NO. 25-253

In the
Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, ET AL.,

Petitioners,

v.

MICHAEL HOWE, SECRETARY OF STATE OF NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the proscription on unintentional "vote dilution" in Section 2 of the Voting Rights Act can be privately enforced using 42 U.S.C. § 1983.

2. Whether Section 2 of the Voting Rights Act contains an implied private right of action for allegations of unintentional "vote dilution."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND CODES

OTHER AUTHORITIES

INTRODUCTION

Whether private individuals can sue the states to allege unintentional "vote dilution" under Section 2 of the Voting Rights Act is a question of significant importance that will likely merit this Court's review at some point. But the Court would likely benefit from further percolation in the Circuit Courts before deciding the important questions presented.

On the question decided in the underlying case—whether Section 2's proscription against so-called vote dilution may be privately enforced via Section 1983—Petitioners have pointed to no conflict in the Courts of Appeal. The Eighth Circuit appears to be the only Circuit Court to have analyzed that specific issue.

And as to the question decided in the earlier Eighth Circuit case of *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*—whether Section 2 itself contains an implied private right of action—while the Eighth Circuit has arguably split with the Fifth Circuit, the Fifth Circuit's analysis of the issue was relatively shallow. *Compare* 86 F.4th 1204 (8th Cir. 2023) *with Robinson v. Ardoin*, 86 F.4th 574, 587–88 (5th Cir. 2023).

The Court would likely benefit from meaningful percolation on these legal questions, which involve the interpretation of two federal statutes, their interplay with the Equal Protection Clause, the separation of powers, and the role played by states within our federalist structure. That is especially true given the Court's very recent guidance on the private enforceability of statutes in *Medina v. Planned Parenthood*, which should guide that analysis in the lower courts. 145 S.Ct. 2219, 2229 (2025).

In any event, whether the Court decides to address these issues now or await further percolation, the Secretary respectfully notes that time is of the essence in this election map dispute. In order to ensure clarity on the election map to be used for North Dakota's approaching 2026 elections, the Secretary respectfully requests that a decision on certiorari—and, if the Court grants certiorari, the merits—be made as expeditiously as possible. Given the practical realities of administering those state-wide elections, the Secretary respectfully requests a certiorari decision by December 31, 2025, so that State officials may have finality on the election map that will be used for the 2026 elections with sufficient time to fairly prepare for and administer those elections.

STATEMENT OF THE CASE

I. Statutory Background

A. Section 2 of the Voting Rights Act

Originally enacted in 1965, the VRA "is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). To achieve those ends, the VRA created extensive prohibitions and protections, most of which are not at issue here. For example, Section 4(a) suspended literacy tests and similar restrictions, Section 5 created a preclearance system for new voting regulations in certain jurisdictions, Section 8 authorized the appointment of federal poll-watchers, and Section 10 addressed poll taxes. *Id.* at 315–16.

At issue here is Section 2 of the VRA, which this Court has summarized as "prohibit[ing] the use of voting rules to abridge exercise of the franchise on

racial grounds." *Id.* at 316. The originally enacted version of Section 2 did not proscribe what is now known as "vote dilution"—i.e., election rules that produce discriminatory results without any showing of discriminatory intent. In *City of Mobile v. Bolden*, this Court considered whether a race-neutral election procedure that allegedly produced discriminatory outcomes violated Section 2 as originally enacted. 446 U.S. 55, 58 (1980). The Court held such a claim could not lie under Section 2, because Section 2 was then co-extensive with the Fifteenth Amendment, and an electoral procedure "violates the Fifteenth Amendment *only* if motivated by a discriminatory purpose." *Id.* at 60–62 (emphasis added).

In response, Congress in 1982 sought to override the *Bolden* decision by amending Section 2 to create so-called claims of "vote dilution." That amendment created a species of disparate-impact liability, prohibiting any electoral practice that "results" in a minority group having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131 (1982) (codified at 52 U.S.C. § 10301); *see also Allen v. Milligan*, 599 U.S. 1, 10–11 (2023) (noting Section 2 was amended in response to *Bolden*). In other words, the 1982 amendment meant States and localities could violate the statute without any discriminatory intent. That amendment "radically transformed" the nature of Section 2 claims. *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting).

Significant for the question of private enforceability, the Court in *Bolden* noted it was

unclear whether Section 2 provided for a private right of action, stating that it "[a]ssum[ed], for present purposes, that there exists a private right of action to enforce this statutory provision," with a "but see" citation to two decisions that said private rights would not be inferred from congressional silence. 446 U.S. at 60 & n.8 (citing, inter alia, *Transamerica Mortg. Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979), and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979)). Yet when Congress radically transformed Section 2 to prohibit unintentional vote dilution, it was silent on whether it intended the amended provision to be privately enforceable—even though the very decision it was responding to provided notice that private rights of action would not be inferred from silence. Nor has Congress affirmatively provided for private enforcement of Section 2's prohibition of vote dilution in any subsequent amendment. *See* Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Voting Rights Act Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577.

B. 42 U.S.C. § 1983

Congress enacted Section 1983 as part of the Civil Rights Act of 1871 to enforce the individual-rights guarantees of the Fourteenth Amendment. Section 1983 provides a federal cause of action for violations of individual federal rights by state actors. It references "[e]very person who … subjects … any citizen of the United States … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983.

"Historically, individuals brought § 1983 suits to vindicate rights protected by the Constitution. But, in 1980, this Court recognized that § 1983 also

authorizes private parties to pursue violations of their federal statutory rights." *Medina*, 145 S.Ct. at 2229 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)). Nonetheless, "this Court has emphasized, statutes create individual rights only in 'atypical case[s].'" *Id.* (quoting *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023)). And fundamentally, Section 1983 "provides a cause of action 'only for the deprivation of rights, privileges, or immunities[;]'" federal statutes that merely "seek[] to *benefit* one group" are not privately enforceable under Section 1983. *Id.* (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2001)).

