

No. 25-253

IN THE
Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, ET AL.,
Petitioners,

v.

MICHAEL HOWE, SECRETARY OF STATE OF NORTH DAKOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF FORMER REPUBLICAN
GOVERNORS ARNOLD SCHWARZENEGGER,
CHRISTINE TODD WHITMAN, MARC
RACICOT, AND WILLIAM F. WELD AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

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INTERESTS OF *AMICI CURIAE*¹

Amici curiae are former Republican governors. Having served as leaders representing their entire state's population, they have a unique perspective on the importance of private-party litigation under Section 2 of the Voting Rights Act to ensure that the political process is equally open across a state. *Amici* believe that ensuring fair representation is one of the central pillars of our democracy, and that private enforcement of Section 2 is essential to maintaining that pillar. They write to urge the Court to grant certiorari review and reverse the Eighth Circuit's outlier position that, if allowed to stand, will leave citizens of seven states unable to guard against the harm that racial vote dilution and other discriminatory voting practices continue to inflict on our democracy. *Amici* are:

Governor Arnold Schwarzenegger was the thirty-eighth governor of California, serving in that role from 2003 until 2011.

Governor Christine Todd Whitman was the fiftieth governor of New Jersey, serving in that role from 1994 until 2001.

Governor Marc Racicot was the twenty-first governor of Montana, serving in that role from 1993 to 2001.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. The parties have been given timely notice of *amici*'s intention to file this brief.

Governor William F. Weld was the sixty-eighth governor of Massachusetts, serving in that role from 1991 to 1997.

SUMMARY OF ARGUMENT

The Voting Rights Act was the culmination of nearly a century of congressional effort to enforce the protections of the Reconstruction Amendments. Section 2's nationwide ban on discrimination in voting gives force to the Fifteenth Amendment by outlawing discriminatory results regardless of intent. Private enforcement has proven essential to Section 2's success, with actions brought by the Attorney General constituting just a fraction of Section 2's vast catalog of precedent. Indeed, every Section 2 case that this Court has reviewed was brought in whole or in part by private parties.

As participants in the districting process, reforms to state redistricting processes, and post-redistricting Section 2 challenges, *amici* have seen firsthand the positive deterrent effect that private Section 2 litigation has in ensuring that states' district lines are drawn lawfully. Private enforcement also ensures that anyone whose vote is at risk of being unlawfully denied or abridged can vindicate their rights directly, independent of the shifting priorities of presidential administrations. These attributes of private enforcement are at the core of Section 2's actualization of Fifteenth Amendment protections.

Congress was clearly aware of such enforcement and repeatedly reaffirmed or amended the Voting Rights Act, including Section 2, against this background, each time with strong bipartisan

majorities supporting the continuation and expansion of the Act's protections. When this Court discontinued some of those protections twelve years ago, it provided reassurance that Section 2's permanent protections would remain. This case threatens that promise.

The Eighth Circuit decision for which Petitioners request this Court's review is a remarkable outlier. It stands in blatant defiance of congressional intent and nearly forty years of unbroken, nationwide precedent. It is also plainly wrong. As explained in more detail below, legislation passed to enforce the Reconstruction Amendments carries no presumption against private enforcement. And the text and structure of Section 2 demonstrate that it confers individual rights and that private enforcement is not remotely incompatible with its existing enforcement scheme. Indeed, public and private enforcement of Section 2 have complimented each other for nearly four decades.

As former governors who represented diverse populations, and whose states' district lines have been the subject of private Section 2 litigation, *amici* fear the effect that an end to private enforcement would have on representative democracy.

REASONS FOR GRANTING CERTIORARI

I. Private Enforcement of Section 2 is Vital to Protecting the Right to Vote and Fair Representation.

A. Section 2 is the Culmination of Congressional Efforts to Enforce the Reconstruction Amendments.

Adopted in the wake of the U.S. Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments reordered the relationship between the states and the federal government. The Fifteenth Amendment in particular prohibits the government from denying or abridging a citizen's right to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Critically, these Reconstruction Amendments authorized Congress to enact laws necessary to enforce them. U.S. Const. amends. XIII, § 2; XIV, § 5; XV, § 2.

