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.

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

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TO THE HONORABLE BRETT M. KAVANAUGH, CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT COURT OF APPEALS:

Applicants do not make the required showings to stay the Eighth Circuit's mandate pending their forthcoming petition for certiorari—an action that they hope would have the extraordinary effect of requiring North Dakota to hold two consecutive elections using a court-imposed map that the Eighth Circuit has now determined should never have been imposed to begin with.

To be sure, in the decades since Section 2 was amended to create so-called vote dilution claims, many courts have uncritically assumed the existence of a private right of action for those claims. But assumptions are not holdings. And the fact that Section 2's private enforceability was not previously challenged does not mean Congress spoke with the clarity needed to create a privately enforceable right, as members of the Court have recognized. *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").

The Eighth Circuit has now addressed that question head-on in two separate decisions. And after faithfully applying the interpretive tests provided by this Court, it determined the statute does not reflect a clear intent for vote dilution claims to be privately enforced, whether under Section 2 itself or through Section 1983. The Eighth Circuit also denied two petitions for rehearing en banc. These were not rushed decisions that slipped past the Circuit; both opinions are deliberate and thoroughly reasoned.

The Court should follow the normal course and allow the Eighth Circuit's judgment to take effect unless and until this Court grants certiorari and has had the opportunity to fully consider the merits of the Circuit Court's rigorous analysis.

INTRODUCTION

After the 2020 census, the Turtle Mountain Reservation in northern North Dakota no longer had the population to constitute its own district for electing members of the State's Legislative Assembly. As Applicants observe, Canada lies to the north, so the Legislative Assembly's options during redistricting were to expand the district east, south, or west. Application at 5 ("App'n"). But Applicants demanded a fourth option: create a diagonal land bridge approximately 100 miles south-by-southeast for the purpose of joining Native American voters from two distinct reservations into a single, elongated, roughly dumbbell-shaped district. Those different reservations had never been joined into one district in State history. And under traditional districting criteria, such a district performs far worse than other options—replacing some of the most compact districts in the State with one of the least compact.

There is strong reason to suspect the State could not have drawn a racially motivated map of that nature in the first instance without violating the Equal Protection Clause. Indeed, there is reason to suspect the State could not have drawn such a racially motivated map even as a remedial matter. *Cf.* Order, *Louisiana v. Callais*, No. 24-109 (U.S. June 27, 2025) (ordering additional argument). Nonetheless, Applicants claimed that Section 2 of the VRA not only permits—but requires—the State to draw such a district in order to maximize the electoral power of members of one racial group (which also predictably benefits one political party). "Redistricting is never easy." *Abbott v. Perez*, 585 U.S. 579, 585 (2018). But redistricting in a world where well-funded private plaintiffs can induce federal courts to strike down state maps based on theories like those that were asserted in this case becomes nearly impossible.

With that as context, the Eighth Circuit addressed a basic question that had been ignored for several decades: are Section 2 vote dilution claims privately enforceable in the first place? In a prior decision arising out of Arkansas, the Circuit said that such a right was not implied in Section 2 itself. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023) ("*Arkansas*"). Then, in this case, the Circuit said such claims could not be privately enforced using Section 1983. The Eighth Circuit's decisions were methodical, well-reasoned, and likely to be affirmed by a majority of this Court if certiorari were granted.

Though to be clear, the Eighth Circuit has not held that all rights implicated by the VRA are incapable of private enforcement. Myriad other types of claims can be asserted under the VRA, and nothing in either the underlying decision in this case or in the *Arkansas* decision announced that other provisions of the Act cannot be privately enforced. Nor has the Eighth Circuit declared that Section 2 vote dilution claims are unenforceable; instead, it held that "Congress intended to place enforcement in the hands of the Attorney General." *Arkansas*, 86 F.4th at 1211 (cleaned up). In other words, despite Applicants' suggestion otherwise, the Eighth Circuit has not invalidated the "nationwide ban on racial discrimination in voting found in § 2." *Contra* App'n at 24 (quoting *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013)).

As to the likelihood of granting certiorari, the Secretary does not dispute that the private enforceability of Section 2 is a question of significant importance that will likely merit this Court's review at some point; however, certiorari at this time is premature. On the question decided in the underlying case—whether Section 2 vote dilution may be privately enforced via Section 1983—Applicants have pointed to no conflict among

the Court of Appeals; the Eighth Circuit appears to be the only Circuit to have analyzed that issue. And as to the question decided in *Arkansas*—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 comparatively scant. *Cf. Robinson v. Ardoin*, 86 F.4th 574, 587–88 (5th Cir. 2023). The Court would likely benefit from further percolation on these complex legal questions, which involve the interpretation of two statutes and their interplay with the Equal Protection Clause.

Finally, irreparable harm and the balance of equities do not favor granting the exceptional relief of a stay pending any forthcoming petition for certiorari.

For one, Applicants claim irreparable harm by pointing to a memorandum from unelected legislative staff analyzing (and making arguments for both sides) whether, pursuant to state law, legislators who would not live in their district if the State's duly enacted map comes back into effect would be able to finish out their current term before running again in 2026. But Applicants themselves dispute that reading of State law, App'n at 3–4 n.1, and such speculation falls far short of establishing irreparable harm. Moreover, even if that reading of State law were correct, the State would be equally irreparably harmed if a legislator who was no longer eligible to serve in the Legislative Assembly under State law were to continue holding the position.

