to spending power statutes. In that discussion, the majority held that *Arkansas NAACP* had already decided that Section 2 was not a rights-creating statute: "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 treated the issue as already-decided even as the Secretary conceded that the court's prior

[7] In light of *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 Plaintiff-Appellees at 21, n.2, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Mar. 18, 2024) (Doc: 5374180).

statements regarding whether Section 2 is rights-creating were nonbinding dicta. *See* Oral Arg. at 7:53, Case No. 23-3655, http://media-oa.ca8.uscourts.gov/OAaudio/2024/10/233655.MP3 [https://perma.cc/7QZV-K22A] (Counsel for Secretary: "[I]t was not the holding of the court, so it's not controlling."); *see also Turtle Mountain*, 137 F.4th at 724 (Colloton, C.J., dissenting) (noting the dicta).

The majority reasoned that *Arkansas NAACP* explained that Section 2 "focuses on both the individuals protected and the entities regulated." *Id.* at 719 (cleaned up). Because Section 2 identifies both, the majority reasoned 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.*

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). The majority reasoned that the Federal Nursing Home Reform Act ("FNHRA") has a "reference to regulated parties" whereas Section 2 has a joint "focus" on both the rights-bearers and rights-violators. *Id.* To support the majority's "focus/reference" distinction, it observed that the statutory text first mentions "any State or political subdivision" before it says "the right of any citizen .

. . to vote." *Id.* (citing 52 U.S.C. § 10301(a)). The majority also rejected Plaintiffs' argument that *Gonzaga*'s "unambiguous conferral" statutory construction standard does not apply to Reconstruction Amendment enforcement statutes—which by their nature enforce Amendments that expressly create rights. *Id.* at 721.

Chief Judge Colloton vigorously 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 *Arkansas NAACP* bound it,

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 did 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, and on June 27, 2025, filed a notice of supplemental authority regarding this Court's decision in *Medina v. Planned Parenthood South Atlantic*, 606 U.S. __; No. 23-1275, 2025 WL 1758505 (U.S. June 26, 2025). On July 3, 2025, the court denied Plaintiffs' petition for rehearing en banc, with Chief Judge Colloton, Judge Smith, and Judge Kelly noting that they would have granted the petition, and with Judge Erickson not participating. App. 2.

Plaintiffs moved to stay the issuance of the mandate on July 9, 2025, but the court denied that motion on July 10, 2025, with Chief Judge Colloton noting he would grant the stay motion. App. 1.

JURISDICTION

The district court had jurisdiction over Plaintiffs' suit pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) & (4). The Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction to grant a stay pursuant to 28 U.S.C. § 2101(f).

REASONS FOR GRANTING A STAY OF THE MANDATE

This Court may stay a lower court's issuance of the mandate in order "to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2101(f). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see id.* ("In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."). Each requirement is readily met here.

I. There is a reasonable probability that four Justices will vote to grant review.

There is a reasonable probability that four Justices will vote to grant review, given the split of authorities on this issue of exceptional importance. Everywhere else in the country, 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 the decision below extinguished the only remaining pathway for private enforcement of Section 2 of the VRA in the Eighth Circuit.

The Eighth Circuit's pronouncement that Section 2 is not privately enforceable contravenes this Court's precedents and undermines the guarantee of uniformity in federal law. Citizens in the Eighth Circuit now have fewer enforceable rights and protections against racial discrimination in voting than citizens elsewhere in the

nation. There is a reasonable probability this Court will grant review of the Eighth Circuit's decision to ensure uniform application of the law.

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

A "conflict among the lower courts on [an] important and recurring issue" in the enforcement of federal law is a strong indicator that Supreme Court review is warranted. *California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers). The Eighth Circuit has created a stark circuit split with the holdings of the Fifth, Sixth, and Eleventh Circuits, multiple three-judge district courts, and the practice of every other court of appeals.