Congress used this authority to pass a series of "Enforcement Acts," which criminalized violations of the Reconstruction Amendments and empowered the federal government to intervene when states failed to enforce them. The Enforcement Act of 1871 established private enforcement of the Reconstruction Amendments through what is now codified at 42 U.S.C. § 1983. Section 1983 complements public enforcement mechanisms by "authorizing [private] individuals to sue anyone who, under color of state law, deprives them of 'rights, privileges, or immunities secured by the Constitution and laws' of the United

States.” *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025).

Notwithstanding Congress’s efforts, “the blight of racial discrimination in voting” continued to “infect[] the electoral process in parts of our country for nearly a century.” *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). In an effort to address this problem, Congress once again used its authority to pass Civil Rights Acts in 1957, 1960, and 1964, which “were intended to supply strong and effective remedies,” but “their enforcement [] encountered serious obstacles” stemming from “the intransigence of State and local officials,” the limited resources of the Department of Justice, and the demanding nature of voting rights litigation. H.R. REP. 89-439, 1965 U.S.C.C.A.N. 2437, 2440–41.

Congress thus enacted the 1965 Voting Rights Act (“VRA”) “in an effort 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.” *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 655 (2021). The VRA “create[d] stringent new remedies for voting discrimination,” *Katzenbach*, 383 U.S. at 308, including under Section 2, which, as amended in 1982, prohibits “any State or political subdivision” from administering elections in a way that “results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color,” 52 U.S.C. § 10301(a). Although this Court held in *Shelby Cnty. v. Holder* that regions of “[o]ur country ha[d] changed” in ways that no longer justified *other* parts

of the VRA, it emphasized that the “decision in no way affect[ed]” Section 2. 570 U.S. 529, 557 (2013).

A key part of what makes Section 2 so effective is the fact that both “the Federal Government and individuals have sued to enforce [it].” *Id.* at 537. Indeed, this Court affirmed the crucial importance of Section 2 against the backdrop of the long history of private litigation. *See id.* at 537, 557; *see also Allen v. Milligan*, 599 U.S. 1, 17–19, 38–39 (2023).

B. In the Redistricting Context, *Amici* Have Seen the Value of Private Section 2 Enforcement Firsthand.

Unlike other provisions of the VRA, Section 2 established a “permanent, nationwide ban on racial discrimination in voting.” *Shelby Cnty.*, 570 U.S. at 557. One of the foremost applications of Section 2 is challenges to state and local districting plans on the basis that they “pack” or “crack” minority communities, which dilutes the vote of their citizens, giving them “less opportunity than other members of the electorate to participate in the political process and [] elect representatives of their choice.” 52 U.S.C. § 10301(b). *Amici* have firsthand experience with the application of Section 2 to districting, and they fear the impact that losing private enforcement could have in this context.

Although the Constitution’s Elections Clause empowers each state’s “Legislature” to prescribe “[t]he Times, Places and Manner of” federal elections, U.S. Const. art. I, § 4, the “uniform practice . . . has been to

provide for congressional districts by the enactment of statutes with the participation of the Governor.” *Moore v. Harper*, 600 U.S. 1, 25 (2023). *Amicus* William F. Weld thus participated personally and substantially as Governor in Massachusetts’s congressional redistricting in 1992, as well as state and local redistricting in 1995.² And *amicus* Arnold Schwarzenegger was a leading advocate as Governor for California’s shift to a citizens redistricting commission in 2008.³ Other *amici* held office during, or were even party to, post-redistricting Section 2 challenges. Through these experiences, they observed the crucial role that private Section 2 enforcement plays in districting.

Like this Court—and all courts except the Eighth Circuit—state legislatures and governors are accustomed to Section 2 being privately enforceable. And the risk of private enforcement has informed how they developed redistricting plans. *See, e.g.*, Gov. Andy Beshear, Veto Message Regarding House Bill 2 of the 2022 Regular Session (Jan. 19, 2022) (describing a redistricting plan as one that “appears to dilute the voices of certain minority communities”). Simply put, knowing that private parties stand ready to enforce

² *See Ruling on Redistricting Ends Political Paralysis in Massachusetts*, Knight-Ridder Tribune (June 28, 1992), <https://www.chicagotribune.com/1992/06/28/ruling-on-redistricting-ends-political-paralysis-in-massachusetts/>.