To establish that a claim found elsewhere is privately enforceable using Section 1983, "a plaintiff must show that the law in question 'clear[ly] and unambiguous[ly]' uses 'rights-creating terms.'" *Id.* (quoting *Gonzaga*, 536 U.S. at 284, 290). The statute must also "display 'an unmistakable focus' on individuals like the plaintiff." *Id.* (quoting *Gonzaga*, 536 U.S. at 284). This is "a 'stringent' and 'demanding' test." *Id.* (quoting *Talevski*, 599 U.S. at 180, 186). "And even for the rare statute that satisfies it," Section 1983 "still may not be available if Congress has displaced § 1983's general cause of action with a more specific remedy." *Id.* (citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)).

"[T]here was a time in the mid-20th century when 'the Court assumed it to be a proper judicial function'" to infer private rights of action whenever the Court thought doing so would best effectuate a statute's purpose. *Id.* (citation omitted). But that was error, "as this Court has since come to appreciate." *Id.* "[W]hether to let private plaintiffs enforce a new

statutory right poses delicate questions of public policy," and the separation of powers dictate that "weigh[ing] those competing costs and benefits belongs to the people's elected representatives, not unelected judges." *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and *Gonzaga*, 536 U.S. at 285); *see also, e.g.*, *Sandoval*, 532 U.S. at 287 ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.").

II. Factual and Procedural Background

Like many states, North Dakota's Legislative Assembly undertakes redistricting for its state legislative districts following every census. N.D. CONST. art. IV, § 2. The North Dakota Constitution imposes several constraints on this process. For example, the Legislative Assembly is required to "divide the state into as many … districts of compact and contiguous territory as there are senators." *Id.* § 1. The State Legislative Assembly enacted the challenged legislative redistricting map in 2021, with broad bipartisan support. *See* HB 1504, 67th Leg., Reg. Sess. (N.D. 2021).

After the 2020 census, the Turtle Mountain reservation in northern North Dakota no longer had the population to effectively constitute its own district. *See* Pet. 7 (acknowledging the district that previously encompassed the reservation was "underpopulated" following the 2020 census). As Petitioners observe, Canada lies to the north, so the Legislative Assembly's options during redistricting were to expand the district east, south, or west. *Id.*

In compliance with its constitutional mandate to draw districts that are compact and contiguous, the North Dakota Legislative Assembly expanded that district eastwards, while also creating a sub-district that would effectively ensure members of the Turtle Mountain Reservation would be able to elect a delegate to the State's House of Representatives. Pet.App. 38a–39a. Petitioners then sued, alleging the 2021 redistricting map "diluted" Native American voting strength in violation of Section 2.

The substance of that "vote dilution" claim was a preference for an apparently racially gerrymandered map that bolsters Native American voting power by creating a diagonal land bridge approximately 100 miles south-by-southeast to join Native American voters from two distinct tribal reservations into an elongated, roughly dumbbell-shaped district. Never mind that those different tribal reservations had never before been joined into a single legislative district in North Dakota history. Never mind that such a district replaces some of the most compact districts in the state with one of the least compact. And never mind that drawing a district of that shape seems to require prioritizing race above every other consideration. Petitioners asserted that Section 2 not only permits, but absolutely *requires*, the State to adopt a new, elongated district that sacrifices traditional criteria like compactness to maximize Native American voting power. As that litigation progressed, the 2022 elections were held under the State's duly enacted 2021 redistricting map.

Simultaneously, in a separate lawsuit, the State was also sued by different private plaintiffs under the Equal Protection Clause, who argued that the exact

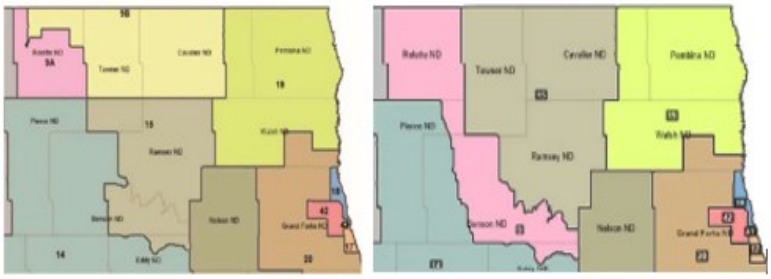
same redistricting plan unlawfully bolstered Native American voting strength *too much*. *See Walen v. Burgum*, 700 F. Supp. 3d 759 (D.N.D. 2023) (three-judge court), *affirmed in part and appeal dismissed in part*, 145 S.Ct. 1041 (2025) (Mem.).

Petitioners asserted a private right of action in this case through two methods: first, through an implied right of action under Section 2 itself, and second, through Section 1983. The Secretary moved to dismiss for lack of any private right of action. The district court remarked that "[a]t first blush, the Secretary's argument" was "compelling." Pet.App. 126a. Nonetheless, it found Section 1983 provides a private right of action for vote dilution claims. Pet.App. 131a–32a. The district court declined to "decide whether Section 2 of the VRA, standing alone, contains an implied private right of action." *Id*.

