No. 25A62

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.

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

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INTRODUCTION

This case easily meets the standard for a stay of the mandate. The Secretary of State ("the Secretary") does not dispute that there is a reasonable probability that certiorari will be granted. He suggests more percolation, but this issue is arriving on this Court's mandatory appellate docket this coming Term, as Alabama's amicus brief makes clear. Moreover, there is plainly a "fair prospect" of reversal. The decisions below directly contravene multiple precedents of this Court, are irreconcilable with the plain text of both Section 2 and Section 1983, and turn Section 1983 jurisprudence on its head. They likewise contradict every circuit court and three-judge district court—all unanimous unlike the divided decision below—ever to have considered the question of private enforcement of Section 2. Any one of those standing alone would suffice to create a "fair prospect" of reversal.

The Secretary fares no better on the equities. He declined to seek a stay of the district court's Section 2 liability finding in either the district court or the Eighth Circuit, and he declined to oppose or appeal the district court's remedial map. The appellate process has thus proceeded to date with North Dakota's elections governed by the district court's remedial map. And now, the North Dakota Legislative Council has upped the temperature by questioning whether issuance of the mandate immediately renders Plaintiff Collette Brown's service as a duly elected state representative unlawful.

Plaintiffs and the public would be irreparably harmed by a sudden reversion to a map found to violate federal law—a decision that Chief Judge Colloton has opined should be affirmed—under these circumstances. The Court should maintain the

status quo as this case proceeds and grant the requested stay of the Eighth Circuit's mandate.

REASONS FOR GRANTING A STAY OF THE MANDATE

I. There is a reasonable probability that this Court will review the clear circuit split that the Eighth Circuit has created on an issue of exceptional importance.

The first stay factor that applicants must meet is that there is a "reasonable probability" that four Justices will vote to grant certiorari. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The Secretary cannot seriously contest that there is not a reasonable probability of certiorari here given the clear circuit split on an issue of exceptional importance. The Secretary argues only (at 34) that the purely legal issues presented here are "premature" for this Court's consideration and may benefit from further percolation.

Not so. Further percolation may be warranted in cases where this Court has not already spoken. But that is not the case here. In *Morse v. Republican Party of Virginia*, 517 U.S. 186, 233 (1996), 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.'" *Id.* at 232 (opinion of Stevens, J., joined by Ginsburg, J.); *accord id.* at 240 (opinion of Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.).

Decades earlier, this Court had 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). The Court in *Morse* recognized that Congress had likewise intended to create a private right of action to enforce the prohibition on poll taxes in Section 10 of the

VRA. *See* 517 U.S. at 232-234 (opinion of Stevens, J.). The holding in *Morse* is predicated on the understanding that it would be anomalous for Congress not to have intended a right of action for Section 10 when Congress had authorized one to enforce both Section 5 and Section 2. *Id.* at 232; *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 State Conference NAACP v. Arkansas Bd. of Apportionment*, 91 F.4th 967, 970 (8th Cir. 2024) ("*Arkansas NAACP II*") (Colloton, C.J., dissenting).

In his response, the Secretary merely quotes at length the panel majority's reasoning in *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023) ("*Arkansas NAACP*") for rejecting *Morse*. Resp. at 30-31 (quoting *Arkansas NAACP*, 86 F.4th at 1215-16). But contrary to the majority's conclusion there, *Morse*'s key reasoning regarding the private enforceability of Section 2 is not a mere "background assumption[]." 86 F.4th 1215-16. *Morse* holds 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"). That reasoning is not dicta. It is central to the resolution of the case. Thus, the linchpin of the Court's holding in *Morse* is that private plaintiffs can enforce Section 2.

The Secretary also suggests (at 34) that further percolation is warranted because most other courts that have explicitly addressed the private enforceability of Section 2 have done so under its implied right of action, rather than through Section 1983. But this does not weigh against resolution of the petition in this case.