For another, Applicants claim they will suffer irreparable harm absent a stay because they believe the Court is unlikely to grant certiorari and resolve the merits of their appeal prior to December 31, 2025—when the Secretary will need finality on the underlying map in order to fairly administer the 2026 elections. But even if Applicants are right that the Court is unlikely to reach a decision by then (assuming the Court

were to grant certiorari), the equities of granting or denying a stay are not as one-sided as Applicants suggest. The State would of course be harmed if the Court were to impose a stay (thereby prohibiting the State from using its duly enacted map for the 2026 elections) but later affirm the Eighth Circuit's vacatur. By blithely claiming the State would "merely see a delay" in using its "preferred map," App'n at 36, Applicants ignore that when "a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Trump v. CASA, Inc.*, Nos. 24A884, 24A885, 24A886, 2025 WL 1773631, at *15 (U.S. June 27, 2025) (citation and quotation marks omitted).

Furthermore, Applicants' claim of irreparable harm relies on a presumption that the district court's invalidation of the State's map would be affirmed if the question of private enforceability were reversed—a question not resolved by the Eighth Circuit below, and thus unlikely to be before the Court on any grant of certiorari. In other words, Applicants' claim of irreparable harm would require the Court to resolve an issue that would not be before it on certiorari. *Contra Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Mem.) (Barrett, J., concurring, joined by Kavanaugh, J.) (Court should not allow applicants to "use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take"). And even if the Court were inclined to dive two levels down to resolve legal questions that would not be before it on certiorari, the district court demonstrably erred by expressly assuming plaintiffs can proffer *Gingles I* maps that are predominantly based on race. App. 66 & n.3. That was clear legal error. It is thus unlikely that the invalidation of the State's map would be

affirmed, even assuming this Court were to reverse the Eighth Circuit on private enforceability.

"Redistricting is primarily the duty and responsibility of the State," *Abbott*, 585 U.S. at 603 (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)), and the Eighth Circuit's vacatur of the district court's decision has for now restored that duty and responsibility to North Dakota. Applicants have failed to justify their exceptional request for a stay of the Eighth Circuit's mandate pending a petition for certiorari, and their application should be denied.

BACKGROUND

I. Statutory Background

A. Section 2 of the Voting Rights Act

In 1965, Congress originally passed the VRA as an enforcement mechanism for voting rights guaranteed by the Fifteenth Amendment. "The heart of the Act 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 administrative 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 include what

are now known as "vote dilution" claims—claims that only allege discriminatory results without any showing of discriminatory intent. In *City of Mobile v. Bolden*, this Court considered whether a race-neutral election procedure that was alleged to produce discriminatory outcomes could violate Section 2 as it was originally enacted. 446 U.S. 55, 58 (1980). The Court held that such a claim could not then lie under Section 2, because Section 2 was then co-extensive with the Fifteenth Amendment, and a race-neutral electoral procedure "violates the Fifteenth Amendment *only* if motivated by a discriminatory purpose." *Id.* at 60–62 (emphasis added).

In response, Congress sought to override the *Bolden* decision by amending Section 2 to create so-called "vote dilution" claims in 1982. The amended statute 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) (explaining current form of Section 2 was enacted in response to *Bolden*). In other words, the 1982 amendment meant that States and localities could violate the law without any discriminatory intent. As Justice Scalia observed, 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 that 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. *Bolden*, 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)). When Congress thereafter amended Section 2 to create vote dilution claims, it was silent on whether it intended for such new rights 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 their silence. Nor has Congress affirmatively provided for private enforcement of vote dilution claims 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 under certain conditions. In relevant part, it covers: "Every 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 v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025) (citing *Maine v. Thiboutot*, 448 U.S. 1, 28 (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)). Section 1983 "provides a [private] 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 (2002)).

To establish that a claim 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)).

The Court has acknowledged "there 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 when 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).

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).

When drawing that redistricting map, the Turtle Mountain reservation in northern North Dakota no longer had the population to effectively constitute its own district. *See* App'n at 5 (acknowledging the district that previously encompassed the reservation was "underpopulated" following the 2020 census). So in compliance with its constitutional mandate to draw districts that are compact and contiguous, the 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. App. 31.

Applicants thereafter sued the North Dakota Secretary of State (the "Secretary"), alleging that the 2021 redistricting map "diluted" Native American voting strength in violation of Section 2. The substance of Applicants' "vote dilution" claim was a preference for an apparently racially gerrymandered map that bolsters Native American voting power by combining two distinct tribal reservations into a single, elongated district that stretches diagonally across the northeast of the State. Those different tribal reservations had never been joined in a single legislative district in

North Dakota history. Such a district also replaces some of the most compact districts in the state with one of the least compact. *See* ECF No. 60-35 at 8–10. Applicants argued that Section 2 not only permits, but absolutely *requires*, the State to adopt a new, elongated district that sacrifices traditional districting criteria like compactness in order to maximize Native American voting power. As that litigation progressed, the 2022 elections were held under the State's duly enacted 2021 redistricting map.