³ *See* Jennifer Steinhauer, *Plan on California Ballot for New Districting Panel*, The New York Times (Oct. 27, 2008), <https://www.nytimes.com/2008/10/28/us/28calif.html>.

Section 2 serves as a strong deterrent against violations. States understand that private Section 2 lawsuits do not wax and wane with changing presidential or Department of Justice priorities and far exceed what would be possible under a federal-only enforcement regime.

Additional virtues of private Section 2 suits are that they are brought by members of both parties and allow citizens of minority communities to independently advocate for their rights. For example, while serving as the Governor of Montana in 1996, *amicus* Marc Racicot was sued by Native American voters who alleged that the State's legislative redistricting diluted their votes in violation of Section 2 and Section 1983. *See Old Pers. v. Cooney*, 230 F.3d 1113, 1117 (9th Cir. 2000). Likewise, just after *amicus* Christine Todd Whitman's tenure as Governor of New Jersey, Black and Latino voters, as well as Republican members of the state legislature, challenged the State's reapportionment under Section 2 and the Reconstruction Amendments. *See Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001). While both cases resulted in the courts ultimately finding no Section 2 violation, they provided critical opportunities for *amici's* constituents to ensure their right to vote was being protected under the law.

These private actions—and just the threat of them—give full effect to Congress's intent in enacting Section 2 by ensuring meaningful enforcement of the rights protected by the statute. Based on their

experiences and unique perspective, *amici* strongly support private enforcement of Section 2.

II. The Eighth Circuit’s Decision is an Anomaly in an Otherwise Consistent History of Private Litigation Under Section 1983 and Section 2.

Congress enacted Section 2 under the same authority as Section 1983 and for the same purpose: to ensure effective enforcement of the Fifteenth Amendment. This history alone calls the Eighth Circuit’s decision—that Section 2 cannot be enforced under Section 1983—into question. It is an absolute outlier, as it stands in complete defiance of these two statutes’ long histories.

“Historically, individuals brought § 1983 suits to vindicate rights protected by the Constitution.” *Medina*, 145 S. Ct. at 2229. And because Congress’s intent was to provide “a mechanism to enforce the Reconstruction Amendments,” this Court originally “construed § 1983’s predecessor statute to ‘refer to civil rights only.’” *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 225, n.12 (2023) (Thomas, J., dissenting). In 1980, this Court expressly recognized that Section 1983 “encompasses claims based on *purely statutory* violations of federal law.” *Maine v. Thiboutot*, 448 U.S. 1, 3–4 (1980) (emphasis added); *see also Medina*, 145 S. Ct. at 2229. In so holding, the Court accepted as a given that a “principal purpose” of Section 1983’s inclusion of the broad phrase “laws of the United States” was to “ensure that federal legislation providing specifically

for equality of rights would be brought within [its] ambit.” *Thiboutot*, 448 U.S. at 7.

As these precedents make clear, the VRA is at the very center of the universe of federal laws Section 1983 enables private parties to enforce. It is only due to the expansion of Section 1983 to also protect “purely statutory” rights, that the Eighth Circuit was even afforded a framework, *see infra* Section III, under which to declare—incorrectly—that Section 2 is no longer within its ambit.

The history of Section 2 itself tells a similar story. Over its nearly sixty-year lifespan, there is an unbroken history of this Court permitting private Section 2 suits. *See e.g.*, *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996); *Milligan*, 599 U.S. 1. In fact, every case that this Court has decided under the current text of Section 2 was brought by private plaintiffs. *See* Pet. 22.

As private Section 2 claims have proliferated, the Fifth, Sixth, and Eleventh Circuits have explicitly held that Section 2 is privately enforceable.⁴ And until now, every circuit, including the Eighth, had heard

⁴ *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023); *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999); *Alabama State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020).

such cases without issue.⁵ The Eighth Circuit was the first—and remains the only—circuit to have held that Section 2 does not contain an implied private right of action. *Arkansas State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). And it has now doubled down on that decision by concluding that private plaintiffs cannot enforce Section 2 through Section 1983 either.