For decades, private plaintiffs have vindicated their rights in Section 2 cases filed in every circuit, litigating many of those cases to the Supreme Court. Every case that this Court has decided under the current version of Section 2 was brought by private plaintiffs. *See, e.g.*, *Milligan*, 599 U.S. at 1; *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). And private plaintiffs have successfully vindicated their rights in Section 2 cases in circuits throughout the country. *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 County*, 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. 1080 (1989); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

In contrast to the Eighth Circuit, the Fifth, Sixth, and Eleventh Circuits have each held that Section 2 is privately enforceable, as has every three-judge court to consider the issue. *See Robinson v. Ardoin*, 86 F.4th 574, 587-88 (5th Cir. 2023); *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 651-54 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021); *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999); *see also Singleton v. Allen*, No. 2:21-cv-01291-AMM, 2025 WL 1342947 (N.D. Ala. May 8, 2025) (three-judge court); *League of United Latin Am. Citizens v. Abbott*, No. EP-21-CV-00529-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court); *Ga. State Conf. of NAACP v. Georgia*, No. 1:21-CV-5338-ELB-SCJ-SDG, 2022 WL 18780945, at *7 (N.D. Ga. Sept. 26, 2022) (three-judge court).

In *Robinson*, the Fifth Circuit squarely held that "Section 2 provides for a private right of action." 86 F.4th at 587-88. *Robinson* explains that another section of the VRA—Section 3—explicitly anticipates private enforcement of the Act. *See id.* at 588. Section 3 states in three separate subsections 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). *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. And *Robinson* further noted that this conclusion followed directly from an earlier Fifth Circuit decision holding that the VRA validly abrogates States' sovereign immunity, the purpose of which is to allow private plaintiffs to sue to vindicate their rights under the VRA. *See id.* (citing *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017)).

The Eleventh Circuit has likewise held that the VRA is "enforceable by private parties." *Ala. State Conf. of NAACP*, 949 F.3d at 652. Like the Fifth Circuit, the Eleventh Circuit carefully examined the text of the VRA, reading the rights created under Sections 2 alongside the remedies provided under Section 3, and concluded that the statute "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 "an individual may bring a private cause of action under Section 2[.]" *See Mixon*, 193 F.3d at 406.

Well-reasoned decisions by three-judge district courts have also repeatedly and uniformly held that Section 2 is privately enforceable. The decision granting a permanent injunction in *Singleton v. Allen* was decided after *Arkansas NAACP* and explicitly rejected the Eighth Circuit's reasoning. 2025 WL 1342947, at *171. Like the plaintiffs in this case, the plaintiffs in *Singleton* "availed themselves of Section 1983" in pressing their Section 2 claims. 2025 WL 1342947, at *172. Unlike the Eighth Circuit, Judges Marcus, Moorer, and Manasco concluded that Section 2 is enforceable through Section 1983 as it contains "rights-creating, individual-centric

language with an unmistakable focus on the benefited class." *Id.* (citing *Talevski*, 599 U.S. at 183). *Singleton* 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 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." *Georgia State Conf. of the NAACP*, 2022 WL 18780945, at *4. Section 2 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.").

This Court need not wait for any further developments on this issue before acting on the clear circuit split. The Eighth Circuit's pronouncement that Section 2 of the VRA is not privately enforceable is already subverting the guarantee of uniformity in federal law. Citizens in the Eighth Circuit's seven states now have fewer enforceable rights and protections against racial discrimination in voting than citizens in the rest of the nation. That result is unjust, untenable, and requires action by this Court.

B. This issue is exceptionally important and will be recurring until this Court resolves the circuit split.

This Court has recognized that 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). As such, there is no question that the private enforceability of Section 2 is a question of exceptional importance. In *Shelby County v. Holder*, this Court assured the nation that Section 2 would remain an essential and effective backstop against discrimination in voting throughout the country. 570 U.S. 529, 537 (2013) ("Both the Federal Government and individuals have sued to enforce § 2 . . . ."); *id.* at 557 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

Section 2 is, and always has been, enforced primarily by private litigants. 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 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, *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)). This issue will recur until this Court addresses the split that the Eighth Circuit has created.