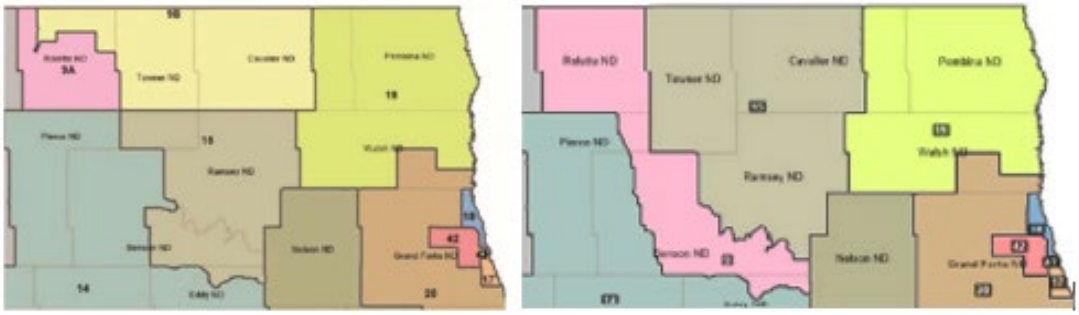
Simultaneously, in a separate lawsuit, the State was also sued by different private plaintiffs under the Equal Protection Clause, who argued that the exact same redistricting plan unlawfully bolstered Native American voting strength *too much*. *See Walen v. Burgum*, 700 F. Supp. 3d 759 (D.N.D. 2023) (three-judge court), *affirmed in part and appeal dismissed in part*, 145 S. Ct. 1041 (2025) (Mem.).

Applicants in this action asserted a private right of action through two methods: first, through an implied right of action under Section 2 of the VRA itself, and second, through Section 1983. The Secretary moved to dismiss on the basis that Applicants lacked a private right of action. The district court remarked that "[a]t first blush, the Secretary's argument" was "compelling." App. 93. Nonetheless, the district court found Section 1983 provides a private right of action for vote dilution claims under Section 2. App. 97. 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 Secretary's 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 plan "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 legislative districts. App. 84–85. The district court noted it was "evident" that the Legislative Assembly "carefully examine[d] the VRA and believed" the as-enacted map would comply with the VRA, but said the State did not "go far enough." App. 84. The district court declined to make a finding whether the maps proffered by Applicants during the *Gingles I* analysis were predominantly based on race, and stated that "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." App. 66 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 of the district court's judgment pending appeal. Both the district court and the Eighth Circuit denied the Secretary's motions for a stay pending appeal. App. 40, 41–46. The district court subsequently entered a remedial order imposing an election map preferred by the Applicants. App. 37–39. 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 App. 54–55 (citing Pl. Exs. 101 and 106).

The Secretary complied with the district court's remedial order for the 2024 elections but continued to challenge the judgment invalidating the State's duly enacted map. In May of 2025, the Eighth Circuit reversed and vacated the district court's decision, agreeing with the Secretary's argument 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. App. 11–23. Judge Gruender, writing for the panel, applied this Court's test from *Gonzaga* and its progeny to analyze the text and structure of Section 2. After methodically applying that test, the Eighth Circuit held that "[b]ecause § 2 does not unambiguously confer an individual right, the plaintiffs do not have a cause of action under 42 U.S.C. § 1983 to enforce § 2 of the Act." App. 23. The Eighth Circuit vacated the district court's contrary opinion and remanded with instructions that Applicant's case be dismissed for want of a cause of action. App. 23. Chief Judge Colloton dissented. App. 23–36.

Applicants petitioned the Eighth Circuit to rehear the case en banc. The Eighth Circuit denied the request. App. 2. Applicants then moved the Eighth Circuit to stay their mandate, and the court denied that request as well. App. 1.

REASONS TO DENY APPLICANTS' REQUEST FOR A STAY

A party asking this Court for a stay of a lower court's judgment pending certiorari "ordinarily must show (i) a reasonable probability that this Court would eventually grant review and a fair prospect that the Court would reverse, and (ii) that the applicant would likely suffer irreparable harm absent the stay." *Merrill v. Milligan,* 142 S. Ct. 879, 880 (2022) (Mem.) (Kavanaugh, J., concurring in grant of applications

for stays) (citing *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)). "[T]he Court also considers the equities (including the likely harm to both parties) …" *Id.*

"Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves v. Barnes*, 405 U.S. 1201, 1203–04 (1972) (Powell, J., in chambers). "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

Applicants have not made the necessary showings for such extraordinary relief. They have not established a likelihood of reversal, or that the Court is likely to grant certiorari at this time. And the balance of equities tips in favor of the State. "[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). That injury is magnified when the enjoined statute reflects "the State's policy judgments" about election matters. *Perry v. Perez*, 565 U.S. 388, 393 (2012).

The Court should follow the normal process and allow the Eighth Circuit's judgment to be given effect unless and until this Court has fully considered the merits.

I. Applicants Are Unlikely to Succeed on the Merits.

A. The Eighth Circuit Did Not Err in Determining that Section 2 Vote Dilution Claims Are Not Privately Enforceable Using Section 1983.

1. The *Gonzaga* Test Applies.

"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. The *Gonzaga* decision provides the test for assessing the applicability of § 1983 to another statute. *Id.* ("Gonzaga sets forth our established method …"). That test proceeds in two steps. The first step 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). That step "sets 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.").