After denying the motion to dismiss, the district court held a bench trial in June of 2023. On November 17, 2023—mere weeks before the State's 2024 election map had to be fixed with finality—the district court rendered a judgment concluding the State's duly enacted map "prevents Native American voters from having an equal opportunity to elect candidates of their choice" and enjoined the Secretary from "administering, enforcing, preparing for, or in any way permitting the nomination or election" of candidates in several districts. Pet.App. 116a. The district court noted it was "evident" the Legislative Assembly "carefully examine[d] the VRA and believed" the duly enacted map would comply with the VRA, but said the State did not "go far enough." Pet.App. 115a. The district court declined to make a finding whether the maps proffered by Petitioners

during the *Gingles I* analysis were predominantly based on race, stating: "even assuming race was the predominate motivating factor in drawing the districts, establishing (and then remedying) a Section 2 violation provides a compelling justification for adopting one of the proposed plans." Pet.App. 87a n.3.

The Secretary appealed. Given the exigency caused by the timing of the district court's order ahead of the 2024 election, the Secretary also moved for a stay pending appeal. The district court and the Eighth Circuit denied the Secretary's motions for a stay pending appeal. Pet.App. 51a–60a. The district court subsequently entered a remedial order imposing an election map proffered by the Petitioners. Pet.App. 47a–50a. A side-by-side comparison of the districts enacted by the State in 2021 and judicially imposed on the State in 2024 are below:



See Pet.App. 71a, 73a (citing Pl. Exs. 101 and 106).

The Secretary complied with the remedial order for the 2024 elections but continued to challenge the invalidation of the State's duly enacted map. In May of 2025, the Eighth Circuit reversed and vacated the district court's decision, holding that Section 2 of the VRA does not clearly reflect the unambiguous intent to create individual rights that would be necessary for such claims to be privately enforceable under Section

1983. Pet.App. 9a–27a. Chief Judge Colloton dissented. Pet.App. 28a–46a. The Eighth Circuit denied a petition to rehear the case en banc and a request to stay its mandate. Pet.App. 1a–4a.

Petitioners then applied to this Court for a stay of the Eighth Circuit's mandate pending resolution of the instant petition for certiorari, which this Court granted. *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 24A62, 2025 WL 1943858 (U.S. July 16, 2025). The effect of that stay was to leave in place—pending disposition of the instant petition—the remedial election map proffered by Petitioners in the district court and vacated by the Eighth Circuit. Justice Thomas, Justice Alito, and Justice Gorsuch would have denied the application. *Id.*

REASONS TO DENY THE PETITION

I. The Court Would Benefit from Further Percolation of These Important Issues.

The Secretary does not dispute that the question of whether private litigants may enforce Congress's prohibition on collective vote dilution is an important one with significant implications. That question may well merit this Court's review at some point. However, the Court would likely benefit from meaningful percolation on the subject in the Courts of Appeal before it decides the important questions presented.

Petitioners do not point to any conflict in the Courts of Appeal on the question that was actually argued and decided in the underlying case: whether a private plaintiff may use Section 1983 to enforce Section 2's prohibition against vote dilution. The absence of any split in the Courts of Appeal on that

specific question weighs against this Court deciding the merits of that question at this time.

Instead, all but one of the cases cited by Petitioners for an alleged split of authorities address some version of the question that was at issue in the Eighth Circuit's prior *Arkansas* case, which analyzed a different question: whether Section 2 itself contains an implied private right of action. *See* Pet. 19–20 & n.7 (citing, inter alia, *Robinson*, 86 F.4th at 587–88; *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, 408 (6th Cir. 1999); *League of United Latin Am. Citizens v. Abbott*, No. 3:21-cv-00259, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021); *Ga. State Conf. of NAACP v. Georgia*, No. 1:21-cv-5338-ELB-SCJ-SDG, 2022 WL 18780945, at *7 (N.D. Ga. Sep. 26, 2022); *Miss. State Conf. NAACP v. State Bd. of Election Comm'rs*, No. 3:22-cv-00734, slip. op. at 18–23 (S.D. Miss. July 2, 2024)). Those cases do not analyze Section 1983 in this context. Of Petitioners' cases for a purported split, only the three-judge court in *Singleton v. Allen* even discussed Section 1983 in this context. *See* 782 F. Supp. 3d 1092, 1321–22 (N.D. Ala. 2025). Though that court's conclusion was that vote dilution claims could be privately asserted "either through an implied private right of action, Section 1983, or both," *id.*, conflating two distinct questions in a manner that may complicate review.

And as to the alleged split of authority among Courts of Appeal on the question of whether Section 2 itself contains an implied private right of action, the split among the Circuit Courts is far less developed than Petitioners suggest.

The Eleventh Circuit's decision in *Alabama State Conference of NAACP* was vacated as moot, so it lacks legal force and cannot give rise to a Circuit split. Moreover, that case involved a challenge to whether Section 2 abrogated state sovereign immunity, not a direct challenge to whether it contains an implied private right of action. *See* 949 F.3d at 649, 654. Likewise, the Sixth Circuit's *Mixon* decision also addressed the abrogation of state immunity, 193 F.3d at 396–99, and simply assumed, without any analysis, that individuals have a private cause of action under Section 2, *id*. at 406 & n.12.

That leaves just the Fifth Circuit's decision in *Robinson*, 86 F.4th at 587–88. While the Fifth Circuit did purport to directly address whether Section 2 contains a private right of action, its analysis of the issue is scant. And its conclusion is as follows: "We consider most of the work on this issue to have been done by [a prior Fifth Circuit decision] holding that the Voting Rights Act abrogated the state sovereign immunity … Congress should not be accused of abrogating sovereign immunity without some purpose. The purpose surely is to allow the States to be sued by someone." *Id*. at 588. The Fifth Circuit's decision appears to have not considered whether the "someone" empowered to sue States under Section 2 of the VRA might be the "someone" that Section 12 of the VRA expressly designates for such claims—the Attorney General of the United States. *See* 52 U.S.C. § 10308(d). And the Fifth Circuit's more recent decision in *Nairne v. Landry* provided no analysis at all, simply stating "the State's argument that § 2 of the VRA does not contain a private right of action is foreclosed by Fifth Circuit precedent." No. 24-30115, 2025 WL 2355524, at *22 n.26 (5th Cir. Aug. 14, 2025); *cf*. Pet. 19.