The Eighth Circuit only had reason to reach the issue of enforcing Section 2 through Section 1983 in this case because it had already rejected the uniform consensus of all other courts of appeals and three-judge district courts that Section 2 is privately enforceable through an implied right of action. *See* Application at 20-23. This does not mean that the circuit split here is "shallow." Resp. at 36. Instead, it means that the Eighth Circuit is a dramatic outlier.

Moreover, the Secretary's assertion (at 34-35) that a Section 1983 split is underdeveloped misses the point. There is a circuit split as to private enforceability of Section 2 of the VRA. There are two pathways to private enforcement of Section 2, both of which the Eighth Circuit has rejected—through an implied right and through Section 1983. While the complete analysis for both pathways is distinct, it overlaps at the first step. At the outset, both inquiries ask "whether Congress *intended to create a federal right*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasis in original). The Eighth Circuit got this critical question wrong, stating in *Arkansas NAACP* that it is "unclear whether § 2 creates an individual right." 86 F.4th at 1209. No other court of appeals or three-judge district court has considered that issue—common to both the implied right and Section 1983 analysis as applied below—to be unclear. *See* Application at 20-22.

Contrary to the Secretary's claims (at 35), there is a sharp and fully articulated split that must be addressed now. Indeed, every Section 2 case that this Court has decided was brought by private plaintiffs. Application at 20 (citing cases). Private plaintiffs have likewise litigated successful Section 2 cases in courts of appeals throughout the country. Application at 20-21 (citing cases). The Fifth, Sixth, and Eleventh Circuits have each directly held that Section 2 is privately enforceable, contrary to the conclusion reached by the Eighth Circuit. *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).[1] And the same is true of every three-judge district decision on the question of private enforceability, both before and after the precedent shattering decision in *Arkansas NAACP*. See Application at 21. Because plaintiffs in this case have preserved their arguments as to both pathways for private enforcement, this Court will be able to decide whether it wishes to resolve this case on one or both grounds.

No further percolation is needed, nor is it likely to occur given the currently binding decision in *Morse*. The Secretary does not contest that Section 2 is, and always has been, enforced primarily by private litigants. This Court has likewise

[1] The Eleventh Circuit's decision in *Alabama NAACP* is not less relevant because it was vacated as moot. The vacatur was "unrelated to its [right-of-action] holding" and its substantive analysis remains "persuasive." *United States v. Utsick*, 45 F.4th 1325, 1335 (11th Cir. 2022). Moreover, the Eleventh Circuit has recognized that *Morse* is controlling, contrary to the Eighth Circuit. *See Ford v. Strange*, 580 Fed. App'x 701, 705 n.6 (11th Cir. 2014) ("A majority of the Supreme Court has indicated that section 2 of the Voting Rights Act contains an implied private right of action.") (citing *Morse*, 517 U.S. at 232 (two justices); *id.* at 240 (three justices).

emphasized that Section 2 is and will remain an essential backstop against racial discrimination in voting. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."); *id.* at 537 ("Both the Federal Government and individuals have sued to enforce § 2 . . . ."). Section 2 cannot serve that vital role unless this Court addresses the Eighth Circuit's error. Plaintiffs have shown a reasonable probability that certiorari will be granted in this case.

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

A. There is a fair prospect that the Court will agree that Section 2 of the Voting Rights Act creates individual rights enforceable through Section 1983.

There is a fair prospect that the Court will agree that Section 2 confers an individual right enforceable through Section 1983. The law secures "the right of any citizen of the United States to vote" from being "denied or abridged . . . on account of race or color." 52 U.S.C. § 10301(a). The Eighth Circuit itself concluded that this language in Section 2's "very first sentence" "unmistakably focuses on the benefited class." *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710, 718 (8th Cir. 2025). That should have ended the Secretary's appeal. The majority below went seriously awry by concluding otherwise.