Applicants briefly forecast an argument that the *Gonzaga* test may be limited only to Spending Clause statutes. *See* App'n at 32. But that argument is squarely foreclosed by this Court's recent *Medina* decision.

In *Medina*, Part II.A. of the Court's analysis discussed the general principles for when statutes may be enforceable via Section 1983. The Court explained that to "vindicat[e] the separation of powers," courts must not supply private remedies that Congress has not created. *Medina*, 145 S. Ct. at 2229–30 (quoting *Talevski*, 599 U.S. at

183). Only after that discussion about the applicability of Section 1983 in general did the Court move on, in Part II.B. of the decision, to discussing Spending Clause statutes in particular. *See id.* at 2230 ("Though it is rare enough for *any* statute to confer an enforceable right, spending-power statutes like Medicaid are especially unlikely to do so.") (emphasis added).

Indeed, the Court regularly describes the *Gonzaga* test in terms applicable to all federal statutes. *E.g.*, *Talevski*, 599 U.S. at 175 ("[W]e have crafted a test for determining whether a particular federal law actually secures rights for § 1983 purposes."); *id.* at 183 (discussing the test as to "federal statutes" and specifying an additional point "[f]or Spending Clause legislation *in particular*") (emphasis added). And the Court has applied the *Gonzaga* test to cases that did not implicate the Spending Clause at all. *See Rancho Palos Verdes*, 544 U.S. at 119–20 (applying the two-step *Gonzaga* test to the Telecommunications Act of 1996); *accord McCready v. White*, 417 F.3d 700, 703 (7th Cir. 2005) ("Any possibility that *Gonzaga* is limited to statutes that rest on the spending power … has been dispelled by *Rancho Palos Verdes*, which treats *Gonzaga* as establishing the effect of § 1983 itself.").

Applicants have not established *any* likelihood that, in the immediate wake of *Medina*, a majority of the Court is now going to cabin the *Gonzaga* test only to statutes that were enacted under Congress's Spending Clause authority.

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

Applicants 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 codified 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, Applicants are wrong to imply that use of the word "right" alone can establish congressional intent to create an individual right. App'n at 31. 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 imposed on funding recipients, should give rise to a statute's enforceability

under § 1983." *Gonzaga*, 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, … within the meaning of § 1983'") (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 rightly concluded there is, at best, a "dual focus" between "the individuals protected and the entities regulated." App. 19. The court acknowledged that the first sentence of subsection (a) contains the phrase "right of any citizen"—parroted from the Fifteenth Amendment. App. 18, 21–22. 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.'" App. 19 (quoting 52 U.S.C. § 10301(a)); *see also Arkansas*, 86 F.4th at 1209 (noting the opening passage of Section 2 "is a general proscription of discriminatory conduct, not a grant of a right to any identifiable class") (cleaned up). Moreover, when looking to subsection (b)—where the substance of what constitutes a vote dilution claim is found—the statute speaks not terms of "rights" to be protected,

but of "political processes" to be prohibited. 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." App. 20 (emphasis added) (citation omitted).

To be sure, *Talevski* provides that a secondary focus on regulated parties does not undermine a statute's 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 that 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." App. 21.

Applicants contend that if the Eighth Circuit is right, the First and Fourteenth Amendments would not be enforceable under Section 1983. App'n at 30. But there are several errors in that argument. For one, this Court has long been clear that when it comes to ascertaining the existence of an individual right, constitutional provisions are

not parsed the same way statutory provisions are. *E.g., Davis v. Passman*, 442 U.S. 228, 241 (1979) ("[T]he 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 in original)). For another, the First Amendment secures "a *pre-existing* right." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (emphasis original). By contrast, there was no pre-existing right against unintentional "vote dilution" *secured* by Section 2. *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 right to be free from unintentional vote dilution, and, as the Eighth Circuit found by applying settled methods for discerning congressional intent in this context, it did not. Finally, even setting all that aside, the Eighth Circuit's decision cannot be read to suggest that the Fourteenth Amendment is not privately unenforceable simply due to its sentence structure. *Cf.* App'n at 29–30. The Eighth Circuit never said the question could be resolved simply by looking at the syntax of a sentence and ending the inquiry. Instead, it took pains to analyze the focus "of the whole law," *Pennhurst*, 451 U.S. at 18 (citation omitted), and determined that the overall "gravamen of § 2 is a proscription of discriminatory conduct," not the creation of a right. App. 19.

Moreover, even if Section 2 could be understood as unambiguously creating a right, it did not unambiguously create an *individual* right, because "vote dilution" claims are necessarily collective by nature.[1] Where statutes "have an 'aggregate' focus,

[1] The Eighth Circuit did not address this question, App. 20 n.4, but provides another basis to affirm the judgment. *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435–36 (1924).

they are not concerned with … any particular person … and they cannot give rise to individual rights" enforceable by Section 1983. *Gonzaga*, 536 U.S. at 275.

It has been noted there is "considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill*, 142 S. Ct. at 881 (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, Section 2 plaintiffs must prove 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 candidate preferences held by any individual member of that racial group are 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 harms that are caused by the government improperly categorizing people according to their race "are personal." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015).[2]

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 would provide 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). Applicants 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. That absence of an entitlement to personal relief, as opposed to collective relief, is a strong indicator that vote dilution claims are "about group political interests, not individual legal rights." *Gill v. Whitford*, 585 U.S. 48, 72 (2018).