Indeed, the question of whether Section 2 is privately enforceable—either through an implied right in Section 2 itself or through Section 1983—is likely to be raised on this Court's mandatory appellate docket in the upcoming Term. The *Milligan* case has now reached final judgment in the plaintiffs' favor. *See Singleton*, 2025 WL 1342947. Alabama contended that Section 2 is not privately enforceable under either an implied right or Section 1983, and the district court thoroughly analyzed and rejected its argument. *Id.* at *171-81. Alabama filed its notice of appeal on June 6, 2025, *see* Notice of Appeal, *Singleton v. Allen*, No. 2:21-cv-01291-AMM (N.D. Ala. June 6, 2025), ECF No. 329, and its jurisdictional statement is due in this Court on August 5, 2025, *see* S. Ct. R. 18(3). That this Court will likely be presented this issue on its mandatory appellate docket amplifies the probability that it will grant certiorari in this case to ensure a uniform application of the Court's decision.

Both this case and the Alabama case should stand on the same footing while this Court adjudicates the private enforcement question. In Alabama, the remedial district is in effect and scheduled to govern the 2026 election. In this case, the Eighth Circuit's denial of Plaintiffs' motion to stay issuance of the mandate means that, absent a stay from this Court, a legislative map with an adjudicated violation of Section 2—which Chief Judge Colloton opined should be affirmed—would be allowed to spring back to life. *See Turtle Mountain*, 137 F.4th at 725 (Colloton, J., dissenting). That would be highly inequitable. That is particularly so given that North Dakota's Legislative Council has asserted that, should the prior (and unlawful) map spring back into place, one of the plaintiffs in this case may no longer be able to serve, citing

a North Dakota constitutional provision requiring legislators to reside in the district from which they were selected. App. 101. That possibility strongly favors a stay here. Both Alabama's and North Dakota's remedial maps should govern the 2026 election while this Court adjudicates the private enforcement question.

II. There is a fair prospect that this Court will reverse the judgment below.

There is a fair prospect that this Court will reverse the Eighth Circuit's judgment. That judgment conflicts with this Court's precedents under Section 1983, as well as its prior decisions regarding implied rights of action under the VRA itself. It is also inconsistent with Congress's ratification of the long-standing private enforceability of Section 2.

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 rights that are enforceable through Section 1983. A statute is presumptively enforceable through Section 1983 when "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." *Talevski*, 599 U.S. at 183 (citation and internal quotation marks omitted). In *Talevski*, this Court held that the Federal Nursing Home Reform Act ("FNHRA")—a statute enacted under Congress's Spending Clause power—created rights enforceable under Section 1983. *Id.* at 192. This Court's decisions in both *Talevski* and *Medina v. Planned Parenthood South Atlantic*, No. 23-1275, 606 U.S. __ (2025), demonstrate that there is a fair prospect for reversal.

Section 2 contains distinctly rights-creating language. It protects the "right of any citizen . . . to vote" free from racial discrimination. 52 U.S.C. § 10301(a); *see also Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (recognizing that Section 2 "grants [individual citizens] a right to be free from" voting discrimination). Section 2 explicitly refers to a citizen's "right" and is "phrased in terms of the persons benefitted"—the main criteria for whether a statute contains rights-creating language. *Talevski*, 599 U.S. at 183.

Indeed, parroting the very language of Section 1983, the VRA creates public remedies against "[w]hoever shall deprive or attempt to deprive any person of any right secured by [Section 2] . . . ." 52 U.S.C. § 10308(a) & (c) (referencing 52 U.S.C. § 10301). Congress's express recognition that someone could "deprive any person of any right secured by [Section 2]," *id.*, is a surefire indication that Section 2 guards against the "deprivation of any rights . . . secured by the Constitution and laws," 42 U.S.C. § 1983. In characterizing Section 2 as securing rights, Congress certainly detected none of the ambiguity that the majority below did. And if the decision below was correct, then Congress's express reference in § 10308(a) and (c) to Section 2 as securing rights would be a nullity. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 699 (2022) (rejecting interpretation that renders statutory provision a "nullity" or leaves "whole provisions without work to perform").

