No. 25-253

In the Supreme Court of the United States

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Petitioners,

v.

MICHAEL HOWE, IN HIS OFFICIAL CAPACITY AS 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 *AMICI CURIAE* ELLEN D. KATZ AND THE VOTING RIGHTS INITIATIVE IN SUPPORT OF PETITIONERS

JEFFREY THEN
HECKER FINK LLP
350 Fifth Avenue
63rd Floor
New York, NY 10018

TRISHA ANDERSON
Counsel of Record
JOSHUA MATZ
BRIAN REMLINGER
HECKER FINK LLP
1050 K Street NW
Suite 1040
Washington, DC 20001
(212) 763-0883
tanderson@heckerfink.com

Counsel for Amici Curiae

October 6, 2025

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INTEREST OF *AMICI CURIAE*[1]

The Voting Rights Initiative (VRI) at the University of Michigan Law School is a faculty-student collaborative research venture under the direction of Ralph W. Aigler Professor of Law Ellen D. Katz. Since 2005, VRI has been tracking and analyzing litigation involving Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301. By virtue of that scholarly work, Professor Katz and VRI have a professional interest in the development of the law and judicial reliance on accurate empirical information about Section 2 litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act has overwhelmingly been enforced by private litigants. VRI's data demonstrates that since Section 2's amendment in 1982 through the end of 2024, 85% of Section 2 claims were pursued solely by private plaintiffs, and private plaintiffs participated in 97% of cases overall. At no point during the VRA's history, until the Eighth Circuit's recent decisions, did courts reject such claims on the basis that Section 2 was not privately enforceable. Instead, courts for over fifty years continuously entertained these claims and ruled on the merits.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, *amici* provided timely notice to all parties of its intent to file this amicus brief.

If allowed to stand, the Eighth Circuit's decision below would upend this well-established practice of private enforcement of Section 2 in seven states and threatens to gut enforcement even more widely, should other courts follow suit. Whether the lower court erred in breaking from this decades-long pattern of private enforcement nationwide is an important question that this Court should resolve. This Court should grant the petition for certiorari and vacate the judgment below.

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION BREAKS FROM A DECADES-LONG PATTERN OF PRIVATE ENFORCEMENT OF SECTION 2 AND PRESENTS AN IMPORTANT QUESTION ON WHICH CERTIORARI SHOULD BE GRANTED.

The petition presents the question of whether Section 2 of the Voting Rights Act is privately enforceable through an implied right of action, through 42 U.S.C. § 1983, or both. Section 2 of the Voting Rights Act prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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." 52 U.S.C. § 10301(a). That prohibition is violated "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." *Id.* § 10301(b).

Although Section 2 does not expressly confer a private right of action, litigants and courts have for decades broadly accepted the proposition that it is privately enforceable. VRI, overseen by Professor Katz, has compiled data that reflects how Section 2 has operated in practice over time. It does so by tracking Section 2 litigation that results in one or more opinions published to Westlaw or Lexis. *See About the Project*, Voting Rights Initiative, Univ. of Mich. L. Sch., https://voting.law.umich.edu/about/ (last visited Oct. 2, 2025). The database that VRI has assembled, which includes opinions issued from 1982 through December 31, 2024, is hosted online by the University of Michigan Law School. *See Section 2 Cases Database*, Voting Rights Initiative, Univ. of Mich. L. Sch., https://voting.law.umich.edu/database/ (last visited Oct. 2, 2025).

VRI has been collecting data on Section 2 litigation for many years. Its data was part of the evidentiary record before Congress when legislators reauthorized Section 5 of the Voting Rights Act in 2006. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. And a VRI report published in 2006 was relied upon by the D.C. Circuit in *Shelby County v. Holder*, 679 F.3d 848, 874-80 (D.C. Cir. 2012), as well as by Justice Ginsburg in her dissent from this Court's reversal of that D.C. Circuit opinion, *see Shelby County v. Holder*, 570 U.S. 529, 577-78 (2013) (Ginsburg, J., dissenting). *See*

generally Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643 (2006) (VRI report).

As VRI's data demonstrates, Section 2 overwhelmingly has been enforced by private litigants both in terms of the absolute number of cases and as a percentage of total cases decided. From 1982—the start of the data in VRI's database—through December 31, 2024, private plaintiffs were the sole litigants in 396 out of 466 or 85% of Section 2 claims that produced published opinions, and private plaintiffs participated in 453 or 97% of these cases overall. *See The Evolution of Section 2: Numbers and Trends*, Voting Rights Initiative, Univ. of Mich. L. Sch., https://voting.law.umich.edu/findings/ (last visited Oct. 2, 2025); *see also* Petition at 22 ("Section 2 is, and always has been, enforced primarily by private litigants.").

In the Eighth Circuit specifically, private parties have been party to every Section 2 case brought since 1982, a total of 41 cases. Of these 41 cases, 23 have challenged city, county, or school board election practices. *See Section 2 Cases Database*, Voting Rights Initiative, Univ. of Mich. L. Sch., https://voting.law.umich.edu/database/ (last visited Oct. 2, 2025). Courts in the Eighth Circuit, moreover, have entertained almost half of the cases—14 of 29 cases—brought nationally by Native American plaintiffs. *Id.* Nine of those 14 cases challenged local election practices. *Id.*

The Section 2 cases brought by private parties have largely challenged local voting practices, transforming

representation for minority communities on school boards, city councils, and county commissions across the country. *See id.* (291 of 466 Section 2 challenges from 1982 through 2024 concerned school district, city, or county practices). Since 2012, vote dilution cases brought by private plaintiffs against local governments continue to be the most common type of claim brought under Section 2. *See id.* (44 vote dilution claims brought against local jurisdictions between 2012 and 2024, while 30 vote dilution claims have been brought against states and 42 vote denial cases were brought overall in the same period).

In sum, in hundreds of cases federal courts have heard private plaintiffs' Section 2 cases and granted relief on those claims. Until the Eighth Circuit's recent decisions, no court had rejected a Section 2 claim on the grounds that the provision was not privately enforceable.[2] The Eighth Circuit's decision breaks from this decades-long pattern of private party enforcement of Section 2. In doing so, it threatens to undermine the overall enforcement of Section 2 given the outsized role private parties have played.

The question presented is thus one of critical importance nationally and to the tribal and other private parties that have over decades enforced Section 2 in the Eighth Circuit. If allowed to stand, the Eighth Circuit's decision would gut Section 2 enforcement in

[2] The decision below found that Section 2 did not confer an individual right enforceable through Section 1983, and a previous decision of the Eighth Circuit found that Section 2 contained no implied private right of action. *See Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

seven states and beyond should courts in other circuits follow suit. As petitioners have explained, the decision conflicts with decisions of other circuits. *See* Petition at 18-22. And it is incorrect because, as the text and structure of Section 2 and the Voting Rights Act demonstrate, Congress intended for Section 2 to be privately enforceable. *See id.* at 24-39. For these reasons, this Court should grant the petition for certiorari and affirm the private enforceability of Section 2.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and vacate the judgment below.

Respectfully submitted,

JEFFREY THEN
HECKER FINK LLP
350 Fifth Avenue
63rd Floor
New York, NY 10018

TRISHA ANDERSON
Counsel of Record
JOSHUA MATZ
BRIAN REMLINGER
HECKER FINK LLP
1050 K Street NW
Suite 1040
Washington, DC 20001
(212) 763-0883
tanderson@heckerfink.com

Counsel for Amici Curiae

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