In doing so, the Eighth Circuit has contravened not just decades of precedent, but Congress’s express intentions. *See* H.R. REP. 109-478, 53, 2006 U.S.C.C.A.N. 618, 653–54 (finding a private Section 2 case “to be illustrative of the important role Section 2 plays,” and that the results of such cases “must be protected”); S. REP. 97-417, 30, 1982 U.S.C.C.A.N. 177, 208 (“reiterat[ing] the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965”). Given Congress’s consistent approval of private Section 2 actions through the decades, with hundreds of such suits being brought in every circuit, “statutory *stare decisis* counsels [this Court] staying the course.” *Milligan*, 599 U.S. at 38–39.

⁵ *See, e.g., Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020); *Quinn v. Illinois*, 887 F.3d 322 (7th Cir. 2018); *Greater Birmingham Ministries v. Sec’y of State for State of Ala.*, 992 F.3d 1299 (11th Cir. 2021).

III. The Eighth Circuit’s Decision that Section 2 is Unenforceable Under Section 1983 is Plainly Wrong.

This Court’s test for determining whether a federal statute is enforceable under Section 1983 originates in *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002), but important nuances were clarified in *Talevski*, 599 U.S. 166. A party advocating for 1983 enforcement must establish that “Congress [] ‘unambiguously conferred’ ‘individual rights upon a class of beneficiaries.’” *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 283, 285–86). “Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.” *Gonzaga*, 536 U.S. at 284. That presumption can be overcome only by demonstrating that the statute’s enforcement scheme is “incompatible” with enforcement under Section 1983. *Talevski*, 599 U.S. at 186–87.

Amici have a unique appreciation for the importance of this analysis. Whether Congress “implicitly preclude[d] private enforcement” actions is frequently contested in cases brought against state officials. But these disputes are often animated by concerns about federalism and limits on Congressional power that are not present when Congress acts to enforce the Reconstruction Amendments.

Because Section 2 unambiguously confers rights, it is presumptively enforceable under Section 1983. That presumption cannot be overcome, because

private enforcement is both consistent with Congress’s intent and compatible with Section 2’s enforcement scheme.

A. Legislation Enacted Pursuant to the Reconstruction Amendments Carries No Presumption Against Private Enforcement.

Most of this Court’s recent cases finding Congressional intent to preclude private remedies have involved legislation enacted pursuant to the Spending Clause. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328 (2015); *Astra USA, Inc. v. Santa Clara Cnty., Cal.*, 563 U.S. 110, 120–21 (2011); *Gonzaga*, 536 U.S. at 278. This type of legislation is “especially unlikely” to create individually enforceable rights, and for good reason. *Medina*, 145 S. Ct. at 2230.

Congress’s spending powers do not allow it to impose “‘policy’ on regulated parties ‘involuntarily.’” *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022) (quoting *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981)). This is especially true when Congress deals with states, which are independent sovereigns. *See, e.g., National Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (*NFIB*); *see also New York v. United States*, 505 U.S. 144, 167 (1992) (noting need to ensure that Congress’s “spending power” does not “render academic the Constitution’s other grants and limits of federal authority”). Rather, Congress can only attach

conditions to federal funds—leaving states the option to “voluntarily and knowingly” accept them. *Pennhurst*, 451 U.S. at 17; *NFIB*, 567 U.S. at 578 (Congress cannot “coerce[]” states). So Congress must speak with an exceedingly clear voice if it wishes states to “answer private . . . enforcement suits.” *Medina*, 145 S. Ct. at 2234.

But none of the concerns animating judicial consideration of the private enforceability of Spending Clause legislation apply to the VRA. In fact, they uniformly cut the other way.

As an initial matter, private enforcement of the VRA raises no special federalism concerns like those in the context of spending programs. *Talevski*, 599 U.S. at 186. Congress enacted the VRA pursuant to explicit authority granted to it by the Reconstruction Amendments. Those amendments fundamentally reordered the relationship between the federal and state governments, allowing Congress to “intrude[] into legislative spheres of autonomy previously reserved to the States.” *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quotes and citation omitted). As a result, the Court has repeatedly held that “measures protecting voting rights are within Congress’ power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States.” *Id.* at 518.