Like Congress, this Court has had no difficulty concluding that Section 2 confers individual rights. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. at 437 (holding that the protected "right . . . does not belong to the 'minority as a

group,' but rather to 'its individual members.'") (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)). In addition to focusing on the individual rights-holder, Section 2 also identifies the "class of beneficiaries," *Talevski*, 599 U.S. at 183, to which Plaintiffs belong—individuals 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*, 2025 WL 1342947 at *174 (three-judge court) (internal quotations and citations omitted).

In both the *Arkansas NAACP* decision and the decision below, the Eighth Circuit reasoned that it is ambiguous whether Section 2 confers individual right because the language of the statute "focuses on both" the right holders and those prohibited from violating the rights. *Arkansas NAACP*, 86 F.4th at 1210; *Turtle Mountain*, 137 F.4th at 719 ("Given this dual focus on the individuals protected and the entitles regulated, we concluded that '[i]t is unclear whether Section 2 creates an individual right.'").

This directly contravenes *Talevski*. As *Talevski* explains, "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. Yet the Eighth Circuit failed to mention or consider *Talevski* at all in its *Arkansas NAACP* decision. And its attempt to distinguish *Talevski* in its decision below is unpersuasive.

The majority below reasoned that FNHRA merely includes "reference" to the regulated entities, *i.e.*, nursing homes, while "Section 2 focuses on both the entities regulated and 'any citizen.'" *Turtle Mountain*, 137 F.4th at 720 (quoting 52 U.S.C. § 10301(a)). Both this reasoning and its premise are wrong.

First, nothing in the text of Section 1983 supports the conclusion that a rights-creating statute is unenforceable when it does more than create rights. So long as *one* of the focuses of a "dual focused statute" is the conferral of rights, that is enough for Section 1983 to apply. Statutory rights do not disappear by the inclusion of something else in the statute.

Second, the majority relied on an unconvincing distinction between a "reference" (FNHRA) and a "focus" (Section 2) on the regulated entities that was "entirely artificial . . . . a sure sign that [the] distinction is made-to-order." *Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). The relevant FNHRA provisions start by saying either "[a] nursing facility must protect and promote the rights of each resident, including each of the following rights," 42 U.S.C. § 1396r(c)(1)(A), or "[a] nursing facility must permit each resident to remain in the facility . . . .," *id.* § 1396r(c)(2)(A). The statutes first identify the regulated entity before the rights they cannot violate.

Section 2 is no different. It says:

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed 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 majority below sought to distinguish Section 2 by reasoning that "the subject of § 2's prohibition is 'any State or political subdivision,' rather than on the conferral of a right to 'any citizen.'" *Turtle Mountain*, 137 F.4th at 720 (quoting 52 U.SC. § 10301(a)). This is hardly telling; of course it is the States and political subdivisions that are the subject of Section 2's "prohibition." So too are the nursing homes the subject of FNHRA's "prohibition." The individual right will never be the subject of a statute's "prohibition," the regulated entity must be. Rather, the question is whether the statute identifies rights that are prohibited from being violated. Both FNHRA and Section 2 do.

Returning to the text of Section 1983, nowhere does it indicate that whether a provision of the "Constitution and laws," 42 U.S.C. § 1983, is enforceable depends upon whether the rights are conferred in the beginning, middle, or end of the statutory sentence. Under the Eighth Circuit's reasoning, a statute would be enforceable under Section 1983 if it says a "right shall not be violated by any State or political subdivision" but would be unenforceable if it says "no State or political subdivision shall violate a right." Taking this logic to its next step would lead to the absurd result that the First and Fourteenth Amendments are unenforceable under Section 1983. *See* U.S. Const. amend I ("Congress shall make no law . . ."); U.S. Const. amend XIV ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). But of course, "[t]he Fourteenth Amendment hardly fails to secure § 1983-enforceable rights because it directs state actors not to deny equal protection." *Talevski*, 599 U.S. at 185 n.12.