First, the Secretary contends (at 15-16) that *Gonzaga*'s "unambiguous conferral" standard for determining whether spending power statutes are privately enforceable under Section 1983 should extend to Reconstruction Amendment enforcement statutes. 536 at 283. The Court need not decide that question for

purposes of this stay application because as Chief Judge Colloton explained, "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." *Turtle Mountain*, 137 F.4th at 722 (Colloton, C.J., dissenting). But the Secretary is incorrect. This Court has never applied *Gonzaga*'s "unambiguous conferral" standard to a Reconstruction Amendment enforcement statute. And doing so would make no sense. The Fifteenth Amendment, and the laws Congress enacts to enforce it, are not "in the nature of a contract" such that States must knowingly "consent" to liability for racial vote dilution in exchange for accepting federal funds. *Medina v. Planned Parenthood South Atlantic*, 145 S. Ct. 2219, 2234 (2025) (internal quotations omitted). In this context, it is surely enough that Section 2 expressly secures "the right of any citizen . . . to vote," 52 U.S.C. § 10301(a), for the Court to determine that it is a "law" that secures a "right." 42 U.S.C. § 1983. Venturing further thwarts the purpose of the Reconstruction Amendments and the laws—Section 1983 and Section 2—enacted to enforce those Amendments.

Second, the Secretary invites (at 17-18) the Court to ignore Congress's use of the word "right" in the law's name (Voting *Rights* Act), Chapter 103's title ("Enforcement of Voting *Rights*"), Section 2's title ("Denial or abridgement of *right* to vote . . . ."), Section 2's text ("*right* of any citizen . . . to vote"), 52 U.S.C. § 10301(a), and other VRA sections that refer to Section 2 ("*right* secured by section 10301"), 52 U.S.C. § 10308(a), (c). That directly contravenes *Medina*, decided just weeks ago. 145 S. Ct. at 2235 (emphasizing in bold and italics the statutory references to "rights" in

the Federal Nursing Home Reform Act ("FNHRA")). Instead, the Secretary asks the Court (at 18) to be confused about whether Section 2 confers rights because it purportedly has a "'dual focus' between 'the individuals protected and the entities regulated.'" But that directly contravenes *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023).

The Secretary's effort to explain the panel majority's conflict with *Talevski* is unavailing. The Secretary contends (at 19) that "*Talevski* provides that a secondary focus on regulated parties does not undermine a statute's primary focus on individual rights." Here is what this Court said in *Talevski*: "[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)." *Talevski*, 599 U.S. at 185 (emphasis added). "Consider[ing], alongside" sounds a lot like "dual focus," illustrating a made-to-order distinction without a difference.

The Secretary contends (at 19-20) that his position does not jeopardize Section 1983 enforcement of the First and Fourteenth Amendments. But this Court observed otherwise with respect to the Fourteenth Amendment. *See Talevski*, 599 U.S. at 185 n.12 ("The Fourteenth Amendment hardly fails to secure § 1983-enforceable rights because it directs state actors not to deny equal protection."). That the Secretary's "dual focus" argument seemingly applies to only *one* particular provision of the "Constitution and laws," *i.e.*, Section 2 of the VRA, suggests that the Secretary's preferred outcome has driven the test he articulates.

Moreover, the Secretary's observation (at 19-20) that "constitutional provisions are not parsed the same way statutory provisions are,"—and thus the Court should ignore his "dual focus" argument when reading constitutional provisions—only undermines his case. The Secretary contends (at 18) that Section 2's "right of any citizen" language is "parroted from the Fifteenth Amendment." But it makes no interpretive sense to label language that appears in *both* the "Constitution and laws," 42 U.S.C. § 1983, as rights-conferring in one (the Constitution) but not the other (Section 2). That Congress exercised its power to enforce the Fifteenth Amendment by guarding against discriminatory effects in addition to discriminatory intent likewise does not somehow eliminate the individual rights. *Contra* Resp. at 26-27; *see also Allen v. Milligan*, 599 U.S. 1, 41 (2023) ("The VRA's ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment.") (citation modified).

