No. 23-3655

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, et al.,
Petitioners-Appellees,

v.

MICHAEL HOWE, in his official capacity as Secretary of State of North Dakota,
Respondent-Appellant.

On Appeal from the U.S. District Court
for the District of North Dakota
No. 3:22-cv-00022
Hon. Peter D. Welte

BRIEF FOR *AMICI CURIAE* NAACP ARKANSAS STATE CONFERENCE AND ARKANSAS PUBLIC POLICY PANEL IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, counsel of record for NAACP Arkansas State Conference hereby discloses that it is a unit of:

> National Association for the Advancement of Colored People
> 4805 Mount Hope Drive
> Baltimore, Maryland 21215

There is no stock in NAACP Arkansas State Conference and, thus, no publicly held company or corporation owns ten percent or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, counsel of record for the Arkansas Public Policy Panel hereby discloses that it is a membership organization that does not have stock. It has no corporate parent and no publicly held corporation owns ten percent or more of its stock.

Date: June 4, 2025

/s/ Sophia Lin Lakin
Sophia Lin Lakin

Counsel for Amici Curiae

INTEREST OF *AMICI CURIAE*[1]

The NAACP Arkansas State Conference ("NAACP Arkansas") and the Arkansas Public Policy Panel ("Arkansas PPP") submit this brief in support of appellees' petition for rehearing *en banc*.

NAACP Arkansas is a non-partisan, non-profit, multiracial membership organization affiliated with the National Association for the Advancement of Colored People ("NAACP"). Its mission is to achieve equity, political rights, and social inclusion by advancing policies and practices that expand human and civil rights, eliminate discrimination, and accelerate the well-being, education, and economic security of Black people and all persons of color. It envisions an inclusive community rooted in liberation where all persons can exercise their civil and human rights without discrimination.

Arkansas PPP is a non-profit, non-partisan, interracial membership organization founded in 1963. Its mission is to achieve social and economic justice by organizing citizen groups around the state, educating

[1] In accordance with Rule 29 of the Federal Rules of Appellate Procedure, *amici* state that no party authored any part of this brief and that no person other than *amici* and its counsel contributed any funds for the preparation or submission of this brief.

and supporting them to be more effective and powerful, and linking them with one another in coalitions and networks.

Amici have a strong interest in ensuring that their members—including their Black members—have a full and fair opportunity to vote and elect representatives of their choice. They have a direct interest in this case because they have previously filed lawsuits under Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, to protect their members' rights to vote, and would be prepared to file similar challenges in the future.

In a previous action brought by *Amici*, a divided panel of this Court ruled that private plaintiffs could not sue directly under Section 2 of the Voting Rights Act but left unaddressed whether the statute is privately enforceable through 42 U.S.C. § 1983. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1218 (8th Cir. 2023) ("*Ark. State Conf. I*"). The two judges in the majority then voted against rehearing *en banc* in part for that same reason. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967, 967-68 (8th Cir. 2024) ("*Ark. State Conf. II*").

The merits panel majority in this case, however, wrongly determined that *Arkansas State Conference* foreclosed enforcement under Section 1983. *Turtle Mtn. Band of Chippewa Indians v. Howe*, No. 23-3655, 2025 WL 1389774, at *4 (8th Cir. May 14, 2025). If the panel decision stands, *Amici* will be unable to enforce Section 2 in the future in the Eighth Circuit.

INTRODUCTION

The Voting Rights Act is "the most successful civil rights statute in the history of the Nation." *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (quoting S. Rep. No. 97-417, at 111 (1982) (Senate Report)). Since the Supreme Court functionally nullified the "preclearance" process, codified in Section 5 of the Act, Section 2 has been the VRA's most powerful remaining tool. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 537 (2013) (citing 52 U.S.C. § 10301). The panel majority's opinion, however, effectively shutters enforcement of Section 2 across the Eighth Circuit.

