
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

REPLY BRIEF

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INTRODUCTION

The Eighth Circuit erred in holding that private plaintiffs may not sue to vindicate their rights under Section 2 of the Voting Rights Act, either through Section 1983 or an implied right of action. *See Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710 (8th Cir. 2025); *Arkansas State Conference NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). Those holdings are at odds with this Court’s precedents, decades of practice, and the holdings of every other court of appeals and three-judge court to address private enforcement of Section 2.

In *Shelby County v. Holder*, 570 U.S. 529 (2013), this Court assured the public that Section 2 would remain an effective bulwark against voting discrimination. *Id.* at 557 (“Our decision in no way affects the *permanent, nationwide* ban on racial discrimination in voting found in § 2.”) (emphasis added). But in foreclosing private enforcement of Section 2, the Eighth Circuit gutted that assurance. This Court should correct the error below, and restore to citizens in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota the same ability to enforce their right to be free from voting discrimination enjoyed by citizens everywhere else in the country.

I. The Eighth Circuit’s decision warrants review.

The Secretary does not dispute that a circuit split exists and that it is only in the Eighth Circuit that private plaintiffs are completely unable to enforce Section 2. Opp. at 11-12. Nor does he dispute that the question presented is important. Opp. at 1. There is no reason for this Court to delay review.

A. The circuits are split.

The Eighth Circuit has split from Fifth, Sixth, and Eleventh Circuits, all of which have held that Section 2 is privately enforceable. *See Nairne v. Landry*, No. 24-30115, 2025 WL 2355524, at *22 n.26 (5th Cir. Aug. 14, 2025) (per curiam); *Robinson v. Ardoin*, 86 F.4th 574, 587-88 (5th Cir. 2023); *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021); *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999). The Eighth Circuit has split too from the well-reasoned decisions of three-judge district courts, which have repeatedly and uniformly reached the same conclusion. *See* Pet. at 20-21 (collecting cases). And most glaringly of all, the Eighth Circuit departed from the otherwise uniform practice of all other federal courts of appeal and this Court. *See id.* at 21-22. Certiorari is thus warranted to resolve the clear conflict between the Eighth Circuit’s position and the wall of authority allowing private litigants to enforce Section 2.

The Secretary nonetheless maintains that the existing split is too shallow to merit review now because most other courts have addressed only the implied right of action issue and have not separately considered enforcement of Section 2 through Section 1983. Opp. at 11-12. But the Eighth Circuit reached the Section 1983 question only because it had already rejected the uniform consensus of all other courts of appeals and three-judge district courts that Section 2 is privately enforceable through an implied right of action. See Pet. at 18-22. This does not mean that the circuit split is shallow. Instead, it means that the Eighth Circuit is a dramatic outlier. Nor does considering both paths to private enforcement together “complicate review.” Opp. at 11. Just the opposite: addressing the issue in a case that raises both paths is ideal. The Court may choose to resolve the case on either or both grounds, each of which depends on a common question: “whether Congress intended to create a federal right” in Section 2 of the Voting Rights Act. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

The Secretary also attempts to downplay the split on Section 2’s implied right of action. See Opp. at 11-12. But the Eleventh Circuit’s decision in *Alabama NAACP* is not less relevant because it was vacated as moot. See *id.* at 12. The vacatur was “unrelated to its [right-of-action] holding” and its substantive analysis remains “persuasive.” *United States v. Utsick*, 45 F.4th 1325, 1335 (11th Cir. 2022). Meanwhile, the Secretary does not contest that the relevant Fifth and Sixth Circuit decisions are binding in those circuits.

See Opp. at 11-12. And again, other circuits have not directly weighed in only because the Eighth Circuit recently departed from otherwise uniform practice and precedent. Everywhere else in the country, Section 2 is and has always been privately enforced. Pet. at 18-22.

B. The question presented should be decided now.

The Secretary nonetheless argues that the Court should deny certiorari to allow further percolation in the lower courts. Opp. at 1. But this argument is unpersuasive.