Relatedly, Alabama contends that Section 2 cannot be enforced under Section 1983 because it created a new *remedy* not a new *right*. Alabama Amicus at 5-6. Because the right Section 2 enforces through its remedy is not "new," Alabama observes, Section 1983 is inapplicable. Section 1983's text has no "newness" requirement—that derives instead from the obvious observation that congressional *spending power* statutory rights will necessarily be "new." *Gonzaga*, 536 U.S. at 287. Moreover, Alabama's rights/remedies argument turns the text and purpose of Section 1983 on its head. As Chief Judge Colloton noted in rejecting this argument, "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.'" *Turtle Mountain*, 137 F.4th at 724-25 (Colloton, C.J., dissenting) (quoting 42 U.S.C. § 1983). If Alabama's position were correct, *no* Reconstruction Amendment enforcement statute would be enforceable under Section 1983. But as this Court has recognized, creating a cause of action for those statutes was Congress's "principal purpose" in adding "and laws" to Section 1983. *Maine v. Thiboutot*, 448 U.S. 1, 7 (1980); *id.* at 13 n.1 (Powell, J., dissenting) (noting that the strictest interpretation of Section 1983 would limit it to Reconstruction Amendment enforcement statutes because they secure rights via both the Constitution *and*—as opposed to "or"—laws); *Talevski*, 599 U.S. at 225, n.12 (Thomas, J., dissenting) (reasoning that "statutory § 1983 actions [should be] confined to laws enacted under Congress' Reconstruction Amendment enforcement powers"); *Holder v. Hall*, 512 U.S. 874, 917-23 (1994) (Thomas, J. concurring) (expressing the view that Section 2 confers rights on affected voters). A Reconstruction Amendment enforcement statute by its very nature "secures" rights contained in the "Constitution and laws." 42 U.S.C. § 1983.

Third, and reaching beyond the decision of the majority below, the Secretary contends (at 20-23) that Section 2 vote dilution claims are "collective in nature" and thus unenforceable under Section 1983. This argument fails at the gate because this Court has twice held otherwise. In a Section 2 case brought by private plaintiffs, this Court held in *League of United Latin American Citizens v. Perry* that "[a] local appraisal is necessary because the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" 548 U.S. 399, 437 (2006)

(quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)); *Shaw*, 517 U.S. at 917 (characterizing as a "misconception" the view that the "right to an undiluted vote . . . belongs to the minority as a group and not to its individual members"). This Court's holding flows from the plain statutory text. *See* 52 U.S.C. § 10301(a) ("the right of any citizen . . . to vote"). A clear holding of this Court—with the considerable force of statutory stare decisis—creates a fair prospect of that precedent being followed here.[2]

The Secretary does not mention this Court's contrary precedent and instead contends (at 21-22) that Section 2 vote-dilution claims are collective rather than individual because the *Gingles* preconditions assess district-level voting patterns. But this conflates the *statutory right* of "any citizen," to be free of racial vote dilution, 52 U.S.C. § 10301(a), with the type of threshold *evidence* that establishes that it is the challenged electoral system that is causing a redressable, individual harm, *see Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). Every discrimination claim is proved by showing how others are treated in relation to the complainant. That *evidence* does not convert the *right* to be free of discrimination from an individual to a collective one. Moreover, the Secretary is wrong to contend (at 22) that Section 2 rights are collective because a plaintiff may not ultimately reside in the newly configured remedial district. The legal injury is that the plaintiff's voting strength is diluted, *i.e.*, "abridged," "on account of race" by the districting configuration. 52 U.S.C. § 10301(a). Once a remedial map is adopted, the plaintiff's voting strength is no longer being

[2] The Secretary's citation to Section 2's "class of citizens" language, Resp. at 21 (quoting 52 U.S.C. § 10301(b)), is especially peculiar, given that an identifiable "class of beneficiaries," makes a statute enforceable under Section 1983, *see Talevski*, 599 U.S. at 183-84.

diluted "on account of race," *id.*, even if her favored candidates do not prevail in the district in which she resides. The racial vote dilution injury has been resolved, and what remains is a political disagreement with other voters. The Secretary's misunderstanding in this regard explains his odd suggestion (at 22) that vote dilution claims are collective while vote denial claims are individual—despite the same statutory text creating both.