[2] To sharpen that point: 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 the voting cohesion among the different racial groups in the area.

For either of those separate reasons, Applicants 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 § 1983.

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

Even if Applicants could establish that Section 2 of the VRA unambiguously created a new individual right, the second step of the *Gonzaga* framework would independently preclude the application of Section 1983.[3]

The Court has recognized several ways in which Congress can implicitly preclude the private enforcement of a statute under Section 1983. One way is where private enforcement under Section 1983 would "thwart the operation of the administrative remedial scheme" of the statute. *Talevski*, 599 U.S. at 188. Another is where a statute's own enforcement scheme is "comprehensive." *Id.* at 189. And if the statute expressly authorizes a government actor to "deal with violations," 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.'" (quoting *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981))).

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 Attorney General.

[3] The Eighth Circuit did not address this issue, App. 20 n.4, but it provides yet another basis to affirm the judgment. *Am. Ry. Express Co.*, 265 U.S. at 435–36.

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 named 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.* Separately, the VRA also establishes criminal penalties for violating Section 2. *See id.* § 10308(a)–(c).

That comprehensive enforcement regime 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). As the Eighth Circuit noted in the *Arkansas* decision, "[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.'" 86 F.4th at 1211 (citation omitted). Notably, "[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." *Id.* at 1210 n.2 (citation omitted).

This enforcement regime makes sense, and tracks what Section 2 did in substance. When Congress "radically transformed" Section 2 by creating so-called vote dilution claims, *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 requiring

any showing that those maps were designed with a discriminatory intent. However, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Abbott*, 585 U.S. at 603 (quoting *Miller*, 515 U.S. at 915). And since vote dilution claims "demand[] consideration of race" while the Constitution's Equal Protection Clause "restricts consideration of race," *id.* at 587, the 1982 amendment of Section 2 also had the effect of making 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).

There are thus significant federalism justifications for why, when exposing every state and locality in the nation to such sweeping new potential 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, for example, causing a State to be sued for allegedly favoring 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 Section 2 by using race in a proxy fight to win a few seats for their favored political party. *See, e.g.,* Christopher S. Elmendorf & Douglas M. 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.

4. Applicants' Other Arguments to the Contrary Are Unavailing.

The bulk of Applicants' other arguments for using Section 1983 to enforce Section 2 dedicate relatively little attention to the actual text of Section 2, focusing instead on policy concerns and *other* provisions of the VRA. *See generally* App'n at 26–32. 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* App'n at 31. 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* App'n at 31. Applicants misleadingly quote a partial sentence from *Medina* for the proposition that "[a] title may underscore that the statutory text creates a right," *id.* (quoting *Medina*, 145 S. Ct. at 2237), while the omitted half of that sentence—which was the point being made in that part of the opinion—is that titles 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 (finding the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act not enforceable under Section 1983).

Nor does it help Applicants that the Fifteenth Amendment itself enshrines an individual right. *See* App'n at 31. After all, this Court has already determined that

claims of unintentional vote dilution are not encompassed within the Fifteenth Amendment right. *Bolden*, 446 U.S. at 58, 62; *Allen*, 599 U.S. at 11.

And Applicants' roundabout 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. *Contra* App'n at 27. Applicants belie this conclusion with a creative use of bracketing, writing that "the VRA creates public remedies against '[w]hoever shall deprive or attempt to deprive any person of any right secured by [Section 2].'" *Id.* (quoting 52 U.S.C. § 10308(a) & (c)). With that bracketing in place, they claim that failing to read Section 12(a) and (c) as implying the existence of an individual right to be free from vote dilution would render the references to Section 2 a nullity.

But even assuming this Court should discern rights-creating language in such a roundabout way, Sections 12(a) and (c) do not say what Applicants 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) & (c) (emphasis added). Those sections do not single out Section 2 (codified at 52 U.S.C. § 10301) as Applicants imply, nor do they "characteriz[e] Section 2"—or any other of the listed provisions—"as securing rights." *Contra* App'n at 27. Instead, they simply provide that *if* "any right" is secured in any of the listed substantive provisions listed, then violating them may result in specified criminal penalties. Moreover, that language from Sections 12(a) and (c) 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, Title I, § 12, 79 Stat. 443; *Bolden*, 446 U.S. at 60–61. But claims of unintentional vote dilution under Section 2 are *not* claims to enforce 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 Applicants suggest. Because 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 that plaintiffs in that action pointed to); *id*. at 1213 n.4 (same for the attorneys' fee provision in Section 14(e)).

Finally, lacking a viable textual argument, Applicants repeatedly fall back 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.*, App'n at 1–2 ("Since 1982, private plaintiffs have brought more than 400 actions based on § 2 [of the Voting Rights Act] that have resulted in judicial decisions.") (citation omitted).