To start, further percolation is unwarranted when, as here, the Court has already spoken on the issue. In *Morse v. Republican Party of Virginia*, 517 U.S. 186, 233 (1996), five Justices recognized that although Section 2 “provides no right to sue on its face, ‘the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965.’” *Id.* at 232 (opinion of Stevens, J., joined by Ginsburg, J.); *accord id.* at 240 (opinion of Breyer, J., concurring in the judgment, joined by O’Connor & Souter, JJ.). The Eighth Circuit’s disregard of *Morse* calls for immediate resolution.

Moreover, additional percolation of this issue is also highly unlikely to occur. As the Petition noted, private enforcement of Section 2 is already raised in two cases on this Court’s mandatory docket. Pet. at 25. This Court’s decisions in those cases—even if they are summarily resolved—will be decisions “on the

merits, entitled to precedential weight.” *Meek v. Pittenger*, 421 U.S. 349, 366 n.16 (1975). So unless both of these mandatory-docket cases are dropped or mooted (which is unlikely), further percolation is impossible. One way or another, the Court likely must address this question this term. It should do so by granting certiorari here and reversing the circuit that committed the error and created the split.

II. The Eighth Circuit erred.

The Eighth Circuit erred—repeatedly—in holding that Section 2 is not privately enforceable. As the Petition explains, both pathways to private enforcement—through Section 1983 as well as through an implied right of action—hinge on the fact that Section 2 creates individual rights. Pet. at 24. Section 2 uses individual-focused, rights-conferring language that expressly secures “the right of any citizen” to be free from discrimination in voting. 52 U.S.C. § 10301(a). While a full rebuttal of each of the Secretary’s points will come in merits briefing, none of the Secretary’s arguments can overcome the rights-creating text of the VRA.

A. Section 2 is privately enforceable through Section 1983.

As petitioners previously explained, *Gonzaga* sets out the framework for determining whether private plaintiffs can enforce a federal statute through Section 1983. *Gonzaga University v. Doe*, 536 U.S. 273 (2002). At *Gonzaga*’s first step, a court must “determine whether Congress *intended to create a*

federal right” in the statute that a plaintiff seeks to enforce. 536 U.S. at 283 (emphasis in original). That analysis “is no different from the initial inquiry in an implied right of action case.” *Id.* at 285. In *Talevski*, this Court explained that this first step is satisfied where “the provision in question is phrased in terms of the persons benefited and contains rights-creating, individual-centric language with an unmistakable focus on the benefited class.” *Health & Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166, 183 (2023) (citation and internal quotation marks omitted). Given the text of the VRA as a whole and Section 2 specifically, petitioners easily make that showing.

At the second step, the burden shifts to defendants to rebut the presumption of enforceability by showing that Congress “specifically foreclosed a remedy under § 1983.” *Smith v. Robinson*, 468 U.S. 992, 1004-05, 1004 n.9 (1984). There is no sign that Congress acted to foreclose a private remedy for Section 2 under Section 1983. To the contrary, the text of the statute repeatedly reinforces Congress’s intention that Section 2 is privately enforceable.

At the first step, the Secretary argues that “Section 2’s prohibition on collective vote dilution” does not unambiguously create an “individual right.” *Opp.* at 14. But it does. To start, petitioners reiterate that *Gonzaga*’s unambiguous conferral requirement is superfluous in the context of legislation enforcing the Reconstruction Amendments. *Pet.* at 34. *Gonzaga*’s unambiguous conferral requirement was fashioned to police the outer boundaries of Section 1983

enforcement. Enacted to enforce both the Fourteenth and Fifteenth Amendments, Section 2 is at the heartland of laws properly enforceable through Section 1983.

Contrary to the Secretary’s arguments (Opp. at 13), all Section 2 litigation protects personal, individual rights. Indeed, this Court has already held that Section 2 “grants” individual citizens “a right to be free from” discriminatory voting practices. *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (citation omitted); *see also Talevski*, 599 U.S. at 184 (finding that statute “framing” relevant section in terms of rights is “indicative of an individual ‘rights-creating’ focus” (quoting *Gonzaga*, 536 U.S. at 284)).