This Court's decision in *Medina* (issued after the decision below, but before the Eighth Circuit denied en banc rehearing and denied a motion to stay the mandate), further supports the conclusion that there is a fair prospect that this Court will reverse. *Medina* emphasized that Congress's use of the word "right" in statutory language and title headings carries great weight. *Medina*, 2025 WL 1758505 at **10-11 ("[A] title may underscore that the statutory text creates a right[.]"); *Id.* at **13.

This reasoning applies with greater strength to Section 2. Start with the law'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." *Id.* Section 2 thus starts at a stronger rights-creating posture than FNHRA.

Moreover, Congress explained that the Voting Rights Act was "[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 thus enforces the 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 (emphasis added).

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*." 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).

Although certainly not necessary for Plaintiffs to prevail, given the decision in *Medina*, there is also a fair prospect that this Court will hold that the *Gonzaga* test's "unambiguous conferral" requirement—developed in the context of a spending power statute—does not apply to statutes enacted to enforce Reconstruction Amendments. As the Supreme Court explained in *Medina*, "'*Gonzaga* sets forth our established method' for determining whether a spending-power statute confers individual rights." *Medina*, 2025 WL 1758505, at **10 (quoting *Talevski*, 599 U.S. at 183); *id.* at 15 (explaining that the *Gonzaga* test "measure[s] whether spending-power legislation confers a privately enforceable right"); *id.* at **9 (same).

As Chief Judge Colloton explained in dissent below, "the federalism concerns that animated" the development of the unambiguous conferral requirement under Section 1983 and the spending power "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." *Turtle Mountain*, 137 F.4th at 722 (Colloton, C.J., dissenting). There is thus a fair prospect that this Court will decline to extend *Gonzaga*'s judicially-created rule of construction to Reconstruction Amendment enforcement statutes like the VRA.

B. Section 2 is enforceable through its own right of action, as Congress intended and has ratified.

Since 1965, Congress and the Supreme Court have repeatedly made clear that private actors can enforce the VRA generally, and Section 2 specifically. In *Morse*, five Justices 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. at 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.).

Decades earlier, this Court found a private right of action to enforce Section 5 of the VRA. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 556-557 (1969). Given *Allen*, the Court in *Morse* recognized that Congress had likewise 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). Moreover, "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" pre-existing 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).

As the three-judge district court adjudicating the Alabama congressional Section 2 case just reasoned, "[i]t is difficult in the extreme for us to believe that for nearly sixty years, federal courts have consistently misunderstood one of the most important sections of one of the most important civil rights statutes in American history, and that Congress has steadfastly refused to correct our apparent error." *Singleton*, 2025 WL 1342947, at *181. A strict rule of *stare decisis* in favor of affirming *Morse*'s conclusion with respect to Section 2's private enforceability far exceeds the "fair prospect" standard necessary to warrant a stay of the Eighth Circuit's contrary decision.

Given the rupture that the Eighth Circuit has created as to previously uniform precedent and congressional intent, there is a fair prospect of reversal.

III. The irreparable harm Plaintiffs face and the balance of the equities favor a stay of the mandate.

Finally, there is eminently good cause for a stay because Plaintiffs will suffer irreparable harm without one and the balance of equities further favors a stay. After Plaintiffs in this case proved at trial that North Dakota's legislative districts unlawfully dilute Native American voting strength in violation of Section 2 of the

VRA, this Court denied the Secretary's motion for a stay of the district court's judgment while the Secretary's appeal moved forward. App. 40. Thereafter, on January 8, 2024, the district court ordered into place the current remedial map—an order the Secretary neither opposed nor appealed. App. 37-39. The district court's remedial map was used in the 2024 election cycle and resulted in Plaintiff Collette Brown's election to the North Dakota Legislature for District 9. Plaintiffs would suffer significant harm if the remedial map were discarded, especially given that the only judges to consider the merits of Plaintiffs' suit have either found in their favor or concluded that finding should be affirmed. Indeed, plaintiff Collette Brown faces the threat of being ejected from her seat should the prior, unlawful map be reinstated. *See supra* at 3-4, n.1.