For similar reasons, there is no default rule that the federal government “alone has the power to enforce” civil rights statutes. *See Medina*, 145 S. Ct. at

2231 (quotes and citations omitted). Unlike Spending Clause legislation—which operates “more like treaties” between the states and the federal government, *id.*—the Reconstruction Amendments expressly authorize Congress to abrogate state sovereign interests. *Compare id.* at 2231 n.2 (“[T]he background presumption is that treaties do not . . . provide for a private cause of action.” (cleaned up)) *with City of Boerne*, 521 U.S. at 518. Thus, the reach of the VRA generally—and the availability of private remedies in particular—does not turn on whether “State[s] voluntarily and knowingly accept[]” such lawsuits. *Pennhurst*, 451 U.S. at 17.

As this Court has noted, the “States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it ‘terminates according to federal law.’” *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14–15 (2013). And especially where, as here, a federal civil rights law creates an individual right, there is no reason to presume that this right is not privately enforceable.

B. Section 2 Confers Individual Rights Subject to Private Enforcement.

The Eighth Circuit majority is correct that “[t]he ‘touchstone’ for determining whether a provision unambiguously confers a new individual right is ‘congressional intent,’ which [is] discern[ed] from the text and structure of the statute.” Pet. App. 18a (quoting *Frison v. Zebro*, 339 F.3d 994, 999 (8th Cir. 2003)).

The majority acknowledged that “§ 1983 provides a cause of action for private plaintiffs seeking to enforce the Fifteenth Amendment,” yet insisted that the same mechanism cannot be used to enforce Section 2 due to its finding in *Arkansas State Conference* that Section 2 sends “mixed signals about legislative intent.” Pet. App. 14a, 22a (citations omitted). This Court has “held that the *Gonzaga* test is satisfied where a statute is ‘phrased in terms of the persons benefited’ and contains ‘rights-creating,’ individual-centric language with an ‘unmistakable focus on the benefited class.’” *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 284, 287). Far from sending “mixed signals” Section 2 squarely satisfies these criteria.

First, like the Fifteenth Amendment, Section 2 is phrased in terms of the persons benefited—“*any citizen of the United States*”—and the benefit: “the right . . . to vote.” 52 U.S.C. § 10301(a) (emphasis added). Subsection (b) is correspondingly phrased in terms of the “citizens protected by subsection (a)” and explains how *their* right to vote is violated under the statute: by having “less opportunity,” “on account of [*their*] race or color,” “to participate in the political process and [] elect representatives of *their* choice,” such that “the political process . . . [is] not equally open to [*their*] participation.” *See id.* § 10301(b) (emphasis added).

Second, Section 2 contains “rights-creating, individual centric language.” The majority observed correctly that the 1982 Amendments “made it easier to prevail under § 2 than under the Fifteenth

Amendment,” yet it asserted that Section 2 “merely parrots a preexisting right guaranteed by the Fifteenth Amendment.” Pet. App. 16a, 25a. What the majority overlooks is that it is easier to prevail under Section 2 because it confers rights that *surpass* those guaranteed by the Fifteenth Amendment.

Whereas the Fifteenth Amendment confers the right to be free only from *intentional* voting discrimination, *see City of Mobile v. Bolden*, 446 U.S. 55 (1980), Section 2 confers a right to be free from discriminatory *effects* on the right to vote, regardless of intent. More specifically, Section 2 protects citizens against any “voting qualification or prerequisite to voting” or any “standard, practice, or procedure . . . which *results* in a denial or abridgement of the right . . . to vote on account of race or color.” *See* 52 U.S.C. § 10301(a) (emphasis added). This is Section 2’s rights-creating language. And that language is “individual centric”—not just because the person benefited is “any citizen,” *id.*, but because the right to vote is a fundamental individual right. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

Third, Section 2 has “an unmistakable focus on the benefited class.” *Talevski*, 599 U.S. at 183 (quotation omitted). While subsection (a) is phrased in terms of protecting “citizens of the United States” from denial or abridgment of their right to vote, in subsection (b), the statute becomes almost entirely focused on “members of a *class* of citizens” and the benefits conferred on them—namely, the opportunity for “*its* members . . . to participate in the political process and to elect representatives of *their* choice.” 52