As an initial matter, this point suffers from Applicants' general muddling 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 under Section 1983's general cause of action (decided in this case). Most of those previous decisions likely 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 or constitutional prohibition." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

And in any event, assumptions are just that—assumptions. Until very recently, few courts appear to have actually analyzed whether Section 2 is properly enforced by private parties, whether directly or through Section 1983. And long-held assumptions—especially about whether Congress intended to allow statutory claims to be privately enforced in federal court—have proven to be unfounded once the Court takes a closer look. *See Medina*, 145 S. Ct. at 2229–30 ("To be sure, there was a time in the mid-20th century when the Court assumed it to be a proper judicial function to provide whatever remedies it deemed necessary to make effective a statute's purpose …. [But t]he job of resolving how best to weigh those competing costs and benefits belongs to the people's elected representatives, not unelected judges." (cleaned up)).

Moreover, the fact that private litigants have been prolific in bringing lawsuits to enjoin States from using their duly enacted election maps since 1982 is not a point in Applicants' favor. *Contra* App'n at 1. 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 favoring a bloc of Native American voters too much and allegedly favoring 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 is still

out of grasp. Yet all the while, the public official actually charged by the VRA with enforcing the prohibition on vote dilution—the Attorney General (under two different Administrations)—has declined to intervene in support of the merits for either of those lawsuits. And other states have arguably had it even worse in recent years. The Eighth Circuit was right to critically examine the assumption of private enforceability using the tools of statutory interpretation that have been provided by this Court.

B. The Eighth Circuit Did Not Err in its Prior Determination that Section 2 Does Not Provide an Implied Right of Action for Vote Dilution Claims.

To the extent the Court would consider granting certiorari in this case to review a question that was not decided in the underlying appeal, the Eighth Circuit's prior holding that Section 2 itself does not contain an implied private of action for claims of vote dilution, *Arkansas*, 86 F.4th at 1214–15, was likewise rightly decided.

Applicants' 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). App'n at 33–34. Applicants 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*, thoroughly 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. *Id.* (analyzing § 2, § 5, and § 10).

> 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." *Id.* 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. … Assumptions and statements of belief about other issues are not holdings, no matter how confident the court making them may sound. *See* Bryan A. Garner et al., *The Law of Judicial Precedent* 44 (2016) ("Not all text within a judicial decision serves as precedent.").
>
> 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. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 775 [] (1968) ("[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases."). … 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; *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."); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

Moreover, at least two sitting Justices have indicated they consider the existence of an implied right of action for Section 2 claims to be an open question. *See Brnovich*,

594 U.S. at 690 (Gorsuch, J., concurring, joined by Thomas, J.) (characterizing it as an "open question"); *Allen*, 599 U.S. at 90 n.22 (Thomas, J., dissenting, joined by Gorsuch, J.) (declining to address the issue because it "was not raised in this Court").

Applicants' other 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 not answer the question. App'n at 33–34. 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). This is not a case where the Court "should 'place on the shoulders of Congress the burden of the Court's own [unexamined] error.'" *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 695 (1978) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)).

While Applicants' motion does not address in any depth this Court's governing precedent for analyzing whether statutes contain an implied private right of action, that analysis strongly supports the Eighth Circuit's decision in *Arkansas*.

The relevant time period here for assessing Congressional intent is not 1965, when the VRA was originally enacted (*cf.* App'n at 33), but 1982, when Section 2 was amended to create vote dilution claims. And in 1975, this Court expressly 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. at* 286–87 ("[r]aising up causes of action where a statute has not created them" is not a proper function of federal courts) (cleaned up). Congressional intent to create a private right of action for a statutory claim must be especially clear

when the federal 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 Section 2 vote dilution claims. In 1975, for example, Congress provided individuals with additional remedies under the VRA in actions to enforce certain voting guarantees. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400, §§ 401–07; *see also Arkansas*, 86 F.4th at 1211–13 (explaining the 1975 amendment created additional remedies under the VRA for certain claims that had private causes of action, but did not create new private causes of action itself). Yet Congress has never statutorily provided for private enforcement of Section 2.

That remained notably true when Congress amended the VRA in 1982 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 claims, *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—even though the very Court decision it was responding to provided notice that privately enforceable rights would not be inferred from congressional silence. Moreover, by 1982, 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, and Congress is presumed to have been aware of

that fact when it substantively amended Section 2 to create so-called vote dilution claims. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009).

II. Applicants Have Failed to Establish a Sufficient Likelihood of Certiorari to Justify a Stay.

The Secretary does not dispute that the question of whether private plaintiffs may use Section 1983 to enforce Congress's prohibition on collective vote dilution is an important one with significant implications. That question may well merit this Court's review at some point in the future. However, Applicants' intended petition for certiorari is premature, as the Court would likely benefit from percolation in the Courts of Appeal before it decides the issue—especially in light of the Court's very recent guidance on the applicability of Section 1983 in *Medina*.

Applicants do not point to any conflict in the Courts of Appeals on the question that was briefed and decided in this case: whether a private plaintiff may sue under Section 1983 to enforce Section 2's prohibition against vote dilution.

Instead, all but one of Applicants' cited cases for an alleged split of authority focus on some version of the question that was at issue in the Eighth Circuit's prior *Arkansas* case, which analyzed whether Section 2 itself contains an implied private right of action. *See* App'n at 21 (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. Sept. 26, 2022)). Those cases do not

mention, let alone analyze, Section 1983 in this context.[4] Of Applicants' cases for the purported split, only the three-judge court in *Singleton v. Allen* even discussed Section 1983. *See* Nos. 2:21-cv-01291-AMM, 2:21-cv-01530-AMM, 2025 WL 1342947, at *181 (N.D. Ala. May 8, 2025). Though that court's conclusion was that Section 2 could be privately enforced "either through an implied private right of action, Section 1983, or both," *id.*, treating the two issues as one in a way that would complicate review.