The Court's analysis of the questions presented would therefore benefit from further percolation among the Courts of Appeal. Further percolation may be especially warranted here given the thorniness of the interplay between the two implicated federal statutes, the Equal Protection Clause, the separation of powers, and the role that states are supposed to play administering elections within our federalist system—to say nothing of the significant practical implications of the questions presented for states and voters all around the country.

II. The Lower Court Did Not Err.

A. Section 2's Prohibition Against Collective Vote Dilution Is Not Privately Enforceable Using Section 1983.

"Although federal statutes have the potential to create § 1983-enforceable rights, they do not do so as a matter of course." *Talevski*, 599 U.S. at 183. As Petitioners now apparently concede (Pet. 25), the *Gonzaga* decision provides the test for assessing the applicability of Section 1983. *Talevski*, 599 U.S. at 183 ("*Gonzaga* sets forth our established method …"). The *Gonzaga* test proceeds in two steps, and allegations of vote dilution under Section 2 fail at both steps.

1. Section 2 Did Not Unambiguously Create an Individual Right Against Collective Vote Dilution.

The first step of *Gonzaga* asks whether the substantive statute *unambiguously* creates an individual right. "To seek redress through § 1983, a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law*." *Gonzaga*, 536 U.S. at 282 (cleaned up) (emphases in original). This

is "a demanding bar: Statutory provisions must *unambiguously* confer individual federal rights." *Talevski*, 599 U.S. at 180 (emphasis original); *Gonzaga*, 536 U.S. at 283 ("We … reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."). And Petitioners are incorrect to imply the requirement for unambiguous conferral of an individual right is limited to statutes enacted pursuant to the spending power. *Compare* Pet. 32–34, *with Medina*, 145 S.Ct. at 2230 ("Though it is rare enough for *any* statute to confer an enforceable right, spending-power statutes … are especially unlikely to do so.") (emphasis added).

In this case, Petitioners cannot meet the "demanding" and "significant hurdle" to establish that Section 2's prohibition on collective vote dilution *unambiguously* creates an *individual* right. *Talevski*, 599 U.S. at 180, 184; *Medina*, 145 S.Ct. at 2229.

Section 2 of the VRA states:

> **(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> **(b)** A violation of subsection (a) is established if, based on the totality of

> circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301 (formerly at 42 U.S.C. § 1973).

The text of Section 2 does not unambiguously reflect congressional intent to create an individual right for several reasons.

As an initial matter, simple use of the word "right" does not establish congressional intent to create an individual right. *Cf.* Pet. 27. The Court rejected that very proposition in *Gonzaga.* Justice Stevens, in dissent, suggested "any reference to 'rights,' even as a shorthand means of describing standards and procedures … should give rise to a statute's enforceability under § 1983." 536 U.S. at 289 n.7. But the Court disagreed, noting: "[t]his argument was rejected in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18–20 [] (1981)," which eschewed a "presumption of enforceability merely

because a statute 'speaks in terms of rights.'" *Id*. Instead, the inquiry "must not be guided by a single sentence … but look to the provisions of the whole law." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18 (1981) (citation omitted); *see also Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (courts must take "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created 'enforceable rights …'") (citation omitted). That is true even when the word "right" appears in a statute's title. *Gonzaga*, 536 U.S. at 290–91 (rejecting Section 1983 enforcement for provision of the Family Educational *Rights* and Privacy Act).

Looking at Section 2 as a whole, the Eighth Circuit properly concluded there is, at best, a "dual focus" between "the individuals protected and the entities regulated." Pet.App. 22a. The court acknowledged that the first sentence of subsection (a) contains the phrase "right of any citizen"—parroted from the Fifteenth Amendment. Pet.App. 20a–21a, 24a–26a. However, when considered as a whole, "the gravamen of § 2 is a proscription of discriminatory conduct, with the very subject of its prohibition being 'any State or political subdivision.'" Pet.App. 21a (quoting 52 U.S.C. § 10301(a)).

Moreover, when looking to subsection (b)—where the substance of what constitutes a vote dilution claim is found—the statute speaks not in terms of "rights" that are to be protected, but of "political processes" that are to be prohibited. Indeed, to the extent subsection (b) speaks of "rights" at all, it is to *deny* the creation of a right to proportional representation. At best, it is ambiguous whether Section 2 was intended

to create new individual rights. And "[w]here structural elements of the statute and language in a discrete subsection give mixed signals about legislative intent, Congress has not spoken—as required by *Gonzaga*—with a clear voice that manifests an unambiguous intent to confer individual rights." Pet.App. 22a (citation omitted).

To be sure, *Talevski* provides that a secondary focus on regulated parties does not undermine a primary focus on individual rights, at least where reference to the regulated parties is not a "material diversion." 599 U.S. at 185. But Section 2's focus on what States cannot do is not merely a "diversion"—it is the primary focus. *See* 52 U.S.C. § 10301(a) ("No voting qualification or prerequisite … shall be *imposed* or *applied by any State or political subdivision* ….") (emphases added); *id.* § 10301(b) ("A violation" exists when "the political processes leading to nomination or election in the *State or political subdivision* are not equally open …") (emphasis added). As the Eighth Circuit explained, it did not hold Section 2 "fails to secure individual rights simply because it mentions States and political subdivisions. Rather, the plain text of § 2 'focuses' on the States and political subdivisions …. And § 2's historical background suggests that the 'right of any citizen' in § 2 merely parrots a preexisting right guaranteed by the Fifteenth Amendment." Pet.App. 25a.