U.S.C. § 10301(b) (emphases added). Notably, while both subsections refer, just once, to “any State or political subdivision,” each sentence of subsection (b) focuses on the persons benefited, referring to the “protected class” no less than four times. *See id.*

Thus, Section 2 clearly places greater emphasis on the citizens whose rights it protects than the State or political subdivisions being regulated. But even if Section 2 did send “mixed messages,” this Court’s analysis in *Talevski* makes clear that Section 2 easily satisfies *Gonzaga*.

The *Talevski* Court held that two provisions of the Federal Nursing Home Reform Act (FNHRA), each of which begins with the phrase “A nursing facility must,” nonetheless conferred individual rights on nursing-home residents. This is because references to “who it is that must respect and honor [] statutory rights . . . is not a material diversion” from the statute’s focus on the rights of the benefitted class. 599 U.S. at 185. The Eighth Circuit majority acknowledged this but did not meaningfully attempt to distinguish it. Pet. App. 25a.

This Court has also explained that statutory provisions “must be read in their context and with a view to their place in the overall statutory scheme.” *West Virginia v. EPA*, 597 U.S. 697, 721 (2022). The FNHRA is focused on reforming federal nursing homes. Section 2, meanwhile, is part of the Voting Rights Act, resides in a chapter titled “Enforcement of Voting Rights,” and is itself titled “Denial or Abridgement of Right to Vote on Account of Race or

Color” Every contextual clue therefore confirms that Section 2 is focused on the rights it confers.

In concluding in *Arkansas State Conference* that Section 2 was not privately enforceable, the Eighth Circuit did not follow this Court’s guidance in *Talevski*. See 86 F.4th 1204 at 1209–11. And here, faced with the question of whether Section 2 is enforceable under Section 1983, the majority took the position that it was “unnecessary to undertake an independent analysis of *Gonzaga*’s first step given that *Arkansas State Conference* ha[d] already decided the issue.” Pet. App. 20a. This was similarly incorrect, compounding the initial error.

One last point bears emphasis. The Eighth Circuit majority ended its opinion by noting that “other circuits have applied *Gonzaga* . . . to the Materiality Provision” and “§ 1971 of the Voting Rights Act[.]” Pet. App. 27a (citing *e.g.*, *Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023)). Yet the majority failed to grapple with the logical implications of those cases.

The Materiality Provision, like Section 2, provides that “[n]o person acting under color of law shall . . . deny the right of any individual to vote . . . because of an error or omission on any record or paper relating to any . . . act requisite to voting, if such error or omission is not material in determining whether such individual is qualified . . . to vote.” 52 U.S.C. § 10101(a)(2)(B). Like Section 2, the Materiality Provision thus focuses on both regulation of state actors and an individual’s right to vote.

In *Callanen*, the Fifth Circuit—applying the *Gonzaga* test as articulated in *Talevski*—held that the Materiality Provision conferred an individual right and was enforceable under Section 1983. 89 F.4th 459. The *Callanen* court explained that “although ‘[t]he *subject* of the sentence is the person acting under color of state law . . . the *focus* of the text is nonetheless the protection of each individual’s right to vote.’” *Id.* at 474–75 (emphases added) (quoting *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003) (holding the same)).⁶ The same reasoning applies here. *See* Pet. App. 28a–46a (Colloton, J., dissenting).

Given its history, text, structure, and similarity to the Materiality Provision, Section 2 is unambiguously rights-conferring and thus presumptively enforceable under Section 1983.

C. Congress Intended Private Enforcement of Section 2, Which is Compatible with its Statutory Enforcement Scheme.

Because the Eighth Circuit misapplied the *Gonzaga* framework at the first step, it failed to even reach the second. App. 23a n.4. Had it done so, it would have confronted overwhelming evidence that Congress intended Section 2 to confer privately enforceable rights.