Fourth, the Secretary contends (at 27) that it is a "roundabout" analysis to conclude that Section 2 "secures" against the "deprivation of a[] right[]," 42 U.S.C. § 1983, because the VRA expressly guards against a person who "shall deprive or attempt to deprive any person of any right secured by [Section 2]," 52 U.S.C. § 10308(a). The VRA uses the exact language of Section 1983 to describe the operation of Section 2. That is a straight line, not a roundabout. The Secretary's response is unconvincing. He contends (at 27) that Section 10308 "simply provide[s] that *if* 'any right' is secured by the listed substantive provisions, then violating them may result in specified criminal penalties." (emphasis in Secretary's brief). The statute does not use the word "if," and the Secretary's interpretation seems to suggest that Congress inadvertently listed a host of VRA provisions without attending to whether its list had any meaning or import. That is not how statutory interpretation is conducted. Nor is it relevant that this provision predated the 1982 amendment that added the results test to Section 2. Resp. at 27-28. Congress's maintenance of its "any right secured by [Section 2]" language, 52 U.S.C. § 10308(a), underscores its view that Section 2 secures rights, pre- and post-1982. And this Court has rejected the

Secretary's contention (at 28) that Section 2 does "*not* . . . enforce a Fifteenth Amendment right" because it protects against discriminatory effects in addition to discriminatory intent. (emphasis in Secretary's brief); *see Milligan*, 599 U.S. at 41 (noting "40 years" of precedent in that regard).

Fifth, the Secretary contends (at 23-26) that even if Section 2 confers an individual right, he has overcome the presumption of Section 1983 enforceability because Section 2 contains a "comprehensive enforcement regime." But that is not enough. "[W]hen a particular comprehensive remedial scheme discharges the defendant's burden, it does so because the application of ordinary interpretive tools reveals *incompatibility*. . . ." *Talevski*, 599 U.S. at 189 (emphasis added); *id.* at 187 ("necessary discordance" requires indication that private enforcement is "incompatible," "inconsistent," or would "thwart" public enforcement). The Secretary did not contend below—and does not in this Court (at 23-26)—that private enforcement of Section 2 is *incompatible* with the VRA's provisions for enforcement by the Attorney General.

The Secretary's "single-minded focus on comprehensiveness mistakes the shadow for the substance" of the necessary incompatibility showing. *Talevski*, 599 U.S. at 188-89. This Court has only found incompatibility where statutes had "self-contained enforcement schemes that included statute-specific rights of action." *Id.* at 189. It is the very *absence* of an express right of action in Section 2 that undermines the Secretary's contention that Section 1983 is unavailable. As Chief Judge Colloton explained in rejecting the Secretary's argument, there are no "indicia of congressional

intent to preclude enforcement of the Voting Rights Act under § 1983." *Turtle Mountain*, 137 F.4th at 725 (Colloton, C.J., dissenting). "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." *Id.* To the contrary, Congress expressly envisioned that "the Attorney General or an aggrieved person" would sue to enforce the VRA, 52 U.S.C. § 10302(a), provided that "a person asserting rights under the provisions of [the VRA, including Section 2] . . . [need not] exhaust[] any administrative or other remedies that may be provided by law," *id.* § 10308(f), and provided that prevailing parties "other than the United States" were eligible for attorneys' fees, *id.* § 10310(e). This is assuredly not how Congress would communicate that private enforcement would thwart its regulatory scheme.[3] Decades of practice—with hundreds of private suits—illustrate that private and public enforcement of Section 2 are in harmony.

The Secretary emphasizes (at 29) North Dakota's dual redistricting litigation as an argument for eliminating private Section 2 enforcement. But the second lawsuit, which alleged that respecting the reservation boundaries of a Tribal Nation constituted racial gerrymandering, rightly failed at the summary judgment stage—an outcome this Court summarily affirmed. *See Walen v. Burgum*, 700 F. Supp. 3d

[3] That the Attorney General is authorized to criminally prosecute those who violate an individual's Section 2 rights hardly makes private enforcement under Section 1983 incompatible. Resp. at 24, 28. Private civil lawsuits do not thwart the Attorney General's criminal prosecution authority, and Section 1983 does not purport to authorize *private* criminal enforcement. Indeed, the VRA authorizes criminal enforcement of Section 5 and 10 as well, *see* 52 U.S.C. § 10308(a), yet this Court has held those provisions to be privately enforceable, *see Allen v. State Bd. of Elections*, 393 U.S. 544, 556-57 (1969); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).