While the Secretary concedes that vote-denial claims under Section 2 claims do involve individual rights, *see* Opp. at 20, the text of Section 2 does not differentiate between vote dilution and vote denial claims. The same statutory text governs both kinds of claims. *See* 52 U.S.C. § 10301. Again, Section 2 protects “*the right of any citizen* of the United States to vote” from “denial or abridgement . . . on account of race or color [or language minority status].” 52 U.S.C. § 10301(a) (emphasis added); *see also* 52 U.S.C. § 10301(b) (focusing on “*members* of a class of citizens protected by subsection (a)” (emphasis added)). The Secretary’s suggestion that the nature of statutory right is different when vote dilution is at issue is thus incorrect.

Indeed, in the vote dilution context, this Court has specifically explained that Section 2 is violated

when “[i]ndividuals . . . lack an equal opportunity to participate in the political process” because “a State’s electoral structure operates in a manner that ‘minimize[s] or cancel[s] out the[ir] voting strength.’” *Allen v. Milligan*, 599 U.S. 1, 25 (2023) (emphasis added) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). That Section 2 liability in such cases rests on a determination that minority voters are disproportionately harmed by the challenged practice relative to other voters does not diminish the individual nature of the right that Section 2 protects. As this Court has explained, the political process “is not equally open . . . when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter.” *Milligan*, 599 U.S. at 25. When this occurs, “*an individual is disabled* from ‘enter[ing] into the political process in a reliable and meaningful manner’ ‘in the light of past and present reality, political and otherwise.’” *Id.* (quoting *White v. Regester*, 412 U.S. 755, 769 (1973)). That individual inequality of opportunity is the essence of a Section 2 claim. After all, groups do not vote; individual citizens do.

The Secretary’s arguments also fail at the second *Gonzaga* step. The Secretary posits that references to the Attorney General’s enforcement of Section 2 were intended by Congress to be exclusive. *Opp.* at 25. But neither the statute’s text, history, nor this Court’s precedents support such a claim. The mere fact that the VRA permits the United States to

enforce Section 2 does not mean that public enforcement is incompatible with private enforcement. Indeed, that argument is refuted by the long-standing—and entirely compatible—practice of both public and private enforcement of the VRA generally, and Section 2 specifically. The VRA has been privately enforced since the statute was enacted.

In 1969, this Court held in *Allen v. State Bd. of Elections* that despite the lack of express statutory language, private plaintiffs could enforce Section 5 of the VRA. 393 U.S. 544, 556-557 (1969). *Allen* was decided in light of the established understanding that voting rights are generally considered “private rights,” and principally enforced by individual voters. *United States v. Raines*, 362 U.S. 17, 27 (1960). The Secretary ignores *Allen’s* explanation that the references to the Attorney General in the VRA “were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as ‘private’ rights.” 393 U.S. at 555 n.18 (quoting *Raines*, 362 U.S. at 27). Moreover, *Allen’s* holding that Section 5 is privately enforceable is not tied to any language specific to that provision, but follows from the “broad purpose” of the VRA “to make the guarantees of the Fifteenth Amendment finally a reality for all citizens.” 393 U.S. at 556-57.

At the time it was decided, Congress had no reason to regard *Allen’s* reasoning as any less applicable to Section 2 than to Section 5. Subsequent cases did not alter that understanding. In *City of Mobile v. Bolden*, this Court assumed a private right of action to enforce Section 2. 446 U.S. 55, 60-61

(1980). When Congress amended Section 2 in response to *Bolden* to make clear that proof of discriminatory intent is not necessary to establish a violation of the statute, there was no need to expressly provide a private right of action. Instead, in the 1982 Senate Report that this Court has called the “authoritative source for legislative intent” regarding Section 2, *Gingles*, 478 U.S. at 43 n.7, Congress simply “reiterate[d] the existence of the private right of action under section 2.” S. Rep. No. 97-417, at 30 (1982); *see also* H.R. Rep. No. 97-227, at 32 (1981).