Petitioners contend that if the Eighth Circuit is right, the First Amendment would not be enforceable under Section 1983. Pet. 32. But there are several errors in that argument.

For one, "[t]he decision to recognize an implied cause of action under a statute involves somewhat

different considerations than … whether to recognize an implied cause of action to enforce … the Constitution." *Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017) ("It is logical … to assume that Congress will be explicit if it intends to create a private cause of action [for a statute]."); *see also Davis v. Passman*, 442 U.S. 228, 241 (1979) ("the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution") (emphasis original). For another, the First Amendment secures "a *pre-existing* right." *D.C. v. Heller*, 554 U.S. 570, 592 (2008) (emphasis original). By contrast, Section 2 did not *secure* any pre-existing right against unintentional "vote dilution." *Allen*, 599 U.S. at 11 ("The Fifteenth Amendment. … does not prohibit laws that are discriminatory only in effect.") (citations omitted). So the question is whether Congress clearly intended to *create* a statutory right to be free from unintentional vote dilution when it amended Section 2, and, as the Eighth Circuit found by applying settled methods for discerning congressional intent, it did not.

Moreover, even if Section 2 could be understood as unambiguously creating a right, it did not unambiguously create an *individual* right. "Vote dilution" claims are necessarily collective by their very nature. And where statutes "have an 'aggregate' focus," "they are not concerned with … any particular person" and "cannot 'give rise to individual rights'" that would be enforceable by Section 1983. *Gonzaga*, 536 U.S. at 288 (citations omitted).

It has been noted there is "considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill v.*

Milligan, 142 S.Ct. 879, 881 (2022) (Mem.) (Kavanaugh, J., concurring) (quoting *id.* at 883 (Roberts, C.J., dissenting)). But when a vote dilution claim is boiled down to its essence, it becomes clear that, whatever its contours, such claims can only be understood as collective in nature.

Starting with the text, subsection (b)—which provides the substantive basis for a vote dilution claim—describes a violation as occurring when "the political processes leading to nomination or election … are not equally open to participation by members of a *class of citizens* … in that *its members* have less opportunity than *other members* of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphases added). That language makes it clear that vote dilution claims are concerned with the *collective* impact on "class[es] of citizens"—not the impact on any particular individual. *Id.*

That straightforward reading also comports with how Section 2 claims have developed in practice. When a court analyzes a vote dilution claim, it is irrelevant whether any particular individual minority voter is unable to select the candidate of his or her choice. (After all, not all minority voters of a given race vote the same way.) Instead, for a Section 2 claim to succeed, it must be shown that a collective "minority group" in a given geographic region has "distinctive minority group interests," in the form of candidates collectively favored by that racial group, who they are unable to elect due to racial bloc voting by another ethnicity. *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Put another way, vote dilution claims are about the ability of political majorities of racial

minority groups in a designated area to elect their candidates of choice. The ability of any individual member within that racial group to elect his or her candidates of choice is immaterial.

Vote dilution claims thus stand in stark contrast to vote denial claims, which do clearly have an individual focus. Vote dilution claims also stand in stark contrast to racial gerrymandering claims, where the injuries caused by the government improperly categorizing people by their race "are personal." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015). To state a racial gerrymandering claim, a plaintiff need only sufficiently allege "that he personally has been subjected to [an improper] racial classification." *Bush v. Vera*, 517 U.S. 952, 957 (1996). The improper classification is the harm. The claim does not depend on the racial demographics of the area, nor on a historical examination of racial voting practices in the area, nor on a statistical analysis of racial bloc voting cohesion in the area.

Moreover, the collective nature of vote dilution claims is brought further into focus by looking to the available remedies. Even if a private plaintiff were to prevail on a vote dilution claim, the plaintiff would not be entitled to a remedy that provides him or her a personal benefit—the plaintiff could still be placed in a district where, due to racial bloc voting, the majority of the plaintiff's racial group is unable to elect the candidate of their collective choice. *Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996). Petitioners have identified no other type of alleged individual right where a putative plaintiff could prevail yet not be entitled to a remedy that provides a personal benefit. The absence of an entitlement to personal relief, as opposed to

collective relief, is another strong indicator that vote dilution claims are "about group political interests, not individual legal rights." *Gill v. Whitford*, 585 U.S. 48, 72 (2018).[1]

For either of those reasons, Petitioners have failed to meet their "demanding" burden to establish that Section 2 of the VRA clearly and *unambiguously* created an *individual* right capable of enforcement under Section 1983.

2. Congress Created a Comprehensive Public Enforcement Regime for Section 2 Vote Dilution Claims.

Even if Petitioners could establish that Section 2 unambiguously created a new individual right, the second step of the *Gonzaga* test would independently preclude private enforcement using Section 1983.

The second step of *Gonzaga* asks whether "Congress has displaced § 1983's general cause of action with a more specific remedy." *Medina*, 145 S.Ct. at 2229. And the Court has recognized several ways in which Congress can implicitly preclude the private enforcement of a statute using Section 1983.