The case thus screams out for *en banc* review. Two years ago, this Court ended *Amici*'s Section 2 lawsuit on the grounds that the statute did not itself contain a private right of action. But even as most of the Court's judges voted to deny *en banc* review in that case, the two judges in the panel's majority underscored that private plaintiffs could potentially enforce Section 2 through another civil rights statute, 42 U.S.C. § 1983—a question that was explicitly not resolved in that case. For that reason, it may have been sensible for the full Court not to take up the question that *Arkansas State Conference*

presented. Now, the panel in this case, erroneously determining that *Arkansas State Conference* already resolved this issue, has shut the door on Section 1983 as well. In short, the panel explicitly relies on a determination that was never made. Thus, the panel's decision has no legal basis.

Without *en banc* intervention, the Eighth Circuit will be the only Circuit where Section 2 of the Voting Rights Act is a dead letter. That outcome would be intolerable for the millions of Black voters across the Circuit who have long relied on Section 2 to challenge discriminatory election practices that dilute their voting power and render them unable to elect candidates of choice on equal terms. At a minimum, the full Court should have the chance to consider this critical issue by taking up the question *en banc*.

ARGUMENT

The Court should grant the petition to avoid conflicts with precedent and address a question of exceptional importance. Fed. R. App. P. 40(b)(2). Petitioners ably explain why the panel's opinion conflicts with long-established Supreme Court and Circuit precedent

recognizing that Section 2 of the Voting Rights Act is privately enforceable. Pet. 6-15.

Amici write to emphasize why the petition presents a question of exceptional importance. In light of this Court's recent decision in *Arkansas State Conference* foreclosing enforcement directly under Section 2, the panel's decision to close the door on enforcement via Section 1983 effectively eliminates Section 2 enforcement in this Circuit. As such, any arguable basis for denying full-court review on the issue of private enforceability of Section 2 in *Arkansas State Conference* has now disappeared.

I. The Panel Majority Shuts the Door to Section 2 Enforcement Through 42 U.S.C. § 1983 That *Arkansas State Conference* Left Open.

A. *Arkansas State Conference* Left Open the Question Whether Section 2 of the VRA Could Be Enforced Through Section 1983.

In 2021, *Amici* challenged the apportionment of the Arkansas House of Representatives under Section 2 of the Voting Rights Act. Compl., *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment* (E.D. Ark. Dec. 29, 2021) (No. 4:21-cv-01239), ECF No. 1. Out of 100 seats in the State House, the enacted apportionment plan created just 11

majority-Black districts, even though more than 16 percent of the state's population is Black, and it would have been possible to draw 16 geographically-compact, majority-Black districts. *See id.* ¶ 33. In addition, Arkansas has a long history of official voting-related discrimination against its Black citizens, persistent socioeconomic disparities, and voting in Arkansas's elections is highly polarized along racial lines. *Id.* ¶¶ 27-28, 30.

Amici did not file a Section 1983 claim. In suing directly under Section 2, *Amici* followed the well-trodden path of using the statute to combat maps that dilute Black voting strength. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 660 & n.5 (2021). At the time *Amici* sued, "hundreds of cases ha[d] proceeded under the assumption that Section 2 provides a private right of action." *See Ark. State Conf. I*, 86 F.4th at 1223 (Smith, C.J., dissenting) (citation omitted).

The district court found that *Amici* presented "a strong merits case that at least some of the challenged districts in the Board Plan are unlawful under § 2 of the Voting Rights Act." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 897 (E.D. Ark. 2022). But—despite decades of contrary precedent—the district court became

the "first federal court in the nation" to hold "no private right of action exists to enforce § 2 of the Voting Rights Act," and dismissed their case. *Id.* at 905, 906 n.73, 922.