As to the alleged split of authority among Circuit Courts on the question that was decided in the *Arkansas* case (i.e. whether Section 2 itself contains an implied private right of action), the split is far less developed than Applicants would have the Court believe. The Eleventh Circuit's decision in *Alabama State Conference of NAACP* was vacated as moot, so it lacks any 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 Ala. State Conf. of NAACP*, 949 F.3d at 649, 654. Likewise, the Sixth Circuit's *Mixon* decision also addressed the abrogation of state immunity question, 193 F.3d at 396–99, and simply assumed, without 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 the question of whether Section 2 contains a private right of action, its analysis of the issue is scant in comparison to the Eighth Circuit's analysis in *Arkansas*. And its conclusion is as follows: "We consider

[4] Although *Mixon* referenced Section 1983 in the context of a separate claim, the court did not address whether Section 2 was enforceable using Section 1983. *See* 193 F.3d at 394, 406–08.

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 anchored in the Eleventh Amendment. 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. 52 U.S.C. § 10308(d).

Those are shallow waters for a Circuit split. And thoughtful percolation among the lower courts may be especially warranted here given the significant practical and legal implications of the issue. Additional time for percolation may also help assess Applicants' sky-is-falling policy arguments, as well as how the dynamics of Section 2 enforcement may change if there were not a cottage legal industry prolifically flooding the space with lawsuits after every redistricting cycle.

III. The Equities Do Not Favor the Extraordinary Relief Applicants Seek.

Applicants have not established irreparable harm sufficient to justify continued usurpation of the State's ability to implement a duly enacted election map while this Court considers any forthcoming petition for certiorari. Rather, the equities favor allowing the State's duly enacted map to be in effect unless and until the Court has had an opportunity to fully review the merits of the Eighth Circuit's decision.

First, Applicants argue that they will be irreparably harmed absent continued imposition of the court-ordered map because legal staff in the North Dakota Legislative Council posted a memorandum on its website analyzing whether, pursuant to State

law, legislators elected from districts wherein they would no longer reside could continue serving their terms until the 2026 election. App'n at 3–4, 35. Applicant Collette Brown is one such legislator who would no longer reside in her district. *Id*.

The Legislative Council consists of non-partisan staff who provide research and advice to members of the North Dakota legislature.[5] In a memo entitled "Redistricting Litigation Update," staff members simply flagged the potential issue, among others. App. 98–102. The memo argued both sides of the issue, noting that historical practice would support leaving the member in place until the following election, but that "an argument also could be made" that the member would be ineligible to remain in the position during that time. App. 101. That document is not an authoritative statement of State law; it is a research memo flagging a potential question and then arguing both sides. Applicants offer no evidence the State plans to adopt the argument that "could be made," and they in fact argue the proper reading of state law is to the contrary. App'n at 3–4 & n.1. The hypothetical existence of a future state-law dispute that may or may not come to pass does not establish irreparable harm.

Next, Applicants make the audacious argument that because a different lower court analyzing Alabama's election maps currently requires Alabama to use remedial maps pending further action by this Court, North Dakota should suffer the same fate. App'n at 25, 36. That makes very little sense, and Applicants provide no support for the proposition that the Court should "place North Dakota voters on equal footing to Alabama voters" by effectively invalidating North Dakota's duly enacted election map.

[5] *See Legislative Council*, N.D. LEGIS. COUNCIL, https://perma.cc/E9U6-UMG3.

Id. at 36. Even assuming Applicants are correct that Alabama will remain subject to the judgment of a lower court pending any review from this Court, "equal footing" would mean North Dakota should also remain subject to the judgment of the lower court pending any review from this Court. Applicants' argument is an unvarnished heads-I-win, tails-you-lose proposal. The people of North Dakota deserve for their case to be considered on its own terms, not subject to what another set of judges evaluating another state's election map thought was appropriate in another case.

Further, the fact that North Dakota's election map must be established by at least December 31, 2025, for the Secretary to effectively administer the 2026 elections cuts *against* a stay, not in favor. If Applicants are right that the Court cannot grant certiorari and review the merits of their forthcoming petition by that deadline, the Court should allow the State's duly enacted map to come back into effect—as the Eighth Circuit has directed. Staying the mandate under such circumstances would effectively decide, for purposes of North Dakota's 2026 election, that Section 1983 *does* provide Applicants a private cause of action to challenge North Dakota's duly enacted map.

Applicants make much of the fact that the Secretary did not appeal the remedial order. App'n at 3–4, 35. However, as the Secretary has explained, that litigation choice did not "indicate[] agreement with [the] court-imposed map," Br. of Defendant-Appellee, *Turtle Mountain Band of Chippewa Indians v. Howe*, Nos. 23-3697, 24-1171, 2024 WL 2788950, at *8 (8th Cir. May 21, 2024), but rather "was a reflection of the ... duties and authorities of the Secretary," *id.* The Secretary administers state elections, but he does not have constitutional authority to propose modifications of the election map. *Id.* at *5. And as Applicants are well aware, the State entity that did have

authority at the remedial stage—the Legislative Assembly—moved to intervene and appealed the remedial order. That appeal was briefed and argued alongside the Secretary's appeal of the order invalidating the State's election map, and it was dismissed as moot when the Eighth Circuit vacated the district court's judgment in the Secretary's appeal. *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2024 WL 493275 (D.N.D. Jan. 08, 2024), *appeal dismissed as moot*, 137 F.4th 709 (8th Cir. 2025). Applicants' suggestion that the State would not be injured by continued imposition of the remedial map because it did not appeal the remedial order is baseless. And in any event, the Secretary's appeal of the order invalidating the State's election map challenged both private enforceability and the district court's Section 2 analysis—specifically arguing, *inter alia*, that the maps proffered by Applicants to satisfy their *Gingles I* burden (one of which was imposed by the district court as the remedial map) were likely to be unlawful racial gerrymanders.

And that leads to another jarring aspect of Applicants' argument on the equities. Their entire theory of relative harms for the 2026 election is premised on the notion that the district court's finding of a Section 2 violation will be affirmed if the Eighth Circuit's determination on the lack of private enforceability is reversed. App'n at 36. But the Eighth Circuit did not decide that question, App. 23, and consequently it is unlikely to be before this Court in any forthcoming certiorari review. Nonetheless, Applicants assert a theory of the equities that would require the Court to predict that both (a) the Eighth Circuit's holding on the lack of private enforceability will be reviewed and reversed, and (b) the *district court's* judgment on the merits of the Section 2 claim—which the Eighth Circuit did not review—will be reviewed and affirmed.

Contra Does 1–3, 142 S. Ct. at 18 (Barrett, J., concurring, joined by Kavanaugh, J.) (Court should not allow applicants to "use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take").

But even if the Court were inclined to now assess, in the stay posture, questions that it likely would not address on certiorari review, the district court's Section 2 analysis contains glaring errors that make it unlikely to be affirmed. Most notably, the district court declined to make a finding whether race predominated in the maps that Applicants proffered to satisfy their *Gingles I* burden, and expressly assumed that *even if* race predominated in the proffered maps, that was no issue. App. 66 n.3 ("[E]ven assuming race was the predominate motivating factor in drawing [Applicants'] districts, establishing (and then remedying) a Section 2 violation provides a compelling justification for … the proposed plans."). That was clear legal error. *Allen*, 599 U.S. at 32 (plaintiffs satisfy their *Gingles I* burden when "race did not predominate in [the proffered] maps."); *see also id.* at 33 ("The line that we have long drawn is between [race] consciousness and [race] predominance"); *id.* at 99 (Alito, J., dissenting) ("[P]laintiff bears both the burden of production and the burden of persuasion" to establish that an additional majority-minority district "can be created without making race the predominant factor" (citing *Voinovich v. Quilter*, 507 U.S. 146, 155–56 (1993))).[6]

[6] In support of their claim that the district court's remedial map is "likely to be upheld," App'n at 36, Applicants offer disputed characterizations of materials from the trial court record. For example, Applicants claim that ECF No. 123 at 27 reflects: "The Secretary's proposed legal conclusions stating that the first *Gingles* precondition was satisfied." *Id*. The Secretary disputes that characterization; the referenced section was discussing the State's as-enacted map, not Applicants' proffered maps, and the Secretary has never conceded that Applicants could satisfy their *Gingles I* burden without proffering

Finally, Applicants give short shrift to the State's injuries if a stay were granted, summarily asserting "the State has no cognizable interest in enforcing an unlawful map." App'n at 36. But the State in no way concedes that its map is unlawful. And "any time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 567 U.S. at 1303 (Roberts, C.J., in chambers) (cleaned up).

"The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 29 (2020) (Mem.) (Gorsuch, J., concurring in denial of application to vacate stay). The Eighth Circuit has returned that responsibility to the North Dakota legislature. Even putting aside the other strong reasons for denying Applicants' request, were everything else in equipoise, that fact should militate against staying the Eighth Circuit's decision unless and until this Court has had the opportunity to fully review the merits.

CONCLUSION

Applicants' request for emergency relief should be denied.

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reasonably configured maps that are not predominantly based on race. Applicants also point to a post-trial Legislative Council memo referencing the alleged compactness of Applicants' remedial maps, App'n at 36–37 (citing ECF No. 158-3 at 13–16), while ignoring the expert testimony from trial that their proffered remedial districts were far less compact than the districts they sought to invalidate, *see* ECF No. 117 at 94:3–97:12. Applicants also mischaracterize the Secretary's expert testimony, suggesting he testified the second *Gingles* precondition was satisfied. App'n at 37 (citing ECF No. 117 at 140–42). To the contrary, the Secretary's expert specifically testified there was not enough precinct-level data to produce reliable results for the subdistricts at issue. *See* ECF No. 117 at 89:9–18. And in any event, the fact that Applicants' argument for irreparable harm requires forecasting the resolution of trial court disputes that are unlikely to be before the Court on this certiorari review weighs against granting the extraordinary relief of staying the lower court's judgment pending that petition for certiorari review.

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