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[1] In *Shaw*, the Court indicated vote dilution claims do not belong to "the minority as a group." 517 U.S. at 917. But *Shaw* did not purport to address private enforceability or the nature of a vote dilution claim in this context. That part of *Shaw* addressed whether racial gerrymandering in one part of a state could be excused by creating a majority-minority district in an entirely different part of the state (it could not). *Id.* at 907–08, 917. Within "a particular area," *id.* at 917, the claim is necessarily aggregate in nature, and it can only be understood as so. To the extent that passing language from *Shaw* could be construed more broadly, the Secretary would encourage the Court to thoroughly examine the nature of a "vote dilution" claim.

One way is where private enforcement would "thwart the operation of the administrative remedial scheme" of the statute. *Talevski*, 599 U.S. at 188. Another is where the statute's own enforcement scheme is "comprehensive." *Id.* at 189. And where the statute expressly designates a government actor to "deal with violations" of that statute, that too may suffice. *Gonzaga*, 536 U.S. at 289–90; *see also Talevski*, 599 U.S. at 195 (Barrett, J., concurring) ("Our cases have looked to a wide range of contextual clues, like 'enforcement provisions' that 'confe[r] authority to sue … on government officials.'") (citation omitted).

The VRA's enforcement regime for Section 2 falls within these categories and evinces a congressional intent to leave enforcement of Section 2 in the hands of the government official expressly charged with enforcing it—the U.S. Attorney General.

The VRA's enforcement scheme for Section 2 has remained constant since its enactment in 1965. Section 12(d) states: "Whenever any person has engaged … in any act or practice prohibited by" Section 2 or seven other identified provisions of the VRA, "the Attorney General may institute … in the name of the United States, an action for preventive relief." 52 U.S.C. § 10308(d). The statute expressly authorizes the Attorney General to seek wide-ranging and powerful relief, including "an application for a temporary or permanent injunction, restraining order, or other order ... directed to [] State and State or local election officials." *Id.* Section 12 of the VRA also establishes criminal penalties for violating Section 2. *See id.* § 10308(a)–(c).

The enforcement regime provided by statute designates the Attorney General to "deal with

violations," *Gonzaga*, 536 U.S. at 289–90, and it "confer[s] authority to sue on government officials." *Talevski*, 599 U.S. at 195 (Barrett, J., concurring) (cleaned up). And as the Eighth Circuit noted: "[t]he fact that § 12 lists criminal penalties among the potential remedies is strong evidence that it cannot provide a private right of action. After all, private parties cannot seek prison time against violators." *Arkansas*, 86 F.4th at 1210 n.2 (citations omitted). Consequently, "[i]f the text and structure of § 2 and § 12 show anything, it is that 'Congress intended to place enforcement in the hands of the Attorney General, rather than private parties.'" *Id.* at 1211 (brackets and citation omitted).

Congressional intent to vest enforcement authority with the Attorney General rather than private parties is further confirmed by looking at the Civil Rights Act. That statute was enacted near-contemporaneously with the original Voting Rights Act and broadly authorized individuals to bring "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order" for violations of that act, and authorized the Attorney General "to intervene in such civil action if … of general public importance." 42 U.S.C. § 2000a-3(a); *see* Pub. L. No. 88-352, title II, § 204, 78 Stat. 241, 244 (1964). So where Congress broadly intended for civil rights statutes to be privately enforced in parallel with potential public enforcement, it was capable of saying so clearly, even in the 1960s. It said so for the Civil Rights Act. It did not say so for Section 2 of the Voting Rights Act.

Moreover, an enforcement regime overseen by the Attorney General makes sense, and tracks what Section 2 did in substance. When Congress "radically transformed" Section 2 by prohibiting unintentional vote dilution, *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting), it exposed every State and locality in the nation to having their election maps struck down without any showing of discriminatory intent. However, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Abbott v. Perez*, 585 U.S. 579, 603 (2018) (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). And since vote dilution claims "demand[] consideration of race" while the Equal Protection Clause "restricts consideration of race," *id.* at 587, the 1982 amendment of Section 2 made every election map drawn by any state or locality in the nation "vulnerable to 'competing hazards of liability,'" *id.* (quoting *Bush*, 517 U.S. at 977). Those competing hazards might be navigable if enforcement is vested in a central, accountable actor. But they have begotten perennial chaos when enforcement is placed in the hands of a cottage legal industry that exists solely to bring such lawsuits.

There are thus significant federalism bases for why, when exposing every state and locality in the nation to such sweeping new liability, Congress intended to keep enforcement with an accountable actor who would ensure that new type of claim would not be abused—such as by causing a state to be sued for allegedly empowering the same bloc of racial minority voters both too much and too little with the exact same map. Intervening decades have shown that private plaintiffs have very little cause to be sensitive to the turmoil that such litigation causes,

and every motivation to game vote dilution claims by using race in a proxy fight to win a few more seats for their favored political party. *See, e.g.*, C. Elmendorf & D. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2157–58 (2015) (noting "litigating section 2 cases [has become] expensive and unpredictable," and "well-funded actors" can "finance section 2 cases when the political stakes are high").

In short, when Congress created a disparate-impact-theory of liability for "vote dilution" claims in Section 2 of the VRA, it struck a balance with the enforcement mechanism in Section 12, matching a centralized method of enforcement with the collective nature of the prohibition. Lawsuits by private plaintiffs for vote dilution claims are incompatible with the careful balance of that remedial scheme.

3. Petitioners' Other Arguments to the Contrary Are Unavailing.

The bulk of Petitioners' other arguments for using Section 1983 to enforce Section 2 focus on other provisions of the VRA. To the extent those arguments are relevant, they are not persuasive.