In a split decision, this Court affirmed. *Ark. State Conf. I*, 86 F.4th at 1218. The majority applied what it called "the modern test for implied rights of action," which requires a determination that Congress (1) "created an individual right" and (2) gave "private plaintiffs the ability to enforce it." *Id.* at 1209. While the majority said it was "unclear" whether Section 2 created an individual right, *id.* at 1209–10, it expressly declined to decide whether Section 2 created an individual right and based its decision instead on the ground that Congress didn't intend for private enforcement. *Id.* at 1210–14.

Amici asked the full Court to rehear the case *en banc* "to reaffirm that a private right of action exists to enforce Section 2 of the VRA." Pet. for Reh'g and/or for Reh'g En Banc at 1, *Ark. State Conf. I*, 86 F.4th 1204 (No. 22-1395). As *Amici* explained, this question "could not be more important" because the panel opinion threatened to end enforcement of Section 2 across the Eighth Circuit. *Id.* at 14.

The *en banc* Court nevertheless denied *Amici*'s request. *Ark. State Conf. II*, 91 F.4th 967. In explaining their vote to deny rehearing, the members of the panel majority emphasized that "[i]t may well turn out that"—even if plaintiffs cannot sue directly under Section 2—they "can . . . enforce § 2 of the Voting Rights Act under § 1983." *Id.* at 968 (Stras, J., joined by Gruender, J., concurring in the denial of rehearing en banc). Indeed, they observed other "plaintiffs have invoked § 1983" as an alternative way to enforce Section 2 and expressly cited this case as an example. *Id.* at 967. In other words, even as this Court closed the door on a private right of action directly under Section 2, the judges in the panel majority understood that enforcement through Section 1983 remained unaddressed.

B. The Panel Majority Wrongly Assumes That *Arkansas State Conference* Foreclosed Enforcement Through Section 1983.

The panel majority opinion in this case wrongly assumes that the door to Section 1983 enforcement was shut the whole time. The panel applied what it describes as the "two-step process for determining whether a cause of action exists under § 1983." *Turtle Mtn. Band of Chippewa Indians v. Howe*, No. 23-3655, 2025 WL 1389774, at *4 (8th

Cir. May 14, 2025) (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002)). The first step "requires a court to determine whether Congress intended to create 'new rights enforceable under § 1983.'" *Id.* (quoting *Gonzaga*, 536 U.S. at 290). The inquiry "overlap[s]" with the first step in determining whether a statute contains an implied private right of action. *Id.* (quoting *Gonzaga*, 536 U.S. at 290).

But notwithstanding that *Arkansas State Conference* expressly declined to address whether Section 2 created a federal right, *see* 86 F.4th at 1209, the panel in this case found "independent analysis of *Gonzaga*'s first step" "unnecessary . . . given that *Arkansas State Conference* has already decided the issue," *Turtle Mtn.*, 2025 WL 1389774 at *4. So, without conducting its own inquiry, the panel held "plaintiffs do not have a cause of action under 42 U.S.C. § 1983 to enforce § 2 of the [VRA]" "[b]ecause § 2 does not unambiguously confer an individual right." *Id.* at *7.

This judicial sleight of hand is wrong. As Chief Judge Colloton has explained, *Arkansas State Conference I* said little about whether Section 2 creates an individual right. *Id.* at *9 (Colloton, C.J., dissenting). Far from it, the case "contains only indeterminate dicta about whether § 2

confers an individual right, and ill-considered dicta at that" given the Voting Rights Act's text and purpose and the Supreme Court's contrary precedent. *Id.* at *9.

II. The Inability to Enforce Section 2 Presents a Question of Exceptional Importance.

Amici explained in their petition for rehearing in *Arkansas State Conference I* why the enforceability of Section 2 presents a question of exceptional importance. Pet. for Reh'g at 14, *Ark. State Conf. I*, 86 F.4th 1204 (No. 22-1395). That question is even more important now that the panel majority has firmly shut the door on private enforcement of Section 2 throughout the Eighth Circuit.