⁶ *See also Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir. 2022), vacated as moot sub nom. *Ritter v. Migliori*, 143 S. Ct. 297 (2022) (same). The Sixth Circuit held otherwise in *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), but *McKay*’s analysis fails to “wrestle[] with the considerations for implying a private right.” *Callanen*, 89 F.4th at 477–78.

First, there is no evidence in Section 2 that demonstrates Congress foreclosed private enforcement. And surrounding sections of the VRA contain provisions that can be explained only by an intent for such enforcement. Section 3, titled “Proceeding to enforce the right to vote” makes specific remedies available “[w]hensoever the Attorney General *or an aggrieved person* institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment.” 52 U.S.C. §§ 10302(a), (c) (emphasis added). Congress added the term “aggrieved person” in 1975 explaining that “it is sound policy to authorize private remedies to assist the process of enforcing voting rights.” S. REP. 94-295, 39–40, 1975 U.S.C.C.A.N. 774, 806.

Sections 12(f) and 14(e) similarly aid private enforcement. Section 12(f) orders federal district courts to exercise jurisdiction over Section 2 proceedings “without regard to whether *a person asserting rights* . . . shall have exhausted any administrative or other remedies that may be provided by law.” *See* 52 U.S.C. § 10308(f) (emphasis added). Section 14(e), meanwhile, provides that, “[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court . . . may allow the prevailing party, *other than the United States*, a reasonable attorney’s fee.” *Id.* § 10310(e) (emphasis added).

Second, there is no implication that Section 2 is not privately enforceable based on its statutory enforcement scheme. This Court’s “precedents make

clear that the *sine qua non* of a finding” of implicit preclusion is “incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted.” *Talevski*, 599 U.S. at 187 (citing *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 252–54 (2009)). The long history of public and private Section 2 enforcement shows that is obviously not true here.

Gonzaga is instructive. There, the Court found that the Family Educational Rights and Privacy Act of 1974 (FERPA) required the Secretary of Education to create a review board that “permit[ted] students and parents who suspect[ed] a violation of the Act to file individual written complaints.” 536 U.S. at 289 (citation omitted). “These administrative procedures squarely distinguish[ed]” FERPA from cases “where an aggrieved individual lacked any federal review mechanism,” and the Court found it “implausible to presume that . . . Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges.” *Id.* at 289–90.

In *Talevski*, by comparison, this Court found that the FNHRA also “establish[ed] a detailed administrative scheme for government inspections of nursing facilities.” 599 U.S. at 182. But the FNHRA’s administrative scheme provided no enforcement opportunity for private parties, *see id.*, and the Court ultimately held that the FNHRA “lack[ed] any indicia of congressional intent to preclude § 1983 enforcement, such as an express private judicial right of action.” *Id.* at 188 (citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005)).

Section 2 is in a whole different league than *Gonzaga* or even *Talevski*, as it provides no express administrative scheme or judicial remedy for private parties, instead providing for express enforcement only by the Attorney General.

The Materiality Provision again provides a helpful analogue, given that it also only provides for enforcement by the Attorney General. *See* 52 U.S.C. §§ 10101(c)–(e). In *Callanen*, the Fifth Circuit acknowledged that the Materiality Provision’s “elaborate statutory explanations of how enforcement by the Attorney General [wa]s to proceed” were “comprehensive.” 89 F.4th at 476. But noting the “long history of *compatibility* between” the statute and Section 1983, it held that “the Attorney General’s enforcement scheme create[d] no conflicts with private suits under Section 1983.” *Id.* Public and private enforcement under Section 2 are similarly compatible.

IV. The Court Should Address the Question Presented Now to Avoid Further Disruption to Long Established Protections of the Right to Vote.

This Court regularly grants certiorari to resolve conflicts among the lower courts and to course-correct erroneous positions. *See, e.g., United States v. Miller*, 604 U.S. 518, 527 (2025) (granting certiorari to resolve circuit conflict); *Kisor v. Wilkie*, 588 U.S. 558, 565 (2019) (granting certiorari to address the Federal Circuit’s application of *Auer* deference). Both are needed here.

First, the Eighth Circuit now stands in conflict with all other circuit courts around the country that have allowed private parties to enforce Section 2. Having first split from those courts by holding that Section 2 does not contain an implied right of action, the Eighth Circuit has now cemented that split by denying plaintiffs the option to proceed under Section 1983.