For example, the title of the Voting Rights Act does not mean that every provision therein creates an individual right. *Contra* Pet. 27. As noted *supra*, the Court dispelled any such notion in *Gonzaga*. *See* 536 U.S. at 290–91 (rejecting Section 1983 enforcement for provision of the Family Educational *Rights* and Privacy Act). Likewise, the word "right" in a section header does not *ipso facto* mean that the section thereby creates an individual right. *Contra* Pet. 27. Rather, this Court recently reiterated that section

headers cannot "enlarge or confer" rights not provided in the body of the text. *Medina*, 145 S.Ct. at 2237; *see also Pennhurst*, 451 U.S. at 18–20 (holding the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act is not enforceable under Section 1983).

Nor does it help Petitioners that the Fifteenth Amendment itself enshrines an individual right. *Cf.* Pet. 27. After all, this Court has already determined that unintentional "vote dilution" is not prohibited by the Fifteenth Amendment. *Bolden*, 446 U.S. at 58, 62; *Allen*, 599 U.S. at 11. So, to the extent Section 2 secures an individual right against vote dilution, it would have to be an individual, statutory right created by Section 2 itself. And as explained *supra*, Section 2 creates no such individual right.

Petitioners' discussion of Section 12 (codified at 52 U.S.C. § 10308)—which outlines the *public* remedies for violations of several provisions of the VRA—likewise does not imply rights-creating language in Section 2's prohibition on vote dilution. Furthermore, Sections 12(a) and (c) do not say what Petitioners imply. Taken together, those provisions provide that anyone who deprives, attempts to deprive, or conspires to violate "*any right secured* by section 10301, 10302, 10303, 10304, or 10306 of this title … shall be fined not more than $5,000, or imprisoned not more than five years." 52 U.S.C. § 10308(a) (emphasis added); *see id.* § 10308(c). Those sections do not single out Section 2 as Petitioners imply—nor any other of the listed provisions—as securing rights. *Contra* Pet. 28. Instead, they simply provide that *if* "any right" is secured in any of the substantive provisions listed, then violating them

may result in specified criminal penalties. Moreover, that language was enacted in 1965, when Section 2 only referred to the right against intentional discrimination from the Fifteenth Amendment. *See* Pub. L. No. 89-110, § 12(a), 79 Stat. 437, 443 (1965); *Bolden*, 446 U.S. at 60–61. But, again, the prohibition against unintentional vote dilution is not a Fifteenth Amendment right. *Allen*, 599 U.S. at 11 ("The Fifteenth Amendment. … does not prohibit laws that are discriminatory only in effect.").

And more broadly, as noted *supra*, the existence of those express public remedies has the opposite implication from the one that Petitioners suggest. The existence of criminal penalties for violating Section 2 implies that Congress created an enforcement regime for public officials to enforce the provision, not private parties. *See also Arkansas*, 86 F.4th at 1210–11 & n.2 (examining several other provisions of Section 12, and detailing why none of them support private enforceability); *id.* at 1211–13 (same for several provisions of Section 3); *id.* at 1213 n.4 (same for the attorneys' fee provision in Section 14(e)).

Finally, Petitioners place heavy emphasis on the fact that Section 2's prohibition on vote dilution was for several decades uncritically assumed to be privately enforceable in some manner. *E.g.*, Pet. 21–23 (noting that private plaintiffs brought 96.4% of Section 2 claims that produced published opinions); *id.* at 21–22 & n.8 (collecting cases). This point suffers from Petitioners' general conflating of two separate inquiries: whether Section 2 itself contains an implied right of action for vote dilution claims (not decided in the underlying case here) and whether such claims may be privately enforced using Section 1983 (decided

in the underlying case here). Those previous decisions appear to have assumed an implied private right of action in Section 2 itself. But that was "a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory … prohibition." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

In any event, unexamined assumptions are not holdings. Until very recently, few courts appear to have actually analyzed whether vote dilution claims are properly enforced by private parties, whether directly under Section 2 or through Section 1983. And long-held assumptions—especially about whether Congress intended to allow statutory claims to be privately enforced—have proven to be unfounded once the Court takes a closer look. *Medina*, 145 S.Ct. at 2229–30; *see also Sandoval*, 532 U.S. at 291.

Moreover, the fact that private litigants have been prolific in bringing vote dilution claims is not a point in Petitioners' favor. *Contra* Pet. 22–23.

The effect of assuming private enforceability for vote dilution during the last several decades has been perennial chaos, turning federal courts into battlegrounds for thinly-veiled disputes of electoral politics—often with manufactured urgency on the eve of elections. Here, for example, North Dakota was simultaneously sued by private plaintiffs over the exact same map for both allegedly empowering a bloc of Native American voters *too much* and allegedly empowering that same bloc of voters *too little*. It is now three years and two completed election cycles later, with preparation for another election on the horizon, and final resolution remains out of grasp. Yet

all the while, the public official actually charged by the VRA with enforcing the prohibition on vote dilution—the U.S. Attorney General (under two different Administrations)—has declined to intervene in support of the merits for either lawsuit. And other states have arguably had it even worse in recent years, as this Court's docket can attest.

The Eighth Circuit was right to critically examine the previously unexamined question of whether vote dilution claims are privately enforceable in the first place, using the traditional tools of statutory interpretation provided by this Court.

B. Section 2 of the VRA Does Not Provide an Implied Private Right of Action.

To the extent the Court considers granting certiorari in this case to review a question that was not briefed or decided in the underlying appeal, the Eighth Circuit's prior holding that Section 2 itself does not contain an implied private of action, *Arkansas*, 86 F.4th at 1215, was also rightly decided.

Petitioners' primary contention on this point is to assert that the Court resolved the question of Section 2's implied private enforceability in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). Pet. 24, 36. Petitioners are mistaken.