759 (D.N.D. 2023), *affirming in part and dismissing appeal in part*, 145 S. Ct. 1041 (2025) (Mem.). A meritless racial gerrymandering lawsuit aimed at stamping out any Native American legislative representation that was summarily rejected hardly illustrates doctrinal chaos hopelessly ensnaring the State. Nor does a successful Section 2 lawsuit affecting just two out of forty-seven legislative districts.[4]

None of the Secretary's arguments overcome Plaintiffs' showing that there is *at least* a fair prospect that this Court will conclude that by conferring a "right of any citizen . . . to vote," 52 U.S.C. § 10301(a), Section 2 has conferred a right to vote enforceable under Section 1983.

B. There is a fair prospect that the Court will uphold its precedent that Section 2 implies a private right of action.

Plaintiffs have shown that they have a fair prospect of the Court adhering to its *Morse* precedent finding an implied private right under Section 2. In order to establish an implied right of action, the Court looks to the text of "the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy." *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Section 2 contains obvious rights-creating language, *see* Application at 27-32, and Congress's intent to provide a private remedy to enforce the statute can be inferred from the personal nature of the rights that the VRA protects and from

[4] Alabama blithely says that the *Walen* "district court held that North Dakota could racially gerrymander in order to comply with §2." Alabama Amicus at 13. The *Walen* district court ruled that District 4A was *not* racially gerrymandered, the State argued that District 4A was *not* racially gerrymandered, and this Court summarily affirmed the district court's ruling that District 4A was *not* racially gerrymandered. *Walen*, 700 F. Supp. 3d at 775, *affirming in part and dismissing appeal in part*, 145 S. Ct. 1041 (Mem.). Alabama and the 14 signatory states apparently view the mere *existence* of Native Americans in an electoral district as "racial gerrymandering."

several other VRA provisions that evince Congress's understanding that Section 2 is privately enforceable.

The Secretary's main contention to the contrary (at 33) is that "Congress has amended the VRA numerous times yet never codified a private right of action for Section 2." But Congress had no need to do so. "Private enforcement of the VRA dates from the statute's enactment." Ellen D. Katz, *Curbing Private Enforcement of the Voting Rights Act: Thoughts on Recent Developments*, 123 Mich. L. Rev. Online 23, 30-34 (2024) (discussing history of private enforcement of the VRA and Congress's consistently expressed intention for such enforcement). In 1969, 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.

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. 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 VRA 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).

Given this history culminating in *Morse*, there is a fair prospect of reversal. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (citation omitted).

There is also a fair prospect for reversal given the text and structure of the Act as a whole. Indeed, there is no merit to the Secretary's suggestion (at 32-33) that Congress's intent to create a private right of action under Section 2 is not sufficiently clear.

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 (emphasis added). Because Congress enacted and amended Section 2 pursuant to its power to enforce the Fourteenth and Fifteenth Amendments,[5] 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) (emphasis added). 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*, 393 U.S. at 555 n.18 (finding "force" to the

[5] *See* Pub. L. No. 89-110, 79 Stat. 437 (1965); S. Rep. No. 97-417, at 40 (1982); H.R. Rep. No. 97-227, at 31 (1981).

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 indicate that there is a fair prospect for reversal of the Eighth Circuit's conclusion that Section 2 is not privately enforceable.

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

The irreparable harm Plaintiffs face and the balance of equities favor a stay of the mandate. The Secretary's contrary arguments are without merit.