This is not one of the "close cases" requiring the Court to balance the equities in adjudicating Plaintiffs' motion for a stay, given the reasonable probability of Supreme Court review and the fair prospect of reversal. *Hollingsworth*, 558 U.S. at 190. But the equities favor granting a stay. There will be minimal harm to the Secretary if the mandate does not issue and the status quo is maintained, *See id.* "'[O]nce the election occurs, there can be no do-over and no redress' for voters whose rights were violated." *Singleton v. Allen*, 691 F. Supp. 3d 1343, 1355 (N.D. Ala. 2023) (three-judge court) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)).

The candidate qualifying period for the 2026 election will begin in January 2026. N.D. Cent. Code §§ 16.1-11-06, 16.1-11-15. The Secretary has previously

contended, citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006), that the legislative map should be set by December 31 of the year proceeding an election. *See* Sec'y's Mot. for Stay, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Dec. 13, 2023) (Doc. 5344314). Given this Court's calendar and practice, it is highly unlikely it will resolve Plaintiffs' petition and issue a merits decision before that time. Absent a stay from this Court, North Dakota will proceed to conduct elections using the 2021 legislative map that a federal court has found unlawfully dilutes the voting strength of Native American voters. Absent a stay from this Court, Collette Brown may lose her seat in the legislature—all without any court ever disagreeing with the merits of Section 2 violation below. Prematurely altering the legislative districts before the disposition of Plaintiffs' certiorari petition further harms the public by causing unnecessary voter confusion and waste of government resources when the current remedial maps are likely to be upheld following this Court's review.

In contrast, the Secretary will merely see a delay in the adoption of the State's preferred legislative map if a stay is granted and Plaintiffs are not meritorious in this Court. To the extent that the Secretary asserts that the State will suffer irreparable harm if it is unable to enforce its preferred map, the State has no cognizable interest in enforcing an unlawful map. *Singleton*, 691 F. Supp. at 1356 n.1. In this case, the district court found that the map unlawfully diluted the voting power of Native American citizens and the Secretary did not effectively dispute this finding on appeal. App. 30-35; ECF No. 123 at 27 (The Secretary's proposed legal conclusions stating that the first *Gingles* precondition was satisfied); ECF No. 158-3 at 13-16 (The North

Dakota Legislative Council confirming that "[t]he compactness [of Plaintiffs' maps] meets the standards used by the committee when drawing the existing district map"); ECF No. 117 at 140-42 (The Secretary's expert testifying that the second *Gingles* precondition was satisfied); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017) ("[T]his Court to date has not . . . remanded a case for a determination of [racial] predominance, without evidence that some district lines deviated from traditional principles."). Staying the mandate and maintaining the current map until certiorari proceedings resolve will avoid any risk of irreparable harm to Plaintiffs and will not unfairly prejudice the Secretary.

A stay will also place North Dakota voters on equal footing to Alabama voters while this Court considers the question of private enforcement of the Voting Rights Act in cases arising from both states. It is inequitable for a remedial map to govern the 2026 election in one state but not the other while the Court considers whether it will adhere to sixty years of precedent.

CONCLUSION

For the foregoing reasons, the Court should grant a stay of the Eighth Circuit's mandate.

July 15, 2025

Respectfully submitted,

/s/ John E. Echohawk

John E. Echohawk
Counsel of Record
Matthew Campbell
Allison Neswood
Jacqueline De León
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Avenue
Boulder, CO 80302
(303) 447-8760

Leonard R. Powell
Samantha Blencke
NATIVE AMERICAN RIGHTS FUND
950 F Street NW, Suite 1050
Washington, DC 20004
(202) 785-4166

Mark P. Gaber
Anna M. Baldwin
Melissa Neal
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200

Timothy Q. Purdon
ROBINS KAPLAN, LLP
1207 West Divide Avenue, Suite 200
Bismarck, ND 58501
(701) 255-3000

Bryan L. Sells
THE LAW OFFICE OF
BRYAN L. SELLS, LLC
PO Box 5493
Atlanta, GA 31107
(404) 480-4212

Counsel for Applicants

**Counsel for Applicants Turtle Mountain Band of Chippewa Indians and Spirit Lake Nation*