Morse dealt not with the private enforceability of vote dilution claims under Section 2, but with the prohibition on poll taxes found in Section 10. *Morse* also did not have a majority decision. Judge Stras, writing for the panel in *Arkansas*, concisely addressed why the separate writings in *Morse*, despite alluding to the private enforceability of Section 2 claims, did not actually resolve the question:

Justice Stevens, joined by Justice Ginsburg, announced the judgment. Latching on to … legislative history …, the opinion accepts the idea that Congress "clearly intended" that a "private right of action under Section 2" has existed "since 1965." From there, it acknowledges that there is no "express authorizing language" creating a private right to sue under any of the three provisions it discusses. Then, without examining the text or structure further, it implies a cause of action under § 10 to avoid the "anomalous" result "that both § 2 and § 5 are enforceable by private action but § 10 is not." In short, the opinion *assumes* that a private right of action exists under § 2.

Justice Breyer's concurrence, which Justices O'Connor and Souter joined, does the same thing. In a single paragraph, again citing the legislative history, it concludes that Congress must have intended § 10, just like § 2 and § 5, to have a private right of action.

Taken at face value, these statements appear to create an open-and-shut case that there must be a way to privately enforce § 2. If five Justices assume it, then it must be true.

The problem, however, is that these were just background assumptions—mere dicta at most. The question in *Morse* was about the private enforceability of § 10,

> which has different requirements and language than § 2. …
>
> Even as dicta, the statements in *Morse* are the least valuable kind. One reason is that there is hardly any analysis of why § 2 is privately enforceable. Nothing more was necessary because the Supreme Court was deciding something else: the availability of a private right of action under § 10. A second reason is that the various statements in *Morse* are inconsistent with how we are supposed to approach implied-cause-of-action questions today.

Arkansas, 86 F.4th at 1215–16 (citations omitted); *accord, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not … so decided as to constitute precedents."); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("Court does not decide important questions of law by cursory dicta … in unrelated cases.").

Moreover, two sitting Justices have indicated the existence of an implied right of action for Section 2 claims remains an open question. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 690 (2021) (Gorsuch, J., concurring, joined by Thomas, J.) (flagging it as an "open question").

Petitioners' other primary argument on this point is to invoke statutory stare decisis and argue that since Congress has "made no attempt to cabin private enforcement" of Section 2, the Court should never answer the question. Pet. 39. But unexamined

dicta is not precedent. And even "repeated" dicta "is not owed *stare decisis* weight." *Gonzalez v. United States*, 553 U.S. 242, 256 (2008) (Scalia, J., concurring); *see also, e.g.*, *Loc. 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 n.5 (1993) (giving precedential effect to dicta would reflect "a topsy-turvy version of judicial restraint").

While the instant petition does not address in any depth this Court's governing precedent for analyzing whether statutes contain an implied private right of action—provided by *Sandoval* and its progeny (indeed, the certiorari petition does not cite *Sandoval* at all)—that analysis strongly supports the Eighth Circuit's decision in *Arkansas*.

The most relevant time period for assessing Congressional intent is not 1965, when the VRA was originally enacted, but 1982, when Section 2 was amended to proscribe vote dilution. That difference is important, because in 1975 this Court affirmatively turned the corner on inferring private rights of action from congressional silence. *Sandoval*, 532 U.S. at 287 ("We abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 [] (1975)."); *see also id.* ("Raising up causes of action where a statute has not created them" is not a proper function of federal courts.) (citation omitted). And congressional intent to create a private right of action must be especially clear when a statute encroaches on serious federalism interests. *Bond v. United States*, 572 U.S. 844, 858 (2014).

Congress has amended the VRA numerous times yet never codified a private right of action for vote dilution claims. In 1975, for example, Congress provided individuals with additional remedies under the VRA for actions to enforce certain voting

guarantees. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400, §§ 401–07 (1975); *see also Arkansas*, 86 F.4th at 1211–13 (explaining the 1975 amendment to Section 3 created additional remedies for certain claims that otherwise had private causes of action, but did not create sweeping new private causes of action itself). However, Congress has never statutorily provided for private enforcement of vote dilution claims under Section 2—and certainly not with anything that could be described as unambiguous clarity.

That remained notably true when Congress amended the VRA to create vote dilution claims in direct response to this Court's *Bolden* decision. In *Bolden*, the Court noted it was unclear whether Section 2 of the VRA contained a private right of action—with a "but see" citation to two cases that held privately enforceable rights were not to be inferred from congressional silence. 446 U.S. at 60 & n.8; *see supra* Part I.A. That 1982 amendment "radically transformed" the nature of Section 2, *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting), by subjecting States and localities to potential liability without any showing of discriminatory intent. Nonetheless, Congress made no mention of a private right of action for that new type of claim—even though the very Court decision it was responding to provided notice that privately enforceable rights would not be inferred from congressional silence.

Thus, by the time of the 1982 amendment, this Court had been clear that it "abandoned" the "*ancien regime*" of inferring private rights of action from congressional silence. *Sandoval*, 532 U.S. at 287. Congress is presumed to have been aware of that fact

when it radically transformed Section 2 to proscribe unintentional vote dilution. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009). The ball was (and still is) with Congress to speak clearly if it wants the statutory prohibition against vote dilution to be privately enforceable. And whatever else may be said about the issue, the text of Section 2 does not clearly convey an intent for private enforceability.

CONCLUSION

The Court should deny the petition for a writ of certiorari. Either way, the Secretary respectfully requests a certiorari decision by December 31, 2025, so that State officials may have finality on what election map will be in place for the 2026 elections with sufficient time to fairly administer the elections.

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Respectfully submitted,

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