First, the Secretary downplays (at 36-37) the North Dakota Legislative Council's memorandum questioning whether the issuance of the mandate will immediately render Plaintiff Representative Collette Brown ineligible to serve the remainder of her term. Appendix ("App.") at 98-102. But the Secretary opens his brief (at 4) by citing this interpretation of state law and contending that the State is irreparably harmed by Representative Brown completing her term. If a stay is not issued and Representative Brown is forcibly removed from office, Plaintiffs will be irreparably harmed by the ejection of their duly elected candidate of choice. That harm is magnified by the more-than-fair prospect that they will ultimately succeed in this case. The draconian suggestion that Representative Brown becomes ineligible to serve upon the issuance of the mandate strongly favors maintaining the status quo until this Court resolves this case.

Second, the Secretary calls it "audacious" (at 37) that Plaintiffs should be treated similarly to those in *every other circuit*—including the pending case from Alabama that will raise the same issue this upcoming Term—while the Court considers the question of Section 2's private enforcement. A stay by this Court does not "effectively invalidate North Dakota's duly enacted election map," Resp. at 37, but rather it permits the district court's injunction against that map—which Chief Judge Colloton opined should be affirmed on the merits—to remain in effect (as it was for the 2024 election).

Third, the Secretary contends (at 38) that his suggested December 31, 2025, deadline for finalization of the map to govern the 2026 election "cuts *against* a stay"

because to stay the mandate "would effectively decide, for purposes of North Dakota's 2026 election, that Section 1983 *does* provide Applicants a private cause of action." (emphasis in Secretary's brief). But the standard that governs stay applications provides otherwise. A stay would decide that there is a *fair prospect* that Section 2 is privately enforceable—something every other court to consider this question (including this Court) has concluded is so. Maintenance of that status quo does not harm the Secretary.

Fourth, the Secretary posits (at 38-39) that his decision neither to oppose nor appeal the district court's imposition of the remedial map is unimportant to the weighing of the equities. Not so. Contrary to the Secretary's protestation (at 38) that his silence with respect to the remedial map "did not indicate agreement with the court-imposed map" (cleaned up), the district court applied its local rules to conclude that the Secretary's non-opposition meant that he viewed the imposition of the map as well-taken. App. at 39. He did not appeal that finding or the map's imposition. He cannot collaterally attack it now.[6] His acquiescence to the remedial map also casts serious doubt on the genuineness of his suggestion (at 2) that combining nearby Rolette and Benson Counties (and thus the Turtle Mountain and Spirit Lake Nations) somehow constitutes racial predominance in redistricting merely because the two counties are home to Tribal Nations. It of course does not. See App. at 6-7 ("The two

[6] The Secretary is represented by the Attorney General, who is the sole state official with the power to defend the validity of state law. N.D.C.C. § 54-12-01(3). The Secretary's suggestion that the Legislative Assembly should have carried the litigation effort in this regard fails because the legislature has no Article III standing to do so. *See Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658, 664 (2019) (legislature has no Article III standing to appeal where state law gives attorney general that sole power).

Tribal Chairman highlighted how nonracial interests favored the unification of Benson and Rolette Counties, thereby bringing together the two Tribal Nations."). If the Secretary was so concerned that a constitutional violation was afoot, why did he stand mute as the district court imposed the map and the appellate timeline lapsed? Put simply, the State is not harmed by the continued implementation of a map that it did not oppose, did not appeal, and that has already governed an election while this case has proceeded on appeal.

Fifth, and relatedly, the Secretary calls it "jarring" (at 39) that the district court's injunction—based on its finding of a Section 2 violation following a full trial on the merits—would continue in effect if a stay were granted. But the Secretary elides a decisive fact—the injunction has remained in effect to date because when he sought a stay from the district court and from the Eighth Circuit (both of which denied the request), his sole merits argument was that Section 1983 did not provide a cause of action; he never argued that a stay should issue because the district court was likely wrong in finding a Section 2 violation. *See* Sec'y Howe's Mot. for Stay of Judgment Pending Appeal, *Turtle Mountain Band of Chippewa Indians, et al. v. Howe*, No. 23-3655 (Dec. 13, 2023), Doc. 5344314; Secy's Brief in Support of Motion for Stay of Judgment Pending Appeal, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-00022 (Dec. 4, 2023), ECF No. 132; App. at 42-43 (District Court's Order Denying Stay) ("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. . . . [N]owhere 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.").