Likewise, Congress had no need to codify a private right of action for Section 2 when it amended the Voting Rights Act in 2006 because, by that point, this Court had explicitly concluded that the statute is privately enforceable in *Morse*. Thus, the Secretary’s claim that Congress intentionally created a “centralized method of enforcement” residing in only the Attorney General is entirely counter-factual to the statute’s actual history and this Court’s precedents. *Opp.* at 25.

In addition, the Secretary’s claim that Congress intended only for federal enforcement is also irreconcilable with text of the VRA. Multiple provisions of the Act’s text signal Congress’s explicit commitment to private enforcement. *See* *Pet.* at 29-31.

Section 3 of the VRA provides specific remedies to “the Attorney General *or an aggrieved person*” in lawsuits brought “under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment.” 52 U.S.C. § 10302 (emphasis added).

Section 2 is among the “statute[s]” to which Section 3’s private remedies apply. 52 U.S.C. § 10302.

Section 12(f) provides federal courts with subject matter jurisdiction over private suits to enforce the VRA’s substantive provisions, including Section 2. *See* 52 U.S.C. § 10308(f); *see also Allen*, 393 U.S. at 555 n.18 (finding “force” to the argument that Section 12(f) “necessarily implies that private parties may bring suit under the [VRA]”).

Finally, Congress added Section 14(e) to the VRA in 1975 for the express purpose of encouraging private litigation through the provision of attorney’s fees. Pub. L. No. 94-73, § 402, 89 Stat. 404 (1975); *see also* H.R. Rep. No. 97-227, at 32 (1981) (stating that if private plaintiffs prevail under Section 2, “they are entitled to attorneys’ fees under [Section 14(e)] and [42 U.S.C.] 1988”).

The Secretary’s opposition provides no meaningful engagement with any of these provisions, *see* Opp. at 27, each of which make clear that private enforcement of Section 2 has been expressly intended and provided for by Congress for decades.

B. Section 2 is privately enforceable through an implied right of action.

In *Morse*, five Justices of this Court recognized that although Section 2 “provides no right to sue on its face, ‘the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965.’” 517 U.S. at 232 (opinion of Stevens, J., joined by Ginsburg, J.); *accord. id.* at 240

(opinion of Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.). The Secretary makes no real effort to show why *Morse* is not controlling, and instead simply block quotes the Eighth Circuit's rejection of *Morse* as non-binding dicta. Opp. at 30-31.

Morse holds that private plaintiffs must be able to enforce Section 10 because “[i]t would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language.” 517 U.S. at 232 (opinion of Stevens, J.); *accord id.* at 240 (Breyer, J., concurring) (stating that *Allen*'s rationale “applies with similar force not only to § 2 but also to § 10,” *id.* at 240). That reasoning is not dicta. It is central to the resolution of the case. Thus, the linchpin of the Court's holding in *Morse* is that private plaintiffs can enforce Section 2.

When Congress amended the VRA in 2006, after *Morse*, it made no attempt to cabin private enforcement of Section 2. “Congress is presumed to . . . adopt” preexisting judicial interpretations “when it re-enacts a statute without change.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009) (citation omitted). Statutory stare decisis compels this Court to adhere to the reasoning of the majority of the Justices in *Morse*. See Pet. at 39. This Court need not reach beyond its prior holding in *Morse* to reverse the decision below.

* * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

October 3, 2025

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TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, ET AL.,

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Respondent.

-----X

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,944 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of October, 2025.



Melissa Pickett

Sworn to and subscribed before me
this 3rd day of October, 2025.



MARIANA BRAYLOVSKIY
Notary Public State of New York
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AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. 25-253

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v.

MICHAEL HOWE, SECRETARY OF STATE OF NORTH DAKOTA,

Respondent.

-----X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Melissa Pickett, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioners*.

That on the 3rd day of October, 2025, I served the within *REPLY BRIEF FOR THE PETITIONERS* in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual respectively, through FedEx Overnight Mail. An electronic version was also served by email to each individual.

That on the same date as above, I sent to this Court forty copies of the within *REPLY BRIEF FOR THE PETITIONERS* through the Overnight Federal Express, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of October, 2025.



Melissa Pickett

Sworn to and subscribed before me
this 3rd day of October, 2025.



MARIANA BRAYLOVSKIY
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