Lower courts have recognized the Eighth Circuit to be an outlier on this issue. *See, e.g., Singleton v. Allen*, 782 F. Supp. 3d 1092, 1314 (N.D. Ala. 2025) (“[O]ne circuit court . . . has concluded that Section Two does not confer a private right of action, the Eighth Circuit”).⁷ In doing so, they have correctly observed that the Eighth Circuit’s analysis is unpersuasive and conflicts with this Court’s precedent.⁸

Second, even absent its outlier status, the Eighth Circuit’s decision warrants review and correction

⁷ *See also Caster v. Allen*, No. 2:21-cv-1536, 2025 WL 1643532, at *174 (N.D. Ala. May 8, 2025) (similar); *Nairne v. Ardoin*, 715 F. Supp. 3d 808, 831 (M.D. La. 2024) (similar).

⁸ *See, e.g., Driver v. Houston Cnty. Bd. of Elections*, No. 5:25-cv-25, 2025 WL 2523719, at *3 (M.D. Ga. Sept. 2, 2025) (“[T]he Court is neither bound by the outlying (for now), divided panel Eighth Circuit decision . . . nor persuaded by its reasoning.”); *City of Hammond v. Lake Cnty. Jud. Nominating Comm’n*, No. 2:21-cv-160, 2024 WL 68279, at *1 n.3 (N.D. Ind. Jan. 4, 2024) (“My analysis is unaffected by the Eighth Circuit’s *Arkansas* decision” because “a majority of Supreme Court justices ‘explicitly recognized a private right of action under Section 2 in *Morse*,’ and the Court ‘has yet to overrule itself on that precise issue.’”).

because it abridges a core constitutional right. *See, e.g., McElrath v. Georgia*, 601 U.S. 87 (2024) (granting certiorari despite no circuit split because the lower court decision contravened Supreme Court precedent and denied a constitutional right). “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society.” *Reynolds*, 377 U.S. at 555. Congress enacted and amended Section 2 to help “fulfill the guarantee of the Constitution’ with respect to equality in voting.” *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O’Connor, J., concurring) (citation omitted). And this Court has reaffirmed Section 2’s continuing validity.

The Eighth Circuit’s decision leaves private parties in seven states with no means to challenge state policies or actions that result in a denial or abridgment of their right to vote, contrary to congressional intent. Separate from the circuit split, the Court should grant certiorari to ensure that citizens’ ability to vindicate their voting rights remains uniformly available. Doing so is especially crucial now, as states—including those in the Eighth Circuit—consider engaging in mid-decade redistricting efforts.⁹

⁹ Associated Press, *The Fight to Redraw U.S. House Maps is Spreading*, PBS News (Sept. 29, 2025) <https://www.pbs.org/newshour/politics/the-fight-to-redraw-u-s-house-maps-is-spreading-heres-where-things-stand-in-missouri-and-other-states>.

Third, and finally, the issues presented in this case are ideally positioned for this Court's review. Later this term, this Court will rehear a case addressing the constitutionality of majority-minority districts drawn to remedy Section 2 violations. *Louisiana v. Callais*, No. 24-109. *Amici* respectfully submit that courts and litigants will also benefit from resolution of the predicate question of *who* can bring a Section 2 challenge. This case is an excellent vehicle to bring clarity to Section 2 in a comprehensive way.

Amici are aware that parties in related cases regarding private enforceability of Section 2 are seeking this Court's review. See Jurisdictional Statement, *State Bd. of Election Comm'rs v. Miss. State Conference NAACP*, No. 25-234 (filed Aug. 26, 2025); Jurisdictional Statement, *Allen v. Singleton*, No. 25-273 (filed Aug. 26, 2025). Those cases, however, come from circuits that have already affirmed a private right of action under Section 2. The Eighth Circuit is the only court of appeals to have held no private right of action exists to enforce Section 2, an incorrect and damaging conclusion that the Court can best address by granting certiorari in this case.

CONCLUSION

Amici respectfully ask this Court to grant the Petition for Certiorari and reverse the Eighth Circuit opinion below.

Respectfully submitted,

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