And so the district court's injunction finding a Section 2 violation and its (unopposed and unappealed) order imposing a remedial map have governed North Dakota's election as this appeal has progressed. A stay by this Court would place the State in the same position it was in for the 2024 election—which occurred after the Eighth Circuit oral argument but before its decision issued. And because that decision was solely (and erroneously) about Section 1983's inapplicability, all this Court must consider to issue a stay is whether there is a fair prospect *that ruling* will be reversed. If the Secretary thought the district court's Section 2 liability finding were likely wrong—or contained "glaring errors" as he now wrongly contends (at 40), he could have sought a stay on that basis in the district court or the Eighth Circuit. He did not, which together with the district court's careful analysis and Chief Judge Colloton's opinion that it should be affirmed, is telling. So to call it "jarring" that the district court's injunction would continue to govern elections as this appeal continues to proceed rings quite hollow.

Given the Secretary's litigation choices, his contention (at 39-40) that the Court would be unlikely to reach the underlying merits in its review of the decision below misses the point. A stay will maintain the status quo that has persisted through the appellate process as Section 1983's application has remained the primary issue on appeal. But in any event, the Secretary fails to offer even a colorable merits

argument. He argues (at 40) that the case should be remanded to the district court because it did not expressly find that race had not predominated in the configuration of Plaintiffs' demonstrative districts. But "this Court to date has not . . . remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017). And as Chief Judge Colloton opined, "[n]onracial considerations—such as consolidating reservation and trust lands and keeping together tribal communities of interest—justify the district lines" and "[b]y rejecting the State's arguments, the district court implicitly found that race did not impermissibly predominate." *Turtle Mountain*, 137 F.4th at 728 (Colloton, C.J., dissenting).

Alabama chimes in to criticize Plaintiffs' demonstrative district 9 as "contract[ing] [] as it makes its way south before hooking east." Alabama Amicus at 17. What Alabama describes is the *shape of Benson County*, which "hook[s] east" following the shoreline of Devils Lake. Maintaining a whole county within a district is hardly evidence of racial gerrymandering merely because the water border of the county is not a straight line. *See Milligan*, 599 U.S. at 44 n.2 (Kavanaugh, J., concurring) (noting the importance of respecting county boundaries in demonstrative maps). The district court found—and Chief Judge Colloton agreed—that Plaintiffs' demonstrative districts did not deviate from traditional districting principles. App. at 64-66; App. at 33-34. The Secretary did not even oppose or appeal the imposition of

one of those demonstrative maps as the remedial map to govern the State's elections.[7] And his own expert conceded at trial that the demonstrative maps did not subordinate traditional districting principles to racial considerations and that he had no evidence to suggest racial gerrymandering occurred. ECF No. 117 at 163-64. As Chief Judge Colloton explained, "the district court's decision is adequately supported by the record and should be affirmed." *Turtle Mountain*, 137 F.4th at 725; *see generally id.* at 725-29. This is hardly the case to break new ground and remand for a finding of predominance. *Bethune-Hill*, 580 U.S. at 190.

The Secretary is unharmed by the same map he declined to oppose or appeal continuing to govern as the appellate process continues, just as it has up until now. On the contrary, Plaintiffs and the public are harmed by suddenly reverting to a map with an adjudicated Section 2 violation—which the Chief Judge of the Eighth Circuit concluded should be affirmed.

CONCLUSION

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

[7] Indeed, this choice raises a jurisdictional question of whether the Secretary can even collaterally attack that map's lawfulness as a demonstrative district when he failed to appeal its imposition as a remedy map. That is especially so considering that it was undisputed between the parties that *some* district configuration exists that satisfies the first *Gingles* precondition. Resp. at 40 n.6.

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Respectfully submitted,

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