The Voting Rights Act was passed "to achieve at long last what the Fifteenth Amendment had sought to bring about 95 years earlier: an end to the denial of the right to vote based on race," including through "unconstitutional vote dilution." *Brnovich*, 594 U.S. at 655, 659. And, though the scourge of race-based voting discrimination remains a significant challenge, the Voting Rights Act has been the "the most successful civil rights statute in the history of the Nation." *Allen*, 599 U.S. at 10.

Indeed, Section 2 has helped to ensure that Black voters across the Eighth Circuit have a fair opportunity to participate in the electoral process. Since 1982, the Eighth Circuit has heard at least nineteen Section 2 cases, all brought by private plaintiffs.[2] In those cases, Black voters have used Section 2 to successfully challenge various discriminatory election practices, including at-large election systems, *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th Cir. 1995) (en banc), run-off election regimes, *Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423 (8th Cir. 1989), *opinion vacated and district court judgment aff'd mem. by an equally divided court*, 902 F.2d 15 (8th Cir. 1990) (en banc), and redistricting plans, *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

For example, consider *Missouri State Conference of the NAACP v. Ferguson-Florissant School District*, 894 F.3d 924 (8th Cir. 2018). There, the NAACP and individual Black Missouri voters successfully challenged the use of at-large elections in the Ferguson-Florissant School District. *Id.* at 940. This Court affirmed, upholding the district

[2] In addition to this case and *Arkansas State Conference*, this Court has resolved at least seventeen other Section 2 cases. *See Ark. State Conf. I*, 86 F.4th at 1219 n.8 (Smith, J., dissenting) (collecting cases).

court's finding of a "history of official discrimination . . . throughout Missouri, Metropolitan St. Louis, and [the school district]" and its conclusion that "th[is] history is not just a distant memory." *Id.* Of course, working together, *Arkansas State Conference* and the panel ruling here would have prevented Black voters from realizing the VRA's promise in *Missouri State Conference* and every other case like it. (The same is true for Native American voters, like appellees here who have proven that racial vote dilution exists in violation of Section 2. *See Turtle Mtn. Band of Chippewa Indians v. Howe*, No. 3:22-cv-22, 2023 WL 8004576, at *1 (D.N.D. Nov. 17, 2023)).

It is no answer that the Attorney General could still bring Section 2 cases. The United States has confirmed that it cannot fully enforce Section 2 on its own, and that "limited federal resources available for [VRA] enforcement reinforce the need for a private cause of action." U.S. Statement of Interest at 8, *Ark. State Conf. NAACP*, 586 F. Supp. 3d 893 (No. 21-cv-01239), ECF No. 71; *see also id.* ("'The Attorney General has a limited staff' who may not always be able 'to uncover quickly new regulations and enactments passed at the varying levels of state government'") (quoting *Allen v. State Bd. of Elections*, 393 U.S.

544, 556 (1969)). That appears even truer considering the Department of Justice's recent decision to dismiss all active voting rights cases.[3]

Without private enforcement, Section 2 will be a dead letter in this Circuit. Those who desire to violate Section 2 will know that they are free to do so in any state within the Eighth Circuit. That outcome should give each member of this Court grave pause. But if the Court is nonetheless committed to go down that path, *Amici* urge that the first step should come from the full Court.

CONCLUSION

For the forgoing reasons, the Court should grant appellee's motion for rehearing *en banc*, reverse the panel's decision, and hold that private parties may enforce Section 2 of the Voting Rights Act either through itself or through 42 U.S.C. § 1983.

[3] Sam Levine, *Trump's Justice Department Appointees Remove Leadership of Voting Unit*, The Guardian (Apr. 28, 2025), https://www.theguardian.com/us-news/2025/apr/28/trump-doj-voting-rights.

Dated: June 4, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,599 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with 14-point Century Schoolbook font.

Date: June 4, 2025

/s/ Sophia Lin Lakin
Sophia Lin Lakin

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 